COMMUNICATIONS IN EU LAW:
ANTITRUST, MARKET POWER AND PUBLIC
INTEREST

Antonio Bavasso

University College London

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Abstract of Thesis

Communications (including both telecommunications and television broadcasting) form one of the bases upon which a large portion of the future of our society is founded and is continuously evolving. There is a risk that in a liberalised (or liberalising) environment market power will replace the detrimental role of legal monopoly rights. This thesis explores to what extent antitrust law can provide an appropriate legal instrument to reconcile the protection of the public interest with the need for economic development in this sector in the European Union.

Chapter I provides an overview of the policy factors informing the European institutions' actions in communications. Chapter II describes the relevant EU legislation. Another perspective of analysis of this sector is the notion of convergence between various forms of communications and the implications of this are examined throughout the study. Chapter III evaluates how market definitions apply in practice and highlights some differences between convergence as a general trend affecting the industry and the economic reality that informs the competition assessment.

Chapter IV deals with various forms of market power and abuses of dominant position and examines how traditional doctrines can be applied to this converging sector. Communications are inextricably linked with the notion of access. In this respect Chapter V analyses the essential facilities doctrine, (a judicial doctrine originally developed in the US but now widely accepted under EC law), examines its application in EC law and provides a critical evaluation of it. Chapter VI examines the role of the Commission in shaping this industry through its powers in relation to concentrations, joint ventures, and the remedies imposed to authorise them. Finally Chapter VII analyses the sector from the perspective of the public interest and the changed nature of communications as a public service.

This thesis, by describing the application of competition law to communications, demonstrates how the very existence of a system of competition law at EU level has determined an evolution of the concept of public service and outlines how this is likely to shape the future of this sector in Europe.
"La seule faute que le destin ne pardonne pas au peuple est l'imprudence de mépriser les rêves"
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Introduction

Communications are universally recognised as one of the key areas of our society. This is due not only to the economic significance of the sector but also to the importance of information in a continuously evolving society. Communications influence the way in which information is managed and conveyed between individuals, or from one source (e.g. the broadcaster) to the public at large. The importance of the sector is indicated by the number of expressions now familiar in common and institutional usage: Information Society, Knowledge-based Economy, New Economy, Net Economy, e-Economy and even e-Europe. Beyond linguistic trends and institutional rhetoric, these concepts all have a common denominator: they revolve around the communications sector acting either as a goal or an instrument. Communications are a goal in themselves insofar as they represent an activity of established and growing importance with economic and societal consequences. Yet they are also an instrument as they provide the means to convey the content on which Information Society is based, with attendant consequences on freedom of expression, education and - ultimately - both social and democratic development. Communications are not only a service of general or public interest but one could say that they are an intrinsic part of the basis upon which a large portion of the future of our society is founded.

A position of market power or dominance (to use the expression codified in Article 82 of the EC Treaty) is conventionally defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers." In the context of communications, market power bestows a strategic position not only in economic terms, but also

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2 Towards a new framework for Electronic Communications infrastructure and associated services – The 1999 Communications Review, COM (99) 539.

influences the cultural development of society, promotes European integration and diversity within it, and affects its larger, political dimensions. Communications are inextricably linked with the idea of access one of the major tenets of an economy increasingly reliant on dematerialised products. Access in this context refers both to customers (and the need to give them “choice” in an inclusive way in a network economy) and competitors. The regulation of market power is therefore critical.

This thesis intends to explore the relationship between market power, antitrust and the public interest in communications. It will further look at whether - and to what extent - EC antitrust law is the appropriate instrument for containing the abuses of market power in this sector. It will focus on and continuously refer to telecommunications and television broadcasting. The WTO regime and the international dimension of this subject will be outside the scope of the study for space constraints.

Competition law in general, and in particular EC competition law, plays an essential role in this area. In its dual aim of promoting customers’ welfare, affordability of services, and ensuring the correct operation of market forces and advancement of innovation, it has a central role in protecting the public interest. This applies both to the instrumental function of communications in the Information Society, and to their economic function, which is of primary importance in the New Economy. Three strands of analysis will form the backbone of this thesis.

Firstly, the relationships between market power in communications, the liberalisation process and regulation. Whilst liberalisation was aimed at eliminating the negative effects of a patchwork of national monopolies, in a liberalised or liberalising sector, dominance and market power risk replacing their detrimental role thereby impairing competition, innovation and consumer welfare. Although no longer in its infancy, the liberalisation process has not yet reached maturity and therefore requires (and perhaps to a certain extent always will require) regulatory intervention and a legislative framework. However, the prevailing approach seems to favour a stronger role for competition law and the recent proposed overhaul of the European systems is moving in this direction. Inevitably the legislation brings about a sort of codification which stifles the advantages
of a flexible approach based on the circumstances of the case. It appears that it is
mainly the legislative process which draws from the judicial experience of the
application of the EC Treaty provisions (and general pieces of secondary legislation
such as the EC Merger Regulation) rather than the opposite. Nevertheless the
"codification" which results from this process will also have an impact on the
interpretation of general provisions such as Article 81 and 82 and therefore creates a
bilateral and mutual influence which has to be taken into account. This proposition has
found authoritative support in the case law of the ECJ itself. This study will seek to
provide a critical review of how the liberalisation perspective has informed the
Commission's enforcement policy in individual decisions. In a wider time span, the
relationship between regulation and market power beyond the phase of liberalisation
will also be taken into consideration. Market power can indeed be subject both to active
regulation which often imposes asymmetrical obligations on operators and to the more
liberal application of antitrust principles. This work focuses on the latter. Within this
strand of analysis, the aim of the thesis will be two-fold. On the one hand, it will seek
to establish the boundaries of - and relationship of mutual influence between -
regulation and antitrust law at the current stage of economic and legal development of
the sector in the EU. On the other, in absolute terms, the study will highlight the limits
of EC competition law versus regulation in the sector.

Secondly, the phenomenon of convergence which affects the sector will be looked at.
The notion of convergence is somewhat elusive. In general terms, it can be defined as
the blurring of technical and regulatory boundaries between different sectors of the
economy. Insofar as communications are concerned, it can be seen as the phenomenon
whereby activities previously seen as being separate increasingly have a number of
overlapping elements on the demand and/or the supply side. The Internet has
contributed greatly to this process and will continue to do so. The similarities between
telecommunications and broadcasting, as well as the convergence which is widely
recognised as affecting this field, provide reasons which justify a unified approach (at
least in terms of competition analysis). In addition, convergence provides the link
between a sector such as telecommunications, which has been a forerunner and a driver
of the entire liberalisation process in Europe, and broadcasting, in which the notion of public services is more profoundly rooted, primarily because of political reasons.

This last consideration introduces the third and, it is submitted, most important dimension of the thesis: the public interest dimension.

For the reasons outlined above, the strong element of public interest which characterises this sector leads to it being classified as a so-called public utility. However, these two areas of communications (i.e. telecommunications and broadcasting) have features which require a specific analysis within the wider public utilities domain. The liberalisation process has brought about a shift of focus from the concept of public utilitas to that of utilitas singolorum. This is rooted in wider economic considerations.

This thesis, by describing the application of competition law to the communications sector, intends to demonstrate how the very existence of a system of competition law at EU level has determined an evolution of the concept of public service at national level where the State is an active player producing and sustaining a notion of public interest in which the State is the arbiter of the utilitas singolorum. If industrial and economic considerations tend to bring together telecommunications and broadcasting, and if they are subject to the same principles of competition law, the legal consequence is the same as bringing the entire sector outside the domain of public service and into that of public interest. The existence of a system of competition law that can sustain the protection of public interest without an active participation of the State can in itself be seen as one of the causes of this phenomenon. However, this also provides even additional centrality to antitrust policy which, as this work will demonstrate, can provide the necessary flexibility to analyse a sector in which economic power, detrimental to the customers and citizens, takes subtle and disguised forms through the relationships between various markets.

Core of the research

The main focus of the analysis will be on the application of competition law and doctrines to the communications sector. This is in line with the policy pursued at
European level and expressed in the European Commission's 1999 Communications Review, which sets out the blueprint for a reinforced focus on competition law application in the sector. The study will look at the evolution and current status of development of the regulatory legislative package in EU law. This analysis will be used as a model of comparison against which to show the interrelation between regulatory legislation and competition law at EC level. The enforcement policy of the Commission and the precedents this provides for market definition analysis (which is the bedrock of any antitrust analysis) will be examined in detail. These precedents will also be considered with a view to comparing the enforcement policy with the wider industrial trend of convergence, and therefore show the aptness (or failure) of antitrust law to capture the evolution of the economic environment. The provisions of the EC Treaty on market power, their judicial interpretation by the EC Courts and their application by the Commission will be at the centre of the analysis.

The general principles of EC law which are relevant in this sector will be identified and described in their actual and potential application. Where appropriate, and where historically justified, a comparison with the US experience will be provided, particularly in relation to the doctrine of essential facilities and the notion of universal service. Finally, the notion of public service and services of public interest under EC law will be examined, the judicial evolution of the concept will be analysed, and the impact of competition law in the shaping of an EU notion of public interest in communications will be reconstructed.

**Structure of the work**

The structure of the work will be as follows. Chapter I will consider the role of communications in a wider legal and economic context. It will evaluate its role in the context of the liberalisation and deregulation process. It will analyse the relationship between antitrust law and regulation in the sector, and provide an overview of the economic and technical aspects affecting this area. Chapter II will describe the EU legislation on communications. This is an area which is evolving towards an approach increasingly focused on competition law. Nevertheless, there is a strong link and
interrelation between the legislative provisions adopted at EU level and the development of competition doctrines by the Commission and the European Courts. The current status of legislative development is a direct consequence of the progress of the liberalisation process.

A mentioned above, convergence will be one of the main strands of analysis. This notion is of fundamental importance and will be looked at repeatedly throughout the thesis. It is introduced in Chapter I; Chapter II goes on to give an account of the institutional debate around it, and analyses its practical implications through an evaluation of market definition - the core of competition analysis. Chapter III evaluates how market definitions apply in practice and analysis shifts from a policy horizon to the current dimension of the market’s development. This will highlight some differences between convergence as a general trend affecting the industry and the evolving economic reality that guides the competition assessment.

Market power is the key to this study. Therefore, it is of paramount importance to define it and seek it out in all forms to prevent abuse. Furthermore the importance (actual or potential) of convergence and the concentrated nature of some of the relevant markets leads the competition analysis of this sector to reveal more subtle forms of dominance, e.g. extension of dominance from one market to another related one, or collective dominance. Chapter IV deals with various forms of dominance and abuses of dominant positions under EC law and examines how traditional doctrines can be applied in this sector.

Within communications the notion of access also plays an important role. The term will be defined in Chapter I, whilst the legislative framework of access and interconnection will be set out in Chapter II. However, particularly the legislative provisions in particular are arguably the product of the essential facilities doctrine, a judicial doctrine originally developed in the US but now widely accepted under EC law. Chapter V will reconstruct this notion, examine its application under EC law and provide a critical evaluation of it.
Chapter VI will examine the role of the Commission in shaping this industry though its powers in relation to concentrations, joint ventures, collusion and the remedies imposed to authorise these. Acquisitions, and co-operation in structural or behavioural forms have a enormous impact on the structure of the industry. However, they create the risk of strengthening or creating positions of market power. The role of the Commission is of paramount importance because, due to the preventive role of its scrutiny, it is in a position to guide the development of the sector as effectively as proposals of legislative measures. This Chapter will show how the application of competition law in individual circumstances can and has been used by the Commission in pursuit of wider policy considerations relating to the liberalisation process.

Finally, Chapter VII will analyse the sector from the perspective of the public interest and the changed nature of communications as a public service. EC law in general and competition law in particular have and are still contributing to this process. This is the result of the combined effect of both the transformed objectives of national States resulting from the constitutional balance within the European Union and of the role played by the competition regime at EU level. Communications have been at the forefront of this change in the approach towards public services and have contributed substantially, through the application of competition law, to the introduction of a notion of “European public service” with an economic dimension, into the texture of national regimes. One particular area within this converging sector, broadcasting, is again challenging the traditional approach of national States towards public service.

By instruction of my Supervisor this thesis reflects the law and case-law as it stands as on 30 November 2000.
Chapter I

Policy factors influencing communications

1. Introduction

This chapter outlines the policy factors which affect the application of EC competition law in the communications sector. Its purpose is to provide a number of viewpoints from which the legal analysis of the following chapters can be evaluated. I intend to describe the role of communications within (and their relationship with) the EU liberalisation and provide an overview of the basic economic and technological factors affecting competition policy in communications. This chapter will also outline the relationship between regulation and antitrust law in this field and introduce the key notions of access and interconnection which play an essential role within the application of antitrust law.

2. Communications and liberalisation: the “macro dimension”

The EU liberalisation process over the last decade has affected many areas of public utilities, particularly communications. Liberalisation in public utilities, although inspired by economic rationales, has been an inherently political process. However, in Europe this process has been strongly driven and supported by the legal principles set out in the EC Treaty with regard to competition and freedom of movement, as well as the overriding notion of European integration.

The driving force of the internal market and the principle of undistorted competition are closely linked. The Commission realised that national monopolies were at odds with the notion of internal market based on competition and the free circulation of goods,

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services, people and capital. I agree with this conceptual proposition. Evidence of its validity became clear in practice when the technological and economic progress which emerged over the last decade (and described below) revealed even further the commercial and competitive nature of these activities. Indeed, as we will see in more detail in Chapter II, a number of the Directives which formed the legislative bedrock of the liberalisation process were based on what now is Article 95 (and therefore on pure internal market rationales). However the strongest impetus towards liberalisation in communications derives from antitrust principles as applied to both individual undertakings with market power and to Member States (through Article 86 EC and Article 10 EC). Compared to the Treaty principles on free movement, and the EU secondary legislation harmonising legislation on internal market, EC competition law has the advantage of ensuring both an instrumental opening of the market and a subsequent balanced development of market forces. In fact the EC system of competition law provides a legal instrument which is not (or less) reliant on Member States for application, which can equally be applied against Member States (as national monopolists) by virtue of Article 10 and, more importantly, which offers the basis for an on-going application and enforcement. Whilst the basis for full liberalisation has an indisputable internal market origin, competition law and principles are the most important elements which have supported the process. Another less direct or demonstrable but equally important effect of this is the creation of a culture of competition brought about by the existence, the application and enforcement of competition law provisions. This in turn generated political support for the operation of market forces within a legal framework in those Member States which did not have a legal and economic tradition in this respect (and reinforced it in those which did have one).

The process can also be read from another point of view: that of the relationship between the national and the supra-national powers. One could go say that the European liberalisation process as a whole constitutes a paradigm of the decline of

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policies centred on national States and on their political and economic identity. It is undeniable that the measure of the evaluation of the (common or shared) benefit of this process is an economic one. However, in Europe this is a result of the fact that the rationale behind the monopolistic and national-centred policies which determined the creation of public enterprises with their attendant exclusive rights were economic and political in the first place. The two aspects were therefore inextricably linked. On one hand public utilities were regarded in economic and competitive terms as natural monopolies. On the other, the nationalisation process was politically inspired by the defence of "strategic" national interests. It was felt that some areas the natural monopolies which were essential to the economic development of the national sovereign states, required a political control which justified state intervention in the economy. Thus while the creation of legal monopolies has been a national process, liberalisation has undoubtedly been a European phenomenon.

In legal terms, the liberalisation process in Europe can be explained (and derives directly from) the wider trend within which Member States have changed their role. The erosion of the function of national States within the European legal system has given them a new and less intrusive place in the governmental management of economic policy. In this sense, it could be argued that liberalisation is an effect of the process of European integration on the one hand and on the other it both promotes and supports it. In political terms, liberalisation and European integration are linked in a reciprocal relationship of cause and effect.

In the Member States of continental Europe liberalisation has proven to be particularly contested in the name of national economic protectionism or social defences of collective structures as lacking adequate political debate. Opening certain strategic sectors to market forces undoubtedly has far reaching effects (including social ones). However, the fact that this decision has been driven mainly by Treaty principles of internal market and undistorted competition (Article 3 EC), and has been subject to comparatively little democratic debate at national level, does not imply that liberalisation is a dogmatic choice imposed by the political and financial establishment.
which destroys collective structures\(^3\) in the name of profit maximisation. Even on social
grounds and let alone the economic benefits of a competitive market (which will be
analysed below), this process is not aimed at constraining the individual or imposing a
"new wave of economic exploitation" inspired by the profit maximisation.\(^4\) On the
contrary, the goal of a balanced liberalisation process should be the enhancement of the
individual in his compound role of citizen and consumer. The consumer is the real and
ultimate beneficiary of the process in terms of increased choice in the range of services
or products available, and price decreases which are a result of competition and an
expanding the choice of supply. Conversely, the potential for economic initiatives will
be increased and extended geographically to the whole Union’s territory. Undoubtedly
an area of major concern is that of monitoring the economic strength of the undertakings
which operate in these sectors. Those centres of enhanced economic power which
derive from the privatisation and liberalisation processes are effectively entrusted with
the operation of services with a strong economic value and a high public interest. It is in
this context that antitrust law and policy are of paramount importance. The balancing
act is between the interest of the consumer and the imperative of public policy as
manifested in antitrust.

In considering the impact of EC competition law in communications sector, it is of
paramount importance to bear in mind a “macro dimension” in both economic and legal
terms. In economic terms competition law and principles (through the notion of internal
market and beyond this notion as set of legal principles of independent standing) have
made an extraordinary contribution to changing the landscape of an economy previously
based on national monopolies. In legal terms this macro dimension derives from the
unifying function of liberalisation in relation to the legal regime, the Europeanisation of
values which find an expression in this area, and the relationship between the
Community and the national systems. The elements of regulation which exist within
the EU derive largely from an EC regulatory package consisting of Directives which
require implementation. This process calls for interaction between policy principles
established at EU level and national enforcement.

\(^4\) Ibidem.
Communications have the particular feature of having had a pivotal role in the European liberalisation process and, at the same time, and particularly in light of technological development, have acquired a position of primary importance in the public interest. Communications then have a strategic and essential role in our information driven society both in terms of the economic development of the sector itself, and in its wider societal implications.\(^5\)

3. **Overview of the economic and technological factors affecting the sector**

The lack of competition in the various communications markets which characterised the "pre-liberalisation era" was due not only to the nationalistic approach to economic policy, but also to several economic features which pointed towards the creation of national monopolies. These features included sunk costs, externalities (positive and negative) between users, and capacity constraints. Technological advances have undoubtedly contributed substantially to change this scenario.

A positive network externality between users arises when existing subscribers benefit when new subscribers join in.\(^6\) This may have policy implications for pricing and it is a factor which has historically contributed to the establishment of legal monopolies. On the contrary negative externalities may arise from network congestion when users are unable to use a network due to capacity constraints. In telecommunications, a network connects users by a combination of exchanges and transmission links in a hierarchical configuration. Users are connected to local exchanges which are in turn connected by trunk or long distance lines to regional exchanges and ultimately to the international network. Radio technology is used in fixed link network in case of satellite transmission but it is mainly the distinctive feature of mobile communications where the final link from users to the local exchange is a radio link.

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In telecommunications for instance, fixed networks were regarded as a natural monopoly, particularly in the light of high infrastructure costs of the network. An activity is considered a natural monopoly if supply by a single provider is the most cost-efficient form of supply.\(^7\) Traditionally telecommunications networks were considered to exhibit significant economies of density as a whole market in any given area they could be seen to be be covered and served by one fixed, less costly network. This interpretation constituted the economic bedrock which justified the creation of legal monopolies on telecommunications networks, and the restriction of competition in communication services. It has been remarked\(^8\) that since the early eighties economic literature started to note that whilst “the industry has many of the characteristics of a natural monopoly ...at the same time, changing technology is expanding the boundaries of the industry and blurring the distinction between communications and information processing.”\(^9\) Sharkey concluded that “under the broadest definition this evolving industry is not a natural monopoly”\(^10\). Since then further technological changes have made it clear that the legal monopolies created at national level were “un-natural” and that they had “very little to do with the costs of network construction”\(^11\).

A more radical view, and an integrated approach which takes into account both the political and techno-economic dimension of the process, is that expressed by Matson.\(^12\) His integrated analysis is heavily reliant on the distinction between carriage and routing, its historical development and the technological impact of digital technology upon it. Carriage and routing are the two basic functions performed in communications (both telecommunications and broadcasting). The first indicates the moving of the “matter” that is to be transported between the parties, whilst the second refers to directing of that matter from the originator to the destination.\(^13\) These functions are discrete, and each needs to be performed before any communication succeeds. Whilst the conventional

\(^7\) M. Armstrong and J. Vickers, *supra* note 1-6 above, at 286.


\(^10\) *Ibidem*.

\(^11\) C. Veljanoski, *supra* note 1-8 above.

wisdom is that these two functions are vertically integrated for reasons of technology, this was not the case at the early stages of telecommunications and broadcasting. It has been rightly remarked that when Bell first laid the wires for carriage and employed the operator at the local exchange to undertake the routing by switching and connecting the wires, there was no reason why it had to be undertaken this way. He could have encouraged end users to get their "own" wires to his office where, for a fee, he could have performed only the routing. Matson submits that it was early government intervention in the name of national security which caused this integration, in full force of law. Regardless of whether this political intervention was the only reason or whether it was also reinforced by economic considerations (which at the early stage of development of a network required integration to be feasible), national monopolies developed on the basis of vertical integration.

In broadcasting it could be said that carriage is handled by the broadcaster, and routing, in part, is handled in the home by the viewer or listener as he chooses the channel or decides which of the signals received by the set top box is read by the TV set. All the signals of a TV station are carried to the receiving equipment, and the user simply decides which will be routed to him through the loudspeaker and the screen. However, in this model it is the operator of the carriage function and, unlike telephony, not the end customer, who determines what is available. Unlike in telephony, the arguments in favour of a monopoly operator did not lie in the necessity of integration of carriage and routing, but in the fact that there was no two-way communication. This meant that the state (and in time a restricted number of licencees) would be the sole originator of communications. From this premise it is argued that the reasons for monopolies in communications (both in relation to telephony and broadcasting) does not derive inherently from technology. It was a consequence of a political interest to preserve a monopolist primarily in the name of "national security".

Additionally the one way system which has been produced in broadcasting derives from an equally politically driven decision to maintain control over what is supplied. This

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13 Matson uses the analogy of the mail where the postman or the mail train perform the carriage and the sorting offices along the journey perform the routing.
interrelates with a technological and economic decision to use for broadcasting a less expensive system based on low frequencies which could transmit across national territories (and beyond) without the need to build a number of higher frequency transmitters. This fitted with the lack of need for greater capacity given that the intention was that broadcasting was monopolised by public broadcasters. The recent developments in high frequency communications stresses the point that for services requiring high capacity spectrum, capacity diminishes as higher frequencies are used. Digital technology has contributed considerably to these developments. Both radio and wire communications can transmit digital rather than analogue signals. The potential of digital transmission, coupled with the diffusion of fibre optic and satellite communications leads to an increasing convergence between telecommunications and broadcasting. Digital transmission is in fact one of the most important driving factors of convergence: once digitalised, all information is the same and data types (voice text and video) can be mixed to create multimedia services. This type of transmission "alters the nature of communications which traditionally are designed around the carriage of one type of content." New techniques in digital compression have now enhanced even further the application of digitalisation which so far had been impeded by the large amount of bandwidth required. In particular the group of technologies known as Digital Subscriber Line or DSL, which transform the copper local loop into a broadband line capable of delivering multiple video channels into the home. There are currently a variety of these technologies generally known as xDSL. Each type has a unique set of characteristics in terms of broadband capacity, distance over which performance is maintained, frequency of transmission and cost. In broadcasting choice the forms of competition have increased considerably. For instance, satellite broadcasting can now compete with cable networks in terms of the number of channels they can transmit.

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14 For a description of analogue and digital technology see the Appendix in M. Matson, supra note 1-12 above, at 55. One of the main characteristics of digital technology consists in expressing individual static slithers of reality in binary numeric formulae, sometimes very complex and long, made of "0" and "1", "0" and "1" can be represented by an "on" and "off" of switch controlling the flow of electrical current or beam of light. Given that a silicon switch can change its state from on to off some 3 billion times a second, a very long binary formula can be created in a very small space of time and be and transmitted at the speed of light.

15 A fibre optic cable consists of thin stands of glass fibre through which data is sent as pulses of light. This form of transmission is capable of carrying almost any service at any distance.

16 C. Veljanoski, supra note 1-8 above, at 5

17 The main xDSL are: Asymmetric DSL (ADSL) used for fast Internet access; Symmetric DSL (SDSL) and High Speed Symmetric DSL (HDSL) used for 2Mbit's leased lines; Very High-Speed DSL (VDSL) used for high capacity leased line and broad-band services; see for further information http://www.adsl.com/adsl forum.htm.
simultaneously to viewers. Digital compression of video now enables several television services to be transmitted in a spectrum which was previously required by a single analogue service. Whilst this reduces concerns over capacity constraints, new issues arise with regard to access to the new broadcasting technology.\(^{18}\)

However, the argument that market failures exist in broadcasting is still made and this notion is at the very basis of the idea of public service broadcasting.\(^{19}\) This failure would be based on the fact that broadcasting has many features of a public good\(^{20}\) (including the fact that a person watching a television programme does not prevent any other from watching the same programme, - i.e. consumption does not reduce the amount available to others, and that the social value of this good is given by the sum of everyone’s willingness to pay rather than an individual’s evaluation of what they are willing to pay) and quality broadcasting is a merit good (i.e. a good whose value exceeds the valuation an individual would place upon it). In addition broadcasting displays externalities and economies of scale. It can be argued that whist a key assumption of a competitive market is that consumers are perfectly informed, this assumption is flawed in relation to broadcasting, one of whose roles is to inform and educate. Finally broadcasting is affected (although decreasingly so in a digital age) by spectrum scarcity. Looking forward, we can assume that, due to technological advances, spectrum scarcity will disappear, and it is submitted that these propositions seem rebuttable. Without engaging in a purely economic analysis (which is beyond the scope of this study) these features of broadcasting necessarily produce market failure. Indeed the majority of them (externalities, economies of scale) which can be observed in other areas, particularly within communications, have not been hindrance to the establishment of a competitive environment.

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\(^{19}\) See Report of the Independent Review Panel, The Future Funding of the BBC, (Department for Culture, Media, and Sport, 1999), see Appendix 8 Market Failure in Broadcasting.

\(^{20}\) A good is public if providing the good to anyone makes it possible, without additional costs, to provide it to everyone.
An objection to the operation of competition law in relation to broadcasting lies in the fact that while its economic blueprint is a theoretical guarantee of efficiency this does not entirely coincide with quality. Competition law is intrinsically incapable of guaranteeing quality in itself, but on the other hand competition cannot be restricted in the name of a monopolistic structure which only allegedly provides quality. If this objective is beyond antitrust it nevertheless cannot be interpreted as an alternative to competition. The challenge for Member States is to ensure that quality is maintained within a competitive market.\(^{21}\) In economic terms the current system of licence fees in a number of Member States may be considered distortive of competition. One of the classic justifications of a system of public service broadcasting based on licence fees is that based on the idea of broadcasting as a public good, and given that the marginal cost of broadcasting programmes to additional audience is zero, the economically efficient price for consuming those services is zero. However this reasoning applies to programmes produced by all broadcasters, not only the public service ones. Additionally in other information industries such as book publishing it may be equally true that the socially optimal price of a commodity (say a book which has already been written) would be the much lower marginal printing price, as otherwise one would risk excluding some readers from the market. Yet no one suggests moving to some kind of marginal cost pricing for this industry.

In an economic environment in which spectrum scarcity disappears some of the envisaged consequences of the characteristics of broadcasting outlined above relate to over concentration, audience fragmentation and negative externalities.\(^{22}\) Whilst the last two appear to be the inevitable consequence of a free market economy the first one falls mainly in the domain of application of antitrust law. However, the aim of antitrust law however goes beyond, and is more complex, that the mere avoidance of anticompetitive concentration.

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\(^{21}\) In relation to the alleged inability of producing the quality in broadcasting it is unclear to me why the same argument would not apply in publishing including newspaper publishing.

\(^{22}\) See Report of the Independent Review Panel, supra note 19 above, see Appendix 8 Market Failure in Broadcasting, at 205.
The advent of the Internet, with its potential in terms of public penetration and societal impacts, constitute a major factor in the landscape of EU communications. The Internet was originally created as a means of military communication which would resist to a possible nuclear attack on the US military command headquarters. The underlining principle was to have a network of computers distributed throughout US territories instead of a single command centre. At the end of sixties the US Defence Department Advanced Research Projects Agency (ARPA) developed a network system, ARPANET which rapidly expanded from its original four computers to 37 nodes in 1972. The network was operated through a Network Control Protocol which converts messages into packages for transmission and converts them back at the other end. In the early 1980s the network was abandoned by the US military which started to develop a separate and more secure network called MILNET. Universities and research institutions showed interest in the system and by the mid-1980’s they were allowed to use it. In 1985, 50,000 computer nodes were linked to what began to be known as the Internet. The US Government stopped funding ARPANET in 1989, but by then there was already began an established network where operators had started providing services and offering access to the Internet. Nowadays the World Wide Web around which the Internet is focused has reached colossal (and still growing) dimensions. So far this sector has been subject to minimal regulation and therefore competition law is of paramount importance. The impact of the Internet of other forms of communications reinforces, in legal terms, the importance of competition law in the sector as a whole.

4. The relationship between antitrust and regulation in communications

The objectives of regulation are both economic and/or social. The control market power is an economic concept which is the core objective of economic regulation. It has been suggested that economic regulation has two tasks. Firstly, regulating monopolies, which entails “mimicking the effects of market forces through implementing controls on

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24 See Chapter III below with regard to the Internet’s functioning.
25 In 1999 the size of the US Internet economy was estimated at around $300 billion, see C. Vadja and A. Gahnström, "E.C. Competition Law and the Internet", 21 ECLR (2000), 94.
prices and services." The second task consists in "creating the conditions for competition to exist and policing it to ensure that it continues to exist". In the second part of this task economic regulation interacts with antitrust. By contrast the objective of social regulation is not to promote economic efficiency but is based "on the desire to avoid an undesirable distribution of wealth and opportunity." At European level there is an additional dimension which is, as we have seen above, the creation of an internal market. This can be interpreted as a subset of economic regulation although, particularly in the initial phases of liberalisation, this aspect brought a political or institutional character to the process.

Communications in the EU are subject to both forms of regulation. With regard to the economic character of regulation, pricing, access and interconnection are subject to rules and principles set out at legislative or administrative level. It is indisputable that economic regulation has had, and still performs, a key role in reversing the process of monopolisation derived from the former system of national monopolies. Nevertheless, one of the fundamental principles which has dominated the Commission's action since the 1987 Green Paper on the Development of a Common Market in Telecommunications Services and Equipment to the 1998 Notice on the treatment of Voice telephony on the Internet, and the 1999 Communications Review, is that regulation should be kept to the minimum.

The latest position of the Commission, expressed in the 1999 Communications Review is that regulation should be based on clearly defined policy objectives fostering economic growth and competitiveness, thereby promoting employment and ensuring objectives of general interest where they are not satisfied by market forces. However,

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27 Ibidem, at 5.
28 COM (87) 290.
29 OJ 1998, C 6/4 the Commission in the notice on the status of voice telecommunication on the Internet chose not to impose on the undertakings which provide this service regulatory burdens such as licensing and universal service obligation. Whilst the Commission’s policy is mainly based on the fact that voice telephony on the Internet is not sufficiently developed to meet the criteria set out in the relevant regulatory EU measures, this policy appears to be also inspired by a deregulatory, pro-competitive approach aimed ensuring that emerging services will not be unnecessarily regulated in an already liberalised area.
regulation should be kept to a minimum necessary to meet those policy objectives, and
in this respect the framework proposed as a result of the 1999 Communications Review
contain “sunset clauses” whereby certain rules are reviewed periodically to assess
whether they are still necessary. Regulation should further enhance legal certainty in a
dynamic market and should aim to be technologically neutral. This policy undoubtedly
echoes a view widely accepted amongst academics and politicians alike according to
which competition should be preserved and promoted where possible and regulation
should be adopted only where necessary.31

The assumption is that under the pressure of competition undertakings would reveal
more facts about their costs than they would by effect of law or regulation, would be
forced to reduce costs, to remove excess profits and to improve productivity to match
their competitors’, and to innovate and expand the range of products and services
offered. To a certain extent, we share the concerns of those who consider that regulation
is “a difficult, imperfect, and often expensive, time consuming and ineffective activity,
easily spreading from economics into politics.”32 However, if competition is the best
means to guarantee the achievement of these objectives, regulation is often needed to
guarantee the effectiveness of competition both as a temporary instrument aimed at the
opening of the market and in an on-going supporting role of competition law
enforcement.

Social regulation in communications within the EU finds its expression both in relation
to the universal service obligations and in relation to the rules on public broadcasting.
In so far as the goal of social regulation is not to promote economic efficiency it could
be argued that it constitutes the outer limit of the application of competition law.33
Historically, legal monopolies and exclusive rights granted by the Member States to
certain undertakings in the telecommunications and broadcasting sector were an
acknowledgement of their strategic public role. Indeed, the shift of control from the
public to the private sector in these entrepreneurial activities which has occurred over

32 Ibidem, at 145.
33 For a radical view of an advocate of consumers’ welfare within antitrust see the seminal work of R. Bork, The Antitrust
the last decade does not eliminate the need for protection of the public interests involved whilst it possibly enhances the risk of abuse of market power. Both economic and non-economic public interests (such as universal service and pluralism) require - now more than ever - a reinforced and rigorous protection.

However, it is submitted that the force of the culture of competition (in both economic and legal terms) is so pervasive and expansive that the perspective of analysis should be the opposite. Starting from the premise of the economic character of these activities competition and antitrust principles in communications can be seen as a compressive force which limits social regulation in communications with a proportionality test. In addition the Treaty principles in themselves create a link between competition policy and other social values. Firstly by making Article 3 EC on the common policies and activities of the Community subject to Article 2 EC which sets out the tasks and values that should guide it. Secondly by introducing special Treaty provisions which interact with substantive Treaty rules. Some of those values (particularly those relating to the social sphere and the protection of the public interest) have traditionally been guaranteed at national level but have acquired an increasingly European dimension.

The ultimate goal of a liberalisation process is the creation of an authentic market contestability of the undertakings' positions. Whilst size is not to be regarded as an economic offence per se, competition authorities, either at national or European level, should avoid the assumption that the exclusive rights who used to be granted to public undertakings in natural monopolies will de facto be acquired by private operators which are effectively entrusted with the operation of services of public interest and strategic relevance in an unnatural monopoly. The function of competition law is both retrospective and prospective. At this stage of the liberalisation process, the competition authorities and particularly the Commission will increasingly be asked by complainants to look retrospectively (ex post) at the outcome of liberalisation and to assess whether the vertically integrated entities, which still hold market power (if not exclusive rights) as a result of their position of former legal monopolists, abuse their

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34 See in particular Article 16 (ex 7D) EC but also Article 82; see Chapter VII below.
position in an anti-competitive way. However, a competition authority - or national regulatory authorities ("NRAs") - will also need to consider prospectively \textit{(ex ante)} whether increases in size (which occur through growth but more often through mergers or acquisitions) have the effect of creating unnatural monopolies or potentially anti-competitive strengthening of market positions. In this latter sense competition law is a complement to regulation.

As a result of the combined effect of liberalisation, the global dimension of competition and the converging nature of this sector growth by acquisition is occurring at considerable pace. Economic players tend not only to strengthen their market position but also to extend it to different areas by means of vertical or horizontal integration. It is in this context that competition authorities can most effectively exercise their powers to shape the industry structure by requiring the breaking up of units which do not have the typical characteristics of natural monopolies (e.g. falling unit costs) to the extent that such divestments may bring great benefits for competition in general.

Apart from secondary legislation, a fundamental role in the balanced development of this complex sector in harmony with the Treaty principles is played by the competition law provisions contained in the Treaty itself (particularly Article 81, 82 and 86). On one hand Article 82 and the EC Merger Regulation\textsuperscript{35} enable an assessment of the power and strength of the undertakings in control of essential gateways. On the other, Article 81 allows a scrutiny of agreements, concerted practices and alliances between the undertakings involved in this sector which reduce efficiency and allow anti-competitive practices.

In the current situation in which technological changes are blurring the distinction between various forms of communications and pushing towards a rationalisation of the industry players (or even their repositioning in the supply chain), this will be a particularly challenging task. The Commission and the National Competition


Authorities ("NCAs") are in a position to apply competition law principles both retrospectively to existing situations of market power or collusion, and prospectively by shaping the form of the market structure by exercising their powers under the EC Merger Regulation and Regulation 17\(^\text{37}\) (or the equivalent national provisions).

Article 82 has been conceived and used by the Commission and the European Courts as a "repressive tool.\(^\text{38}\) However, its role is coupled with the "preventive function" performed by the notifications under Regulation 17 and the EC Merger Regulation whereby the Commission is given the opportunity to assess markets which do not yet exist or are still in the process of developing.\(^\text{39}\) The Commission therefore has a strong negotiating power to impose divestment or undertakings which, to a certain extent, enable it to shape the structure of the industry.\(^\text{40}\) Furthermore, under Article 12 of Regulation 17 the Commission has the power to launch inquiries into sectors of the economy where it believes competition might be restricted or distorted. The aim of the provision is to allow the Commission to investigate suspicious pricing structures or other practices indicating a possible anti-competitive situation across a whole industry. This provides an additional important tool for the Commission something between individual application of antitrust law and general regulation.

The very notion of access plays a primary role in a modern economy which is increasingly characterised by the dematerialisation of property. Its importance is twofold. On one hand access itself becomes the object of those economic and trade relationships (normally service-based) which are founded on the existence of networks and consist in the provision of access to end users. Therefore access not in physical but in electronic form acquires an economic value and an increasingly important function in the information society. However, access and interconnection (in network based industries) are also essential tools to stimulate competition between service providers. Access and interconnection rights lower the barriers to entry created by network


construction costs and reduce the scope of network externalities, thereby undermining two of the main economic justifications of a monopoly structure. These concepts, which were introduced by means of regulatory legislative measures, now lie at the core of the European antitrust policy and undoubtedly have enormous influence in the interpretation of competition law in general.

In antitrust terms, the notion of access is to be interpreted as referring to the behaviour of the market players. The concept embraces the right by an operator or a service provider to obtain access to any resources, facilities and customers of other network operators and/or service providers, which constitute a bottleneck facility. Its definition under EC law has been recently consolidated in the proposed Access and Interconnection Directive which describes it in the following terms: "access' means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to networks elements and associated facilities and services, which may involve the connection of equipment, by wire or wireless means; access to physical infrastructure including buildings, ducts and masts; access to software systems including operational support systems; access to number translation or offering equivalent functionality; access to mobile networks, in particular for roaming; access to conditional access systems for digital television services." Access for the purposes of that Directive does not refer to access by end users (i.e. a user not providing publicly available electronic communications networks or services). The concept of access does not appear prima facie appropriate to regulate the relationship between analogue broadcasters. However, the creation of digital platforms and the integration of various interactive services has raised the issue of conditional access to broadcasting as a result of which digital broadcasting is now included in the definition. Another important issue concerns access to these platforms by third parties (such as banks or retailers) which enables them to provide these services to end users.

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40 See Chapter VI.
Interconnection by contrast concerns the right to terminate communications on the network of another operator. In Community legislation, interconnection is defined as "the physical and logical linking of telecommunications networks used by the same or different organisations in order to allow users of one organisation to communicate with users of the same or another organisation or to access services provided by another organisation" or "the physical and logical linking of the telecommunications facilities of organisations providing telecommunications networks and/or telecommunications services, in order to allow users of one organisation to communicate with the users of the same or different organisation or to access services provided by third organisation." The duties that, as we will see, are imposed on certain telecommunications operators in order to achieve interconnection are based on the assumption that a given telephone number is a unique type of bottleneck. As a result of the new Access and Interconnection Directive this notion is no longer limited to telecommunications networks but it now extends to "the physical and logical linking of public electronic communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network."

The proposed new Directive emphasises the public character of the communications network in relation to which interconnection obligations are imposed. The core of interconnection rights is based on the concept that any-to-any communications should occur at a price based on costs. This objective is best addressed and has been dealt with in the framework of regulation and by the legislative measures imposing interconnection with incumbents on cost based tariffs. Arguably the public character of the network justifies even more strongly the need for regulatory intervention. The obligations set out in this legislation interact with general competition law and effectively constitute a useful yardstick to evaluate the behaviour of dominant companies.

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42 Directive 97/33/EC, Article 2.1.(a).
44 Squire, Sanders & Dempsey, Study on adapting the EU telecommunications regulatory framework to the developing multimedia environment, January 1998 [summary III 3, 11].
With regard to the right of access there are forms of it which competition law has found difficult to penetrate, and consequently legislative provisions have been required to introduce competition. This is particularly true in the case of unbundled access to the local loop, described in more detail in the next Chapter. However, the right of access can equally be assessed within the framework of competition law (as opposed to regulation). It is in that context that the Treaty provisions in general, and the doctrine of essential facilities in particular will be most relevant. Case law of both the Commission and the European Court of Justice and the Court of First Instance ("European Courts"), has been reluctant to refer expressly to this notion, which has been extensively invoked before the US courts and analysed by American academics. The Commission decision B & I Line plc v Sealink Harbours and Sealink Stena is perhaps the first case making an explicit reference to the doctrine. In that case the Commission defined an essential facility as a “facility or infrastructure, without access to which competitors cannot provide services to their customers.” The Decision is in fact based on the infringement of Article 82 which has been construed as forbidding the refusal to grant access to an essential facility without ‘objective justification’, or the granting of access to that facility ‘on discriminatory terms’. The doctrine is going through a phase of consolidation which was confirmed by the ECJ in Oscar Bronner. However, this notion still plays a key role in both competition law enforcement and regulation. The origins, the scope and the potentials of the doctrine in EU law will be analysed in Chapter V.

45 There are various modalities for unbundled access to the local loop including: full unbundling to the local loop whereby a copper pair is rented to a third party for its exclusive use; shared access to the local loop which refers to the situation where the notified operator continues to provide telephone service, while the new entrant deliver high speed data services over the same loop using its own high speed ADSL modems, telephone traffic and the data traffic are separated by means of a splitter before the incumbent’s switch. The local loop remains connected to, and part of, the notified switched network; high-speed bit stream access whereby the incumbent installs a high speed access link to the customer’s premises and then makes this access link available to third parties, to enable them to provide high speed services to customers. See Annex to Communication from the Commission on Unbundled Access to the Local loop: enabling the competitive provision of a full range of electronic services including broadband multimedia and high-speed Internet, COM (2000) 237 final of 26th April, 2000.


48 Commission Decision, para 41.

5. Conclusion

Communications are going through a dramatic phase of development in which the role of the industry is changing. Driven by convergence of the different markets, the economic players are reconsidering their positions and altering their roles. The liberalisation process pursued by both the Commission and Member States (although with different rigour) has brought about a mutation in the role of the players in this sector, and entrusted them indirectly with the role of guardian of essential instruments of modern democratic society: the conveyance of private or public communications, addressed to an individual (as in the case of voice telephony) or the public (as in the case of broadcasting). Private undertakings with vast economic power have the potential to dictate the evolution of the so-called information society. In this context the main question is to determine to what extent is EC competition law capable of tilting the balance towards a wider public interest dimension in the European Union.
Chapter II

EU legislation on communications

1. Introduction

The current legislation in force in the European Union in the field of communications originated from the policy goals set out in the 1987 Commission Green Paper on Telecommunications. In that document the Commission outlined the initiatives it intended to take in order to introduce regulatory changes which would improve the sector's environment and tackle the anti-competitive situation which was hampering development. The Commission acknowledged the role traditionally performed by telecommunication administration in providing a public service, but it considered that a more liberal, flexible environment in the telecommunications services and equipment market was the necessary precondition for the overall development of the sector in the Community. As a result of the broad and successful consultation process initiated by the Commission (and subsequently agreed by the Council) the legislative process began by focusing on terminal equipment.

Four periods can be identified within the EU communications liberalisation process one. The initial period was initiated by the 1987 Green Paper (1988-96), and followed by a transitional period of two years stemming from the 1992 Review and the 1994 Green Paper (1996-1997). The full liberalisation model (1998-2000) came next and finally the convergence process which is currently taking place and is the common model for

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3 Council Resolution on the development of the common market for telecommunications services and equipment up to 1992 of 30th June 1988, OJ 1988, C 257/1.
communications which is being implemented as a result of the 1999 Communications Review. This chapter will analyse the development of the EU legislation on communications from the 1987 Green Paper to the current stage. In doing so I will analyse the growing (and, as we will see in subsequent Chapters, mutual) influence of general competition law.

2. The policy blueprints and their implementation: from the 1987 Green Paper to the 1999 Communications Review

2.1 The 1987 Green Paper model

The 1987 Green Paper set out a number of key objectives which were achieved through a variety of measures including for the most part directives, but also recommendations and guidelines. Those principles can be summarised as follows: (i) Member States may leave telecommunications infrastructures under monopoly but must preserve network; (ii) the telecommunications services, with the exception of voice telephony, must be liberalised;^ (iii) terminal equipment must be liberalised;^ (iv) Community-wide interoperability must be achieved;^ (v) the regulatory and operational function of public

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7 The adoption of Directive 90/388/EEC ("the Services Directive") was the first step towards a systematic liberalisation of the field of communications in the Community. The Services directive did not apply to television or radio broadcasting. Moreover, in its original form, the Services Directive did not apply to telex mobile telephony paging, satellite services and not even voice telephony which was defined in Article 1 as "the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point.". For a gloss see P. Larouche "Telecommunications" in Geradin (Ed.), The Liberalization of State Monopolies in the European Union and Beyond (Kluwer Law International, 2000), at 25.

8 See Directive 88/301/EEC on terminal equipment of 16th May 1988. This was the first directive to be adopted by the Commission in the telecommunications sector. Following the 1987 Green Paper a wide consensus had been achieved on the need of full liberalisation of the terminal equipment market. The Directive required the abolition of all exclusive rights for import, marketing, connection, bringing into service or maintenance of telecommunications terminal equipment. Local type approval procedures could continue however they were limited only to the cases involving essential requirements of the public network, such as maintenance of security of the network, the achievement of interoperability and the protection of data.

telecommunications operators (PTOs) must be separated;\textsuperscript{10} (vi) competition law must be applied to both PTOs and new service providers;\textsuperscript{11} and (vii) an Open Network Provision (ONP) must be put in place to regulate the relationship between monopoly infrastructure providers and competitive service providers (including interconnection and access).

Whilst trying to avoid a detailed analysis of the implementing measures a few points should be highlighted relating to the model proposed by (and realised as a result of) the 1987 Green Paper. Although the dividing line between services and infrastructure (or telecommunications services and telecommunications networks)\textsuperscript{12} was clearly marked, this gradually faded and disappeared with the introduction of new models of regulation in subsequent periods. Another transitory but yet key distinction was that between reserved and non-reserved (i.e. non liberalised) services.\textsuperscript{13} Television broadcasting was kept quite separate from telecommunications. In particular digital TV was subject to a separate directive (Directive 95/47/EC)\textsuperscript{14} which was not part of the regulatory package. Directive 95/47/EC (the "TV Standards Directive")\textsuperscript{15} aimed at establishing a regulatory regime for the start up phase of the new digital TV service as well as making provision for adequate continuity with the regulatory environment for the advanced TV services based on analogue technology. It contains two types of measures: harmonisation in the use of certain technical standards for television transmission by cable, satellite or

\begin{footnotesize}
\begin{enumerate}
\item This principle which informed much of the ECJ's case law (see Chapter VII) was set out on Article 6 of Directive 88/301 and Article 7 of Directive 90/388.
\item Telecommunications services meant a service whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications process, with the exception of radio broadcasting and television. Public telecommunications network meant the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, microwave, optical means or other electromagnetic means. For the distinctions between the use of the term network and infrastructure see P. Larouche, supra note II-7 above, in his note 33.
\item In the period between 1990 to 1996 those were gradually enlarged by Directive 94/46/EC (OJ 1994, L 268/15) which included in the definition of telecommunication services those (other than public voice telephony) provided over satellite networks.
\item See below.
\end{enumerate}
\end{footnotesize}
terrestrial mode; and behavioural provisions on conditional access to digital television services broadcast to viewers in the Community.\textsuperscript{16}

The behavioural provisions contained in Article 4 are of paramount importance in the regulation of the bottleneck facilities situations created by the introduction of decoders and set boxes. However, some limitations constrain the scope of these provisions considerably. Firstly, this only applies to the new digital services and does not extend to the existing analogue services, which will continue to have a substantial (though decreasing) importance and will continue to be source of market power. Secondly, only broadcasters can benefit from this provision and therefore other carriers which only transmit programmes created by other companies such as cable companies do not appear to be covered. Finally, Article 4 does not guarantee access to the provision of interactive services which do not fall within the scope of television although such access is essential to the profitability of cable companies and other television carriers alike.\textsuperscript{17}

The 1987 Green Paper model was gradually implemented in the period between 1988 and 1996. In 1996 some further reforms resulting from a new review and consultation process were brought into force.

\subsection*{2.2 The 1992 Review and the 1994 Green Paper}

In 1992 when the Commission published its Review of the situation in the telecommunications services sector (in which it favoured the opening of intra-Community voice communications to competition), it faced considerable pressure from the industry and users to push the liberalisation process further and extend it to the infrastructure which was not mentioned in the Review. As a result in its subsequent Communication on the result of the consultation on the Review of the situation in the

\textsuperscript{16} These provisions require Member States to take all the necessary measures to ensure that the operators of conditional access services, irrespective of the means of transmission, who produce and market access to digital television services offer to all broadcasters on fair, reasonable and non-discriminatory terms technical services enabling the broadcasters' digitally transmitted services to be received by viewers authorised by means of decoders administered by the service operators. The operators of conditional access services must comply with Community competition law, in particular if a dominant position appears and are required to keep financial accounts regarding their activity as conditional access providers.

telecommunications sector, the Commission proposed a timetable which included *inter alia*: (i) by 1996 liberalisation of alternative infrastructures (i.e. any telecommunications infrastructure owned by some party other than the local Telecommunication Operators ("TO"), which would then constitute an alternative to the public telecommunications infrastructure); liberalisation of cable TV network for the provision of liberalised services; and a review of the policy concerning public telecommunications infrastructure; (ii) by 1998 full liberalisation of telecommunications services (i.e. of public voice telephony).

Despite a disagreement with the Council on the timing of the reforms (the Council considered that telecommunications infrastructure in general should be liberalised by 1st January, 1998), the Commission extended the liberalisation process to services using cable TV networks with Directive 95/51/EC, whilst Directive 96/2/EC allowed operators of mobile networks to use their own infrastructure or infrastructure leased from anything other than TOs. More generally the Full Competition Directive, Directive 96/19/EC, amended Article 2(2) of the Services Directive (Directive 90/388/EEC) with effect from July 1996 by providing that Member States had to ensure that all remaining restrictions on the provisions of telecommunications services, other than voice telephony over network, established by the provider of the telecommunications services and by means of infrastructures provided by third parties were lifted and the relevant measures were notified to the Commission no later than 1st July, 1996. All the alternative infrastructures had been liberalised but this model was transitory in nature as it was designed to lead to the more radical liberalisation of the most important part of the market, voice telephony, which was to take place by 1st January, 1998.

2.3 The fully liberalised system

The system resulting from the 1992 Review and the 1994 Green Paper also opened the way for the full liberalisation. In addition to the liberalisation of all the

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18 Com (93) 159 final of 28 April 1993.
telecommunications services and infrastructure realised by the Full Competition Directive (Directive 96/19/EC), some regulatory adjustments were required. A number of them were contained in the Full Competition Directive. Others required an adaptation of the competitive environment set up with the original ONP Framework Directive (Directive 90/387/EEC) and the ONP Leased Lines Directive (Directive 92/44/EEC). These adjustments were realised mainly through Directive 97/51/EC and by Directive 98/10/EC on the application of ONP to voice telephony and universal service for telecommunications in a competitive environment.

Furthermore a new common framework for the interconnection of networks and services and networks was with Directive 97/33/EC (the "Interconnection Directive"). Finally the regimes for licensing and authorisation were harmonised with Directive 97/13/EC (the "Licensing Directive"). In particular the Interconnection Directive contained the notion of significant market power (or "SMP"). Pursuant to the Directive, an organisation is presumed to have significant market power when it has a share of more than 25 per cent. of a particular telecommunications market in the geographical area of a Member State within which it is authorised to operate. A number of requirements ranging from obligations to supply to maintenance of accounting separation and analysed in more detail below, are a result of SMP. Therefore these requirements have an asymmetrical nature since they bear more heavily on certain operators.

2.4 Convergence and the common regulatory model for communications

On 3rd December, 1997 the Commission adopted a Green Paper on the convergence of telecommunications, media and information technologies. The adoption of the Green Paper which was aimed at starting a consultation process was prompted by the fact that


\[22\] OJ 1997, L 199/32.


\[24\] Article 4 (3) of Directive 97/33/EC on interconnection in Telecommunications with regard to ensuring universal service and operability through application of the principles of Open Network Provision (ONP).

\[25\] COM (97) 623.
advances in digital technology allow a higher capacity of both traditional and newly-developed communications and media services to be carried over the same networks, and also allow the use of integrated consumer devices for multiple purposes (such as telephony, television or personal computing). The Convergence Green Paper was intended to launch a Europe-wide debate on how this new generation of electronic media should be regulated in the next century.

The Green Paper started from the premise that traditionally, communications media had been separate. Broadcasting, voice telephony and on-line computer services had been operated as distinct services, carried over different networks and using different "platforms": TV sets, telephones and computers. Each has been regulated by different laws and different regulators, usually at national level. However, the Paper noted that telecommunications, media and IT companies, benefiting from the flexibility of digital technologies are able to offer services outside their traditional business sectors. Examples of convergent services identified by the Green Paper include: Internet services delivered to TV sets via systems like Web TV; e-mail and World Wide Web access via digital TV decoders and mobile telephones; webcasting of radio and TV programming on the Internet and using the Internet for voice telephony.

The Green Paper argued that creation of an appropriate regulatory framework would stimulate growth in European industry, employment, and cultural diversity, and provide increased consumer choice. It sought views on two schools of thought or possible approaches, 'maximalist' and 'minimalist', to regulate of these converging industries:.

The 'maximalist' position is that all boundaries between services and industry sectors will be challenged, and that regulation at a national level is no longer appropriate to an international or global industry. The 'minimalist' position is that the effect of convergence will be more limited, and that boundaries between service types will remain. A 'minimalist' regulatory model would have one set of rules for economic aspects and another for service content, intended to guarantee efficiency and quality.
The results of the public consultation on the Convergence Green Paper\textsuperscript{26} highlighted the continuing need to meet a range of public interest objectives whilst recognising the need to promote investment in particular in new services.\textsuperscript{27} The Paper further underlined the need for an appropriate and stable regulatory framework; for separation of transport or delivery and content regulation; for a more horizontal approach to all transport infrastructures and associated services, irrespective of the types of services carried and the application of an appropriate regulatory regime to new services. Most importantly there was a consensus for an effective application of the competition rules and increased reliance on them accompanied by the gradual phasing out of sector specific regulation as the market becomes more competitive.

In parallel, the status of liberalisation and the achievement of the existing Regulatory package were documented in the Fifth Report on the Implementation of the Telecommunications Regulatory package.\textsuperscript{28} The information gained from this report suggested that the combination of sector specific legislation and application of competition rules had worked well. However, whilst the process of creating an internal market for telecommunications was well under way, pan-European services and investment are still being hampered by a relatively low level of harmonisation, particularly in licensing and also in interconnection. Divergences and conflicts create barriers to entry. There are problems in relation to cost accounting of incumbents in relation to interconnection and provision of leased lines and voice telephony. Benchmarking at EU level had proven effective.

In December 1998 the Commission had also launched a public consultation on Radio Spectrum Policy to assess the strategic planning of the use of the radio spectrum,

\textsuperscript{26} Communication from the Commission to the European Parliament, the council, the Economic and Social Committed and the Committee of Regions - The Convergence of Telecommunications, Media and Information Technology Sectors and the Implications for Regulation - Results of the Public Consultation on the Green Paper, COM (1999) 108 final of 10\textsuperscript{th} March 1999.

\textsuperscript{27} In particular in relation to public broadcasting it emerged the need for a balanced solution as to how public broadcasting can be best integrated into new environment which should respect Member State competence by defining the public service broadcasting remit in accordance with Protocol 9 of the Amsterdam Treaty; encourage public broadcasters to exploit new technologies; requires those public broadcasters to distinguish between public broadcasting activities and those lying in the competition domain.

\textsuperscript{28} Communication from the Commission to the European Parliament, the council, the Economic and Social Committed and the Committee of Regions - Fifth Report on the Implementation of the Telecommunications Regulatory package COM (1999) 537.
harmonisation of radio spectrum allocation and related issues in assignment and licensing and the use of radio equipment and standard. In its Communication on the results of the consultation the Commission identified as one the policy objectives the establishment of a regulatory framework for radio spectrum policy.

Finally in relation to digital TV the Commission published a report on the development of the market for digital television in the EU including an analysis of the implementation of the TV Standards Directive. The report concluded inter alia that digital TV markets and technology had evolved beyond the scope of that Directive and further clarification of the regulatory framework for new services, including the interaction of sector specific regulation and competition law was required.

Against this background the 1999 Communications Review proposed to set out a new single regulatory framework for communications infrastructure and associated services. The new framework would apply to telecommunications networks (fixed or mobile), satellite networks, cable TV broadcast networks, as well as to facilities such as API (Application Program Interface) which control access to service. Services provided over networks such as broadcasting services or electronic banking would be outside the scope of the framework and would be regulated by other measures at EU and national level.


30 Communication from the Commission to the European Parliament, the council, the Economic and Social Committee and the Committee of Regions - The Next Steps in Radio Spectrum Policy - Results of the Public Consultation on the Green Paper, COM (1999) 538.


32 The Commission noted that to the extent that associated services are linked to services for the provision of content there may be a need for additional rules concerning that provision of content.

33 The regulation of broadcasting at European level has mainly focused on the free movement and non discrimination aspect of the activity. Directive 89/552/EEC ("the Television without Frontiers Directive"), as lastly amended by Directive 97/37/EC aims creating the conditions necessary for the free movement of television broadcaster. We do not intend to analyse in detail the provision of the Television without Frontier Directive which also contains provisions on content concerning the protection of minors, film broadcasting and advertising minute. It is simply worth remarking that the Directive introduced the so called "home country control" according to which broadcaster are subject only to the law of the country in which they have their principal place of business. The directive defines television broadcasting as the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form of television programmes intended for the reception by the public. Whilst it includes communications of programmes between undertakings with a view to their being relayed to the public, it does not include communications services providing items of information or other messages on individual demand such as telecopying electronic data banks and other
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Antonio F. Bavasso

The Commission recognized that certain regulatory principles would have to underpin the approach to the new framework. Regulation should be based on clearly defined policy objectives fostering economic growth and competitiveness thereby promoting employment and ensuring objectives of general interest where they are not satisfied by market forces. Regulation should be kept to a minimum necessary to meet those policy objectives and in this respect the framework should therefore contain “sunset clauses” whereby certain rules are reviewed periodically to assess whether they are still necessary. Regulation should further enhance legal certainty in a dynamic market and should aim to be technologically neutral. Finally, regulation may be agreed globally, regionally or nationally but should be enforced as closely as is practicable to the activities being regulated in accordance with the principle of subsidiarity.

Therefore the structure of the new framework emerging had to be based on three pillars: sector-specific legislation, complementary sector specific measures and competition law. Whilst this study is focused on the “third pillar” of this structure, it cannot ignore an overview of the sector specific measures particularly because, as the Court recognised, obligations and rules set out in EC secondary legislation can be used as interpretative criteria for the assessment of whether or not certain practices are prohibited under competition law.34

Following the 1999 Communications Review, the Commission proposed a rationalization of consolidation of the binding Community measures which entailed the

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34 Case 66/86, Ahmed Saeed Flugreisen, [1989] ECR 803, para 43 where the Court considered that: “certain interpretative criteria for assessing [under Article 8(2) EC] whether the rate employed is excessive may be inferred from Directive 87/601/EEC, which lays down the criteria to be followed by the aeronautical authorities for approving tariffs. It appears in particular from Article 3 of the directive that tariffs must be reasonably related to the long-term fully allocated costs of the air carrier, while taking into account the need of consumers, the need for a satisfactory return on capital, the competitive market situation, including the fares of the other air carriers operating on the route and the need to prevent dumping.”
adoption of a Competition Directive which would consolidate all the Directives adopted under Article 86 EC. The purpose of the Competition Directive is to recall the obligation imposed on Member States to abolish exclusive and special rights in the field of communications which is an obligation deriving directly from the Treaty itself and consolidate the provisions in the existing Directives which, in turn, originated in Directive 90/388/EEC. In addition, four specific Directives have been proposed on the basis of Article 95 EC with a view to simplify and consolidate the current regime. These are the Directive on a Common Regulatory Framework for Electronic Communications Networks and Services; the Directive on the Authorisation of Electronic Communications Networks and Services; the Directive on Universal Service and Users’ rights relating to Electronic Communications Networks and Services and the Directive on Access to and Interconnection of Electronic Communications Networks and Associated Facilities. The Commission also adopted a Proposed Decision on a Regulatory framework for Radio Spectrum policy in the European Union and a proposal for a Regulation on Unbundled Access to the Local Loop.

The analysis of the present study will follow the structure designed by the proposed measures. Before analysing the relevant binding measures the legal basis of the

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36 A fifth Directive concerns the Telecoms Data Protection but it is not dealt with in this work.


measures will be examined with a view to providing a wider "institutional" understanding of the process.

3. The legal basis

One of the main reasons for the liberalisation process rests upon one of the fundamental principles of the European Union: the establishment of the internal market. By the late 80s it appeared clear to the Commission that as Van Miert put it "a market based on competition and free circulation of goods, services, people and capital is at odds with systems based on national monopolies."\(^{42}\) Whilst the basis for full liberalisation has an indisputable internal market origin, one must also consider the fundamental contribution derived from the Commission's action based on the principle of undistorted competition in the internal market (Article 3(g)). Competition rules and in particular Article 86 (ex Article 90) of the Treaty played a decisive role. In this respect the Commission retains special legislative powers (which can be deployed in addition to its other powers) to ensure the monitoring and implementation of EC competition law.

Since the BT case,\(^{43}\) the ECJ had made clear that competition rules were applicable to the sector and this opened the way to a wider liberalisation process. The legal basis upon which legislative measures sustaining the EU liberalisation were adopted is highly significant when tracing the institutional debate underpinning the whole process. Whilst up to the 1987 Green Paper the Commission seemed to regulate the sector simply through technical, commercial or regulatory harmonisation, or co-ordination between Member States which left them in control of the sector, the new liberalisation era required a more vigorous approach by the Commission, based on competition law principles. The "endointegrated" nature of EC Treaty rules on competition which has grown to be totally independent from Member States' influence could support this process. Article 86 was the point of contact with the Member States sovereignty and role as public service provider. The Commission pursued this by undermining the very basis of the national monopolies which were subject to Article 86 (formerly Article 90). As

\(^{42}\) K. Van Miert, supra note 1-2 above, at 1.

\(^{43}\) Case 41/83, Italy v. Commission, [1984] ECR 873.
we will see in more detail in Chapter VII, Article 86 has a threefold function: it renders public undertakings subject to Treaty rules, it provides to Member States an exception based on their public mission but also confers to the Commission legislative powers.

Public undertakings and those to which Member States grant special or exclusive rights are subject to Article 86 which, in paragraph 1, prohibits Member States from enacting or maintaining into force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 6 and Articles 81 to 88. Article 86(2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to those rules in particular to those on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, on condition, however, that the development of trade is not affected to such an extent as would be contrary to the interests of the Community. Article 86(3) empowers the Commission to enact appropriate directives to ensure the application of Article 86.

The Directives which first implemented the Commission's liberalisation process in the field of telecommunication services were based on its powers under Article 86(3). In fact those directives (the majority of which are now known as the liberalisation directives) aimed at the abolition of exclusive rights by public operators. When the Commission adopted Directive 88/301/EEC on telecommunications terminals, the French Government contested the legal basis of the measure claiming that the Commission should have initiated an Article 226 (formerly Article 169) procedure instead of bringing a measure contrary to the Treaty to an end. In the view of the claimant, Article 86(3) was intended to enable the Commission to inform the Member States, in cases where it is unclear how compliance with the Treaty is to be achieved, of the means which must be used in order to ensure such compliance. The Court found that the Commission had correctly used its powers under Article 86(3) as in the Directive in issue it had not made a specific finding that a Member State had failed to

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46 See supra note 35 above.
fulfil its obligations under the Treaty but determined, in general terms, obligations which are binding on the Member States under the Treaty.

Furthermore it was alleged that the Commission had encroached on the powers conferred on the Council by Articles 87 (now 83) and 100a (now 95) of the Treaty. Article 83 is concerned with the adoption of any appropriate regulation or directives to give effect to the principles set out in Articles 81 and 82. The Court recognised as the distinctive feature of that Article as opposed to Article 86(3) that it refers to measures and rules applicable to all undertakings and not only undertakings with which Member States have specific links. It is only with regard to such measures that Article 86 imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives or decisions addressed to Member States. Article 95 is concerned with the adoption of measures for the approximation of the provision laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

The Court therefore found that the Commission in principle did not lack the power to enact the Directive as the subject matter of the power conferred on the Commission by Article 86(3) is different from, and more specific than, that of the powers conferred on the Council by either Article 95 or Article 83. The case highlights the resistance on the part of Member States to the liberalisation process and in particular in respect of the utilisation of a legislative procedure which produces a measure binding on them but, on whose approval they had little influence. The judgment of the Court had a great impact on upholding the Commission’s approach which brought about a more speedy and effective process of opening up the markets to competition.

The use of Article 86(3) bears the mark of a system governed by national legal monopolies and emphasises the Commission’s intention to dismantle that system in the name of competition rules. In the adoption of measures which had a prevailing

\[\text{French Republic v. Commission, supra note 24 above, para 24.}\]

\[\text{Ibidem, paras 25-27; however the Court found that the reference to special rights contained in Article 2 of the Directive, Article 7 and Article 9 (as far as it referred to the previous two provisions) were declared void.}\]
harmonising function such the ONP Directives\(^{49}\) and the most recent Proposed Directives,\(^{50}\) Article 95 was utilised as a legal basis for the enactment of the relevant directives. This, of course, is the route to be followed on the way to a more mature phase of development of the market, when liberalisation is achieved and harmonisation will still be (decreasingly) required together with application of competition law and principles.

4. Liberalisation measures

The adoption of Directive 90/388/EEC ("the Services Directive") was the first step towards a systematic liberalisation of the field of communications in the Community. The Services Directive did not apply to television or radio broadcasting. Moreover, in its original form, the Services Directive did not apply to telex mobile telephony paging, satellite services and not even voice telephony which was defined as "the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point."\(^{51}\)

The scope of the Directive has been gradually enlarged by new directives dealing with satellite communications (Directive 94/46/EC or "Satellite Directive"),\(^{52}\) the use of cable television networks for the provision of telecommunications services (Directive 95/51/EC\(^{53}\) or "Cable Directive") and mobile and personal communications (Directive 96/2/EC\(^{54}\) or "Mobile Directive"). The Internet, due to its recent and rapid development has been subject to little regulation. However, the Commission Notice on voice


\(^{50}\) See proposals of 12\(^{th}\) July.


\(^{52}\) The Directive also amends Directive 88/301/EEC.

\(^{53}\) OJ 1995, L 256/49.

\(^{54}\) OJ 1996, L 74/16.
communications on the Internet\textsuperscript{55} distinguishes three forms of voice communications from the consumer's point of view: computer to computer voice services; computer to phone voice services (i.e. voice communications transmitted via the Internet between a PC of one user and another using a traditional telephone connected to the PSTN); and phone to phone services where the information is transmitted using Internet protocols. The Commission considered that for Internet voice communications to be considered as voice telephony, and therefore to fall within the scope of Directive 90/388/EEC on competition in the markets for telecommunication services, each of the following conditions had be met: such communications are the subject of a commercial offer for the public (i.e. available to all member of the public on the same basis) and to and from switched network termination points;\textsuperscript{56} and the communications must involve direct transport and switching of speech in real time.\textsuperscript{57}

In 2000 the Commission launched a Consultative Communication to review the 1998 Notice on the Status of voice on the Internet.\textsuperscript{58} The Communication intended to open a public consultation on the review of the 1998 Notice but not to lead to an alteration of the regulatory framework in force. Taking into account market trends and technological development (such as the level of quality and reliability of voice communications on the Internet, the degree of use by PTOs of Internet Protocol in their core networks to carry data and voice, and the use by large data users in a closed user environment of Voice IP for supporting internal telephone services) it asked whether the approach should have been modified. The Commission anticipated that in the current situation it would confirm that Internet Telephony still continues to fall outside the definition of voice communications.

\textsuperscript{56} The communications must connect two network termination points of the public switched telephone network at the same time; if access to the Internet is obtained via leased circuits, the service could not be considered as voice telephony.
\textsuperscript{57} The regulatory consequences of this regime was that Internet access providers under the previous could operate under a general authorisation for data transmission or value added services and requirements of individual licences may not be imposed on them and no universal services obligations could be imposed on them. This is changed as a result of the reforms stemming from the 1999 Communications Review.
telephony. It sought views on the services available to end users, bundled offering (including VoIP services) and identification of market players.59

Despite the current scarce household penetration,60 cable TV networks play an increasingly important role in the conveyance of both broadcasting and telecommunications services. Their capacity to convey telecommunications services places them at the forefront of the process of convergence and multimedia applications. The Cable Directive required Member States to allow the use of cable TV networks for the provision of telecommunication services. As a result of an amendment introduced by the Cable Directive, telecommunications services were subsequently defined as "services whose provision consist wholly or partly in the transmission and/or routing of signals on a telecommunications network."61 Directive 96/19/EC ("the Full Competition Directive") of 13th March 1996 extended the scope of the Services Directive to public voice telephony services, and required Member States to fully liberalise the provision of network infrastructure by (subject to some exceptions)62 1st January 1998.

The Service Directive, as amended by all the directives mentioned above, requires Member States to withdraw all exclusive rights for the provision of telecommunication services.63 Special rights designating or limiting the number of operators authorised to provide services, or to establish networks, had to be withdrawn if they were not based on objective, proportional and non-discriminatory criteria.

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59 A summary of the responses received was published on the Commission's website on 21st September 2000.
60 In 1997 an average of 28% of the households with a TV in the EU subscribed to a cable: Cable Review: Commission Communication concerning the review under competition rules of the joint provision of telecommunications and cable TV networks by a single operator and the abolition of restrictions on the provision of cable TV capacity over telecommunications networks ("the Cable Review").
61 Article 1 of the Cable Directive; the definition adopted for the purposes of the OnP is slightly different and excludes radio and television broadcasting. It reads as follows: "services the provision of which consists wholly or partly in the transmission and routing of signals on a telecommunications network, with the exception of radio and television broadcasting", Article 1, Directive 97/51/EC.
63 Exclusive rights are to be interpreted as "the rights that are granted by a Member state to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a telecommunication service or to undertake an activity within a given geographical area", Article 1.1 of Directive 90/388/EEC as amended by Article 2.1 of Directive 94/46/EC.
Member States may still make the supply of services subject to licensing requirements. However, the conditions attached to the grant of licenses must be objective, non-discriminatory and transparent; reasons must be given for any refusals; and an appeal procedure must be made available. Member States are only allowed to impose conditions on the establishment and/or operation of telecommunication networks or provision of telecommunication services for certain non-economic reasons. These reasons or “essential requirements” are: security of network operations; maintenance of network integrity and, in justified cases, interoperability of services; data protection; the protection of the environment and town and country planning; and effective use of the frequency spectrum and the avoidance of harmful interference between radio based telecommunications systems and other (space-based or terrestrial) technical systems.

The provision of services other than voice telephony, and the establishment and the provision of public networks involving the use of radio frequencies, may be subject only to a general authorisation or declaration procedure.

Cable regulation was recently the subject of another directive which can be considered along with the liberalisation measures. As was recognised in the Full Competition Directive, some Member States retained restrictions on the use of public telecommunication networks for the use of cable television capacity. Furthermore the liberalisation in the use of cable networks raised the issue of the joint ownership by a single operator, providing both access for networks or services (i.e. public telecommunications networks and cable TV networks). Joint ownership is clearly a potential source of abuses and delay the emergence of effective competition which in other countries has proved extremely beneficial for consumers. The Cable Directive addressed the issue merely by requiring account transparency and separation.

64 Telecommunications networks are now defined as the transmission equipment and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire radio, by radio, by optical or by other electromagnetic means, see Article 1.1(a)(ii) of Directive 96/19/EC.
65 This may include protection of personal data, confidentiality of the information transmitted or stored as well as the protection of privacy.
66 According to the Cable Review, incumbent cable companies in America have been forced to respond to competition by cutting prices by 50% and in one case 90%, offer free pay per view events and upgrading their systems.
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The Commission issued a Communication on these issues ("The Cable Review") which followed two studies committed on the topic. The Review concluded that the accounts separation requirement was insufficient to address the potential risks for competition and, after reviewing various options, proposed to require legal separation of the cable TV network companies. In June 1999 the Commission adopted a Directive (Directive 1999/64/EC amending Directive 90/388/EEC) in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities ("the Cable Ownership Directive"). This requires telecommunications operators to separate their cable television operations in structurally separate companies. This is intended to help the development of cable television in the EU and encourage competition and innovation in local telecommunications and high speed Internet access.

As a result of the Services Directive (as amended) Member States have a continuing obligation to notify the Commission of any existing or proposed change in licensing authorisation; in declaration procedures and criteria, or plans to introduce new licensing; general authorisation and declaration procedure for voice telephony; and the provision of public networks. They are entitled to limit the number of licenses only on grounds of lack of available spectrum and, where justified, under the principle of proportionality. Public service specifications for packet or circuit switched data services must be abolished and replaced by the declaration procedure referred above. Member States also had an obligation to ensure that adequate numbers are available for all services and are allocated in an objective, non discriminatory, proportionate and transparent manner by 1st July 1997. The Service Directive also dealt with access and interconnection.

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68 Article 3.
69 The Directive deals with the issue of access for those cases in which Member State maintain special or exclusive rights for the provision and operation of fixed public telecommunications networks. Article 4 provides that in such cases Member States shall take the appropriate measures to ensure that the condition governing access are objective, non discriminatory and shall publish them. Operators must be able to lease lines within a reasonable period and any restrictions must be justifiable. Furthermore pursuant Article 4d Member States shall not discriminate between public telecommunications networks in granting rights of way for the provision of such networks. Thus, where essential requirements mean it is not possible to grant additional rights of way, access to existing facilities on reasonable terms must be ensured. Finally Article 6 provides that restrictions on the processing of signals before their transmission via the public network or after their reception will be removed except where necessary for compliance with public policy or the essential requirements. Between service providers there must be no discrimination in the conditions of use of the network nor in the charges payable. Interconnection must also be provided pursuant Article 4a but without prejudice to the ONP harmonisation measures which we will describe below.
directories,\textsuperscript{70} universal service,\textsuperscript{71} and accounts separation\textsuperscript{72} areas which will be subject to the more detailed provisions contained in the measures described below.

The proposed new Competition Directive will bring within one single, clear and convenient text all relevant provisions of Directive 90/388/EEC which are spread over six different Directives. The proposed Directive does not impose new obligations on Member States. However, given the developments which have marked the liberalisation process of the telecommunications markets in Europe since 1990 when Directive 90/388/EEC was first adopted, only some provisions which were considered still necessary for attaining the objectives of liberalisation of that Directive (as successively amended by Directives 94/46/EC, 95/51/EC, 96/2/EC, 96/19/EC and 1999/64/EC) are being maintained. For the sake of clarity, provisions which have become obsolete have been deleted.\textsuperscript{73}

At the same time as the adoption of the Commission’s Services Directive the Council adopted (under Article 95 (formerly Article 100a)) another directive (Directive 90/387/EEC or “Framework Open Network Provisions (ONP) Directive”) which aimed at introducing harmonised principles and conditions for open network provision, ensuring that PTOs could not abuse their privileged market positions over infrastructures to prevent the provision of services other than reserved services.

\textsuperscript{70} Special and exclusive rights with regard to the establishment of directory services (including both the publication of directories and directory enquiry services) must be removed. These ancillary services are rightly recognised as an essential access tool for telephony services. The rationale of this provision appears to be that of addressing possible situation of abuse of a dominance which extends from neighbouring markets (e.g. that of provision of telecommunication services). This scenario appears to be referred to in Recital 17 of the Full Competition Directive. In fact the national legislative provisions implementing the directive by abolishing the exclusive rights would not in itself eliminate the scope for application of competition law principles and the case law of the European courts.

\textsuperscript{71} Universal service is mentioned in Article 4c although, again, without prejudice to the more specific and detailed ONP provisions. The Services Directive establishes that the national schemes to share the net cost of universal service obligations must apply only to undertaking providing public telecommunication networks and allocate the burden to each undertaking according to objective, proportionate and non discriminatory criteria. Operators may re-balance tariffs to account for market conditions and for the need to ensure the affordability of a universal service. In particular they must be allowed to achieve tariffs based on real cost.

\textsuperscript{72} In order to guarantee an effective separation and the avoidance of cross subsidisation between voice telephony, networks and other activities Article 8 of the Directive requires that Member States must ensure that as soon as operators who are authorised to provide voice telephony services and public networks and also hold special or exclusive rights in areas other than telecommunications, achieve a turnover of more than €50 million in the relevant telecommunications market, they have to keep separate financial accounts for their voice telephony and/or networks activities.

\textsuperscript{73} See Annex I Part A for list of Directives and provisions to be repealed and correlation Table between the Service Directive and the New Competition Directive.

The Open Network Provisions laid down minimum common principles regarding the general conditions for the provision of infrastructure by PTOs to competitors and users. The Directive effectively initiated the process of harmonisation of the conditions in the individual Member States for open and efficient access to public telecommunication networks and services. The ONPs were effectively concerned with both the regulatory framework and the issue of Access and Interconnection which was also covered by the Interconnection Directive (in relation to telecommunications) and the TV Standards Directive (in relation to digital TV).

Following the 1999 Review, the proposed new regime will bring about a much needed rationalisation by adopting separate legal measures.

5. Common Regulatory Framework

The proposed Directive on a common regulatory framework ("Framework Directive")\textsuperscript{75} establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks and associated facilities. It clarifies a number of definitions, providing a wider industrial thrust based on convergence, making the previous definitions redundant.

\textsuperscript{74} Defined as telecommunication facilities which provide for transparent transmission capacity between termination points and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision). Article 2 of Directive 97/51/EC amending Directive 92/44/EEC.

\textsuperscript{75} COM (2000) 393 of 12th July 2000.
5.1 Key definitions and scope

Electronic communications networks are defined as "transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, networks used for radio and television broadcasting, and cable TV networks, irrespective of the type of information conveyed."^^

Electronic communications services are defined as "services provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services."^^

As anticipated by the 1999 Review, the Framework Directive does not cover broadcast content, and clarifies that telecommunications terminal equipment is outside the scope of the new framework. This marks a considerable step in the direction of a model of regulation covering a converging industrial environment, it includes a wide range of networks and services including networks using Internet Protocol, cable TV, and mobile and terrestrial broadcast networks.

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76 Article 2(a).
77 Article 2(b).
78 As noted above, the Commission 1998 Notice on voice communications on the Internet (OJ 1998, C 6/4) distinguishes in three forms of voice communications on the basis of the consumer’s point of view: computer to computer voice services; computer to phone voice services (i.e. voice communications transmitted via Internet between a PC of one user and another using a traditional telephone connected to the PSTN); phone to phone services where the information is transmitted using Internet protocols. The Commission considered that for Internet voice communications to be considered as voice telephony and therefore to fall within the scope of Directive 90/388/EEC on competition in the markets for telecommunication services, each of the following conditions had be met: such communications are the subject of a commercial offer for the public (i.e. available to all member of the public on the same basis) and to and from switched network termination points, the communications involve direct transport and switching of speech in real time. In 2000 the Commission launched a public consultation on the review of the 1998 Notice (OJ 2000, C 177/4).
5.2 National Regulatory Authorities: their duties and tasks

Chapters II and III of the Framework Directive deal with National Regulatory Authorities. The Directive builds on the previous system.79

Article 3 reinforces the concept of national independent regulators by prescribing that National Regulatory Authorities ("NRAs") must be legally distinct from or functionally independent of all organisations providing telecommunication networks, equipment or services, and in addition introduces a requirement of impartial decision making. The right of appeal to an independent body must be provided in order to allow a challenge of any decision by NRAs. A notable provision is that of Article 5, which establishes the right of NRAs to collect information from market players, but ensures that the information gathering is proportionate and justified. In addition it allows the Commission to ask NRAs to provide information for the Commission to carry out its task under the Treaty. The NRAs are bound to the regulatory principles set out at EU level.

Chapter III of the Framework Directive (Articles 7 to 12) focuses of the NRA's tasks and duties and implicitly rationalises the existing set of rules.80 The NRAs are placed under an obligation to follow the regulatory principles which reflect those set out in the 1999 Communications Review set out above. It requires NRAs to manage the radio spectrum efficiently, introduces the right for the NRAs to permit trading of frequency

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80 The existing Interconnection Directive permits the NRAs to set conditions to be included in interconnection agreements concluded within their jurisdiction. These conditions relate to dispute resolution, publication/access to interconnection agreements, equal access and number portability, facility sharing, allocation and use of numbering resources, end-to-end quality of service universal service and contributions. The Directive also encourages the inclusion in agreements of conditions relating to the services to be provided, terms of payment, points of interconnect, technical standards, maintenance of network integrity, interoperability of services and protection of data. NRAs may also: (a) intervene on their own initiative or if requested by an operator to specify issues which may be covered in an interconnection agreement or conditions to be observed by one or more parties to an interconnection agreement; (b) require changes to be made to interconnection agreements already concluded where justified to ensure effective competition and/or interoperability of services for users; (c) set time limits within which negotiations on interconnection agreements are to be completed; (d) inspect all interconnection agreements; (e) when requested by either party, take steps to resolve interconnection disputes within six months of a request, resolving that dispute in a way which represents a fair balance between the legitimate interest of both parties; and (f) require organisations to interconnect their facilities in order to protect essential public interests and, where appropriate, to set terms of interconnection.
assignment and sets out a number of obligations in respect of management of numbering allocation.  

Articles 10 and 11 deal respectively with the rights of way, facility sharing and co-locations. These provisions show continuity with the existing system under the Interconnection Directive. This already requested that NRAs encourage the sharing of facilities and/or property between Operators providing public telecommunications networks and/or publicly available telecommunication services with rights over public or private land, particularly where essential requirements deprive other operators of access to viable alternatives. Article 11 recognises (as indeed Article 11 of the Interconnection Directive did) that agreements for facility sharing must normally be a matter for commercial and technical agreement, but the NRAs may intervene to resolve disputes in the same way they do for interconnection agreements. Member States may impose the facility and/or property sharing arrangements (including rules for apportioning cost) but only after an appropriate period of public consultation during which all interested parties must be given an opportunity to express their views.

Article 12 maintains the requirements of the previous regime to the effect that undertakings with special or exclusive rights in other markets maintain accounting separation between these activities and their activities in relation to the provision of electronic telecommunications and services.  

This is clearly aimed at avoiding and monitoring cross-subsidisation practices. Member States may choose not to apply these requirements where the annual turnover of the operator concerned is less than Euro 50 million. Other accounting separation rules apply in relation to interconnection and network access. This provision is to be read in conjunction with Article 10 of the Competition Directive which mandates accounting separation for undertakings which are granted special or exclusive rights in relation to areas other than electronic communications.

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81 See more specifically paragraph 8.3 below.
82 See previously Article 8 of the Services Directive (as amended); and see also for internal separation Article 11 of the Access and Interconnection Directive below.
Under the Interconnection Directive Member States had to ensure the provision of adequate numbers and numbering ranges. National numbering plans were made subject to the NRAs' control, in order to guarantee independence from the operators. Number allocation procedures must be transparent, equitable and timely, and allocation must be objective, transparent and non-discriminatory. All main elements of national numbering plans must be published. These rules are carried forward in Article 9 of the New Framework Directive which also requires NRAs to ensure that all non-geographic (e.g. freephone, premium rate) numbers can be reached by all users in the Community, except where the called party has chosen to limit access for commercial reasons. Number portability is dealt with under the Universal Services and Users Right Directive.

Finally, Chapter IV contains a number of general provisions which are common to more than one Directive in the regulatory framework. The most significant of these for the purposes of this work concern the new test of Significant Market Power (Article 13) and the procedure for market analysis which is to be used by NRAs in making their determinations concerning regulatory obligations (Article 14). Further provisions of Chapter IV concern such matters as standardisation, harmonisation, dispute resolution, comitology and information exchange.

5.3 The notion of significant market power (or "SMP")

According to the Interconnection Directive an operator was presumed to have significant market power if it had more than 25 per cent. of a particular telecommunications market in the geographical area within which it was licensed to operate. NRAs had the power to rebut the presumption by deciding that an operator with less than 25 per cent. was nonetheless an operator with significant market power or, conversely, that an operator with more than 25 per cent. does not have significant market power. The factors to be taken into account by NRA in making such a decision were: the operator's ability to influence market conditions; its turnover, relative to the
size of the market; its control of the means of access to end-users; its access to financial 
resources; and its experience in providing products and services in the market.84

As currently interpreted the notion of SMP is not necessarily intended to be assessed in 
relation to a relevant economic market. It is intended to relate to the activities of 
specific operators in broad market sectors and to reflect an operator’s position in the 
markets set out in the Directive within the geographical area in which it is authorised to 
operate.85

As SMP determinations relate to broad pre-determined markets set out in the 
Interconnection Directive (i.e. fixed public telephone networks and services, leased 
lines, and public mobile networks and services) there are differences between market 
definitions used in the application of EC or national competition law, and the markets to 
which SMP determinations apply. The current criteria to determine SMP may be 
criticised to the extent that they rely on a form-based approach which does not take into 
consideration either an economic market analysis or other important elements, besides 
market shares, which may indicate (or exclude) market power.86 A conclusive 
assessment of market power invariably requires a detailed analysis of all the 
circumstances affecting the market, including its definition.

One of the greatest innovations brought about by the Framework Directive is a revision 
of the whole concept and definition of SMP which, in accordance with the underlying 
spirit of the reform, is now more in line with the competition law principle of 
dominance. Article 13(2) defines an undertaking deemed to have significant market 
power as the one that, “either individually or jointly with others, ... enjoys a position of 
economic strength affording it the power to behave to an appreciable extent 
independently of competitors, customers and ultimately consumers.” This definition 
corresponds to the classic definition of dominance in EC competition law.87 The

84 Article 4.3.
87 The Court of Justice has defined a dominant position under Article 82 as, “a position of economic strength enjoyed by an undertaking which enables it to frustrate the maintenance of effective competition on the relevant market by allowing
Directive rightly abandons a more formalistic approach merely based on market shares and adopts a more economic approach based on market power. This constitutes a significant step towards a system based on competition law rather than regulation. Most importantly the provision refers to the notion of joint dominance. As will be demonstrated in Chapter IV below, this notion is far from settled and may cause difficulties in its application particularly in relation to oligopolies. However, joint dominance is not the only form of “complex dominance” which is referred to and crystallised in the Framework Directive. Article 13(3) also states that “when an undertakings has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market thereby strengthening the market power of the undertaking.” This definition is directly inspired by the Tetra Pak case law in which the Court of First Instance held that “in the circumstances of [that] case, Tetra Pak's practices on the non-aseptic markets are liable to be caught by Article [82] of the Treaty without its being necessary to establish the existence of a dominant position on those markets taken in isolation, since that undertaking's leading position on the non-aseptic markets, combined with close associative links between those markets and the aseptic markets, gave Tetra Pak freedom of conduct compared with other economic operators on the non aseptic markets, such as to impose on it a special responsibility under Article [82] to maintain genuine undistorted competition on those markets.”

Along the same lines the ECJ ruled out on the basis of existing case law the applicant's argument to the effect that the Community judicature had excluded "any possibility of Article [82] applying to an act committed by an undertaking in a dominant position on a market distinct from a the dominated market" and upheld the CFI and the Commission proposition (although stressing that "in case of distinct, but associated,
markets, as in the present case, application of Article [82] to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances [emphasis added]).  

The provision contained in the Directive which, contrary to the application of Article 82, provides ex ante regulation, does not refer to a situation of abuse of dominant position but simply to “enjoying a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.” This is a static picture, a determination which triggers the application of certain obligations rather than assessing the abusive exploitation of such a position. This is intrinsic in the function of regulation which is preventive rather than repressive. On the contrary Article 82 presupposes the abuse of a dominant position. Arguably the precedents on the prohibition of structural abuse (i.e. the strengthening of a position of market power) as envisaged in Continental Can\(^2\) has now little value as this situation is now covered by the preventive Commission powers under the EC Merger regulation. One might wonder whether the transposition in an ex ante context of a doctrine (such as Tetra Pak’s extended dominance) developed for ex post repression of abusive practices could be also transposed in other areas of ex ante application of competition law such as merger control. In general terms the use of the concept of dominance will create a natural link between the application by the NRAs, and the system of the European Courts and the Commission precedents described in the following Chapters.

This application of ex ante regulation in a more tailor-made fashion, on the basis of individual determination based on market power, can be seen as an extremely positive development compared to a formalistic view based on market shares which simply makes economic analysis the victim of the myth of legal certainty. The unclear aspects of this process are rather in the transposition of a static analysis such as the one involved in ex ante regulation to an intrinsically dynamic concept such as the notion of extended dominance referred to in Article 13(3). This amounts to a sort of codification of the


ECJ case law. In this submission a determination of extended dominance severed from the logic complement of an assessment of market abuse would not work well in *ex ante* regulation.

The application of a system based on dominance requires a market analysis. Article 14 sets out how this is to be carried out in the context of regulation, with the co-operation of the Commission, Member States and the High Level Communications Group. The Commission will issue a Decision on Relevant Product and Service Markets addressed to Member States which will identify those products and service markets within the electronic communications sector, the characteristics of which may justify the imposition of the regulatory conditions set out in the Directives on access and interconnection, universal service and licensing. In addition the Commission will publish Guidelines on market analysis and the calculation of significant market power. Arguably the production of these documents within the framework of sector specific regulation will also produce interaction with the Commission's role in the application of general rules of competition. What is unclear from the current text is the impact of the geographic dimension of the market. Article 14 merely refers to the powers of the Commission to indicate which markets are transnational, and sets out the duty of co-operation with NRAs which derive from this. However this seems to be jurisdictional, or procedural, rather than economic and does not seem to address the possibility that conditions of competition and, in extreme cases, substitutability may potentially vary from one geographic market to another.

It is in relation to the market analysis that the hybrid nature of the proposed reforms emerges more starkly and with less satisfactory results. As was noted by the Commission itself in the 1998 Access Notice: "given the pace of technological change in this sector any attempt to define particular product markets in this notice would run the risk of rapidly becoming inaccurate or irrelevant. The definition of particular product markets [...] is best done in the light of a detailed examination of an individual..."
It is submitted that this risk is more than ever present and the complex method of co-operation chosen for the relevant market predetermination will not always help to keep up with the necessary dynamism. If the route of pre-defining the markets is maintained a large portion of the success of the current reforms will depend on how efficiently this aspect of the regulatory process is managed. In this respect Article 14 provides for a market analysis procedure which entails a high degree of co-operation between NRAs and the Commission. It also contains a provision (Article 14(2)) which ensures the transparency of the entire process throughout Europe by requesting that NRAs carry out an analysis of the product and service markets identified in the Commission Decision referred to above and publish their analysis on each of the markets.

The proposed reform, entailing the application of ex ante regulation in a more bespoke fashion (on the basis of individual determinations based on market power) is in my view a positive development. The system set out in the Framework Directive does not have the same flexibility of ad hoc decisions based on general provision of competition law. Its mixture of concepts borrowed from competition law, and measures of general nature such as the Decisions outlined above and guidelines on the market analysis, may reduce the gap between a system of regulation and a deregulated environment and the asymmetrical character of the current framework. However these provisions also pose a number of challenges which emerge from a closer analysis of the EC case law on dominance to which they indirectly refer and which will be analysed in Chapter IV.

In addition (and most importantly) the Framework Directive gives the NRAs the power to conclude that the market is effectively competitive and therefore not to apply or maintain sector specific regulation (Article 14(4)). The obligations which stem from the status of significant market power holder are of various types and often drawn on antitrust principles. They are now set out in the Access and Interconnection Directive as well as in the Regulation on Unbundled Local Loop described below.

94 Para. 47 of the Access Notice.
6. Access and Interconnection

6.1 Scope, context and key definitions

The proposed Directive on Access to, and Interconnection of, Electronic Communications Networks ("the Access and Interconnection Directive")\(^{95}\) intends to establish a new regulatory framework for these issues and harmonise the way in which Member States regulate the market between suppliers of communications networks and services in the Union.

In accordance with the general theme of the reforms stemming from the 1999 Communications Review, it applies to all forms of communications carrying publicly available communications services. Most notably it is intended to affect the next generation of communications services – fixed and mobile – which will increasingly build on broadband delivery platforms or transport networks using the Internet Protocol. In addition it carries forward not only the existing framework established by the Interconnection Directive (as amended), the ONP Leased Lines Directive and Voice Telephony Directive but also the term of the TV Standards Directive covering access to digital TV. In relation to the latter, the consensus which emerged in the Report of Development of the Market for Digital Television in the European Union published on 9\(^{th}\) November, 1999 was that the treatment of digital television gateways needed to take into account recent technological developments and the regulatory framework needs to adapt accordingly. In particular the approach of the TV standards Directives had to be extended to EPGs and APIs.\(^{96}\)

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\(^{96}\) See Chapter II. This seems to include also what in the UK are referred to as Access Control Services. In the UK, on 31 August 1999 a Class Licence for the provision of Access Control Services ("the Access Control Class Licence") was granted. Access Control Services are construed as services which control the supply of certain digital telecommunications services to end users. Examples of Access Control Services include services for authenticating identity, and services for encrypting or decrypting digital services that are not intended to be available to all. The digital services that might be controlled include home shopping and home banking services delivered via a set-top box or an integrated digital television set. Access Control Services are not supplied directly to end users but are supplied to third parties (such as retailers or banks) who wish to supply digital services to end users. In September 2000 OFTEL issued a set of guidelines which set out the approach the Director General of Telecommunications expects to take when considering a Regulated Supplier determination. A Regulated Supplier determination can only be made in respect of Access Control Services. A determination which makes a licensee a Regulated Supplier will 'trigger' additional obligations that would otherwise lie dormant within the Access Control Class Licence. The conditions that are triggered by such a determination are designed to prevent the licensee using its position in the supply of Access Control Services to behave with an anti-competitive object or effect toward third parties who wish to supply digital services to end users. The ultimate purpose of the triggered conditions is to prevent anti-competitive behaviour against third parties that would
The terms “access” (which had a wide range of meanings) required a definition to dispel some of the confusion surrounding the concept. Article 2 of the proposed Access and Interconnection Directive defines it as follows: “‘access’ means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to networks elements and associated facilities and services, which may involve the connection of equipment, by wire or wireless means; access to physical infrastructure including buildings, ducts and masts; access to software systems including operational support systems; access to number translation or offering equivalent functionality; access to mobile networks, in particular for roaming; access to conditional access systems for digital television services.” Access for the purposes of this Directive does not refer to access by end users (i.e. a user not providing publicly available electronic communications networks or services).

Interconnection is a specific type of access implemented between public network operators. As a result of the new Directive it is no longer limited to telecommunications networks but is now defined as “the physical and logical linking of public electronic communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network.” For the purposes of the Directive an Operator is an “undertaking providing, operating or controlling publicly available electronic communications network (...) or an associated facility such as conditional access system, by means of which it can restrict or deny

result in reduced consumer welfare, for example by restricting the choice of digital services available to end users where no good substitutes exist or by raising the prices of digital services to end users by restricting the availability of alternative digital services. A Regulated Supplier determination can only be made in respect of Access Control Services and can therefore only be made in instances where the licensee supplies or intends to supply Access Control Services and third parties have made a reasonable request for the provision of Access Control Services from the licensee for the purposes of supplying end users with the relevant digital services. However, a determination making a licensee a Regulated Supplier will only be made where the supplier of Access Control Services is in a dominant position or has Market Influence within the relevant market within which those Access Control Services fall. In making a Regulated Supplier determination the Director must, therefore, define the relevant market and assess whether the licensee is in a dominant position or has Market Influence within that relevant market. The same distinction does not seem to apply at EC level.

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service providers' access to the end user or the end user's choice of services.” The presence of the public element in the concept of interconnection places it in the sphere of the liberalisation measures as one of the instruments to promote competition following decades of public monopolies. The markets which are affected by these concepts markets for call origination in the fixed public telephone networks, call termination in the fixed public telephone networks, transit service in the fixed public telephone networks, call origination in the public mobile telephone networks, call termination in the public mobile telephone networks, and leased lines interconnection.

6.2 The general approach and the specific provisions

The Commission recognises that in a competitive market, interconnection of and access to networks should in principle be agreed on the basis of commercial negotiation between the undertakings concerned. However, ex ante regulation is still considered necessary (together with competition) in the light of the current development of the market, the existence of former monopolists who provide the majority of connections, the existence of bottleneck facilities (such as local access in telecommunications or conditional access systems in digital TV), and the limited availability of spectrum in mobile telecommunications (which reduces competition).

Article 3 carries forward the provisions of the existing Directive. It requests Member States to take all necessary measures to remove restrictions which prevent the negotiation of access/interconnection agreements between undertakings within and between Member States. It also provides a sort of one-stop-shop principle in the sense that the undertaking requesting access or interconnection does not need to obtain authorisation to operate in the Member State where access or interconnection is requested and where it is not providing services in that Member State. Furthermore it requires Member States to remove measures obliging Operators to offer different terms and conditions to different undertakings for the same services, and/or imposing obligations that are not related to the actual access or interconnection provided. This provision has a considerable resemblance to and complementarity with the prohibition on tying and discrimination derived from Article 82. The issue of the cost of
interconnection is very sensitive for incumbents and new entrants and has been the subject of EC measures.\^97

Article 4 establishes the ‘primary interconnection rule’ that all undertakings authorised to operate electronic communications services for the provision of publicly available electronic communications services shall have the right, and when requested the obligation, to negotiate interconnection throughout the Community taking as a principle a commercial basis. NRAs have a general monitoring role in this sphere, and the power to intervene to impose obligations on operators, and resolve disputes. Recital 14 highlights how price regulation may be necessary when the markets reveal inefficient competition (such as the case of the market for call termination).\^98 In this context recital 14 refers to the Commission Recommendation analysed below.

Member States must ensure conditional access to digital TV (irrespective of the means of transmission used) as well as the application of a number of provisions already in force in the previous regime. Those are: Article 4,\^99 Article 6,\^100 Article 7,\^101 Article

\^97 See below in relation to Article 13 of this Directive.

\^98 This is a typical case of a bottleneck. When a subscriber joins a given network that network controls communications to that subscriber particularly when there is only one network of the relevant type in place to contact a subscriber If one takes the example of mobiles it could be observed that whilst networks may compete vigorously to attract customers, if a network is free to set the termination charges that other networks must pay to have their call delivered by the mobile networks there is little competitive pressure to keep these charges low. The assumption is that once a subscriber has been induced to join a mobile network callers to that subscriber have to pay the termination of the mobile network to call the subscriber. The importance of this depends on the substitutability analysis of the alternative ways to contact the subscriber. See M. Armstrong, "Converging Communications: Implications for regulation", paper presented for the Beesley Lectures on Regulation, 14th November 2000 (on file with author), at 8.

\^99 Under Article 4 certain organisations set out in Annex II of the Directive authorised to provide public telecommunications networks and/or publicly available telecommunications services have a right, and when requested by organisations in that Annex, an obligation, to negotiate interconnection. Annex II operators are those which: (i) operate public telecommunications networks (fixed or mobile) or providers of publicly available telecommunication services, which control access to network termination points identified by one or more unique numbers in the national numbering plan; (ii) provide leased lines to users' premises; (iii) have exclusive or special rights to provide international circuits between the EU and third countries; and (iv) are permitted to interconnect by the relevant national licensing or authorisation scheme. The obligation to negotiate may be temporarily suspended by the relevant NRA in relation to a particular operator on a case-by-case basis on the grounds that there are technically and commercially viable alternatives available to the requesting operator and that the requested interconnection is inappropriate in relation to the resources available to meet the request. These limitations must be fully reasoned and made public. Under Article 4.2 Operators with SMP are obliged to meet all reasonable requests for access to their networks including access at points other than the network termination points offered to the majority of end-users.

\^100 Under Article 6 operators determined to have SMP must offer interconnection on non-discriminatory and transparent basis. In this respect they are required to: (i) apply similar conditions in similar circumstances to interconnected operators which provide similar services, and provide interconnection and information to other operators under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners; (ii) provide information necessary to facilitate the conclusion of interconnection agreements, including proposed changes to their networks or services within the next six months; and (iii) communicate interconnection agreements which they enter into to the relevant NRA and make them available to interested parties, except those aspects which deal with commercial strategy.
8. Article 11, Article 12 and Article 14 of the Interconnection Directive; Article 16 the Voice Telephony Directive; and Articles 7 and 8 of the ONP Leased Lines Directive; and Article 3 of the Regulation on Unbundling of Local Loop. These obligations are subject to an ongoing process of monitoring and review.

The proposed Directive also sets out a number of obligations which can be imposed on operators with SMP. They are obligations of transparency (Article 9), non-discrimination (Article 10), accounting separation in relation to specified activities related to interconnection and/or network access (Article 11), access to and use of specific network facilities (Article 12), and price control and cost accounting (Article 13). The following paragraph looks at two aspects that have important implications for the application of competition law: access to specific network facilities and pricing.

6.3 Access: a regulation of essential facilities

Article 12 mandates that a NRAs shall be able to "impose obligations on operators to grant access to, and use of, specific facilities and/or associated services, inter alia in

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6.3 Access: a regulation of essential facilities

Article 12 mandates that a NRAs shall be able to "impose obligations on operators to grant access to, and use of, specific facilities and/or associated services, inter alia in
situations where the national regulatory authority considers that denial of access would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end user’s interest.” In this respect Operators may be subject to: (a) obligations to give third parties access to specified network elements and/or facilities; (b) obligations not to withdraw access to facilities already granted; (c) obligations to provide resale of specified services; (d) obligations to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services; (e) obligations to provide collocation or other forms of facility sharing, including duct building or mast sharing; (f) obligations to provide specified services needed to ensure inter-operability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks; (g) obligations to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; and (h) obligations to interconnect networks or network facilities.

It is important to note that, as stressed by the Article, the NRAs have a pronounced instrumental character aimed at avoiding denial of access that “would hinder the emergence of a sustainable competitive market.” Moreover it is strongly end-user centred, in that it refers to “market at the retail level” and expressly mentions “the end-user’s interest as the criterion of evaluation. This is a perspective that could be taken into account also in relation to Article 82 cases which, as we will see in Chapter VI, tend to be excessively competitor-centred. In addition Article 12(2) sets out a number of factors that NRAs should take into account when imposing the obligations referred to above. These include: (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development; (b) the feasibility of providing the access proposed, in relation to the capacity available; (c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment; (d) the need to safeguard competition in the long term; and (e) where appropriate, any relevant intellectual or industrial property rights.

Article 13 the epitome of the interrelation between competition law and regulation. Arguably the categorisations contained in paragraph 1 and the list of factors to be taken
into consideration by the NRAs are modelled on the experience of the application of Article 82. Paragraph 1 appears to list circumstances which may be relevant for the application of Article 82 in respect of dominant players and transforms them into bases for corresponding *ex ante* obligations. Paragraph 2 lists factors which, one suspects, are largely drawn by the application of the essential facilities doctrine and by the objections raised by the incumbents. Yet, the very fact of a rationalised categorisation under a regulatory measure will in turn provide guidelines of paramount importance in the application and interpretation of the doctrine of essential facilities in communications outside the scope of a regulated environment.\(^{110}\)

### 6.4 Unbundled access to the local loop

The local loop (i.e., the physical metallic line circuit in the local access network connecting the customer’s premises to the operator local switch, concentrator or equivalent facility) is one of the key aspects of the telecommunications market. The Fifth Report of the implementation of the telecommunications regulatory package noted that the local access network remains one of the least competitive segments of the market. This is because new entrants do not have a wide-spread alternative network infrastructure and are unable, with traditional technologies, to match the economies of scale and scope of SMP operators. Furthermore the Commission recognises that it would not be economically viable for new entrants to duplicate the incumbents’ copper local loop access infrastructure in its entirety and within reasonable time and alternative infrastructures (such as cable TV, satellite, wireless local loops) do not generally offer the same functionality or ubiquity.\(^{111}\) Therefore the Commission considered it appropriate to mandate unbundled access to the copper local loops. The Commission set out in Recommendation 2000/417/EC of 25th May 2000,\(^{112}\) and Communication of

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\(^{110}\) *Ahmed Saeed Flugreisen*, supra note II-34 above, para 43 referred to above where the court considered that: “certain interpretative criteria for assessing [under Article 82 EC] whether the rate employed is excessive may be inferred from Directive 87/601/EEC, which lays down the criteria to be followed by the aeronautical authorities for approving tariffs. It appears in particular from Article 3 of the directive that tariffs must be reasonably related to the long-term fully allocated costs of the air carrier, while taking into account the need of consumers, the need for a satisfactory return on capital, the competitive market situation, including the fares of the other air carriers operating on the route and the need to prevent dumping.” Is particularly relevant here.

\(^{111}\) Recital 5 of the Unbundled Access to the Local Loop Regulation.

\(^{112}\) OJ 2000, L 156/44.
26th April 2000 on unbundled access to the local loop, a detailed guideline on the application of existing Community law in this respect. However, Member States indicated that without a strong legal basis they would have difficulty in achieving this goal and therefore the Commission decided to impose access by means of a regulatory binding measure.

The proposed Regulation on Unbundled Access to the Local Loop prescribes that notified operators (those designated by the NRAs as having SMP) shall make available unbundled access to the local loop ("ULL") under transparent, fair and non-discriminatory conditions. Furthermore to the extent that the level of competition in the local access network is not sufficient to prevent excessive pricing, NRAs shall ensure that the prices charged by the notified operators to give access to the local loop follow the principle of cost orientation. This regulation is a landmark in the introduction of competition and will have enormous effects on the competitive environment in EU communications. Again in relation to unbundled access to the local loop the Commission Communication which preceded the proposed Regulation reveals the profound impact of judicial principles developed in the application of the competition Treaty rules on regulation. The Communication on Unbundled Access expressly refers to the Oscar Bronner precedent to justify the need for intervention and identify the circumstances in which regulation is necessary. The Commission stated that "[g]iven the size of investment required, the absolute cost of nation-wide duplication of the incumbents' network with a similar population coverage is likely to be a barrier to entry for any competitor. This infrastructure appears to be with present technologies economically unfeasible, or un-reasonably difficult to duplicate at a nation-wide level in a reasonable time period, even for the most important competitors of existing incumbents." Therefore the Commission again to borrow concepts developed under the ECJ case law to reinforce its activity of enforcement.
The political backing behind this measure has provided it with an increased impetus and on 27th October the Parliament adopted a new, consolidated text. The Parliamentary text extends the provision to all metallic (not only copper) loops and the sub-loop (i.e. a partial loop connecting the network termination point at the subscriber's premises to a concentration point or a specified intermediate access point in the fixed public telephone network). The consolidated text provides that notified operators must meet not all tout cour but all reasonable requests from beneficiaries for unbundled access to their local loops and related facilities (notably collocation, cable connections and relevant information technology). The new text states that those requests shall only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity. The disputes that may arise in this respect are to be dealt with under the provisions of the current Interconnection Directive (Directive 97/33/EC). The regulation also states that prices charged for unbundled access to the local loop and facilities shall be set on the basis of cost orientation but the NRAs will have a power to lift this price obligation if local access is deemed sufficiently competitive.

Given the accelerated approval of this provision and its application had to be severed from the approval of the other directives including the Framework Directive which introduces the concept of SMP based on a dominance test with which it was interrelated. The net result of this is that provisions and obligations stemming from this regulation, which in the context of competition law are imposed to dominant companies (and more than that, companies which hold an essential facility), are potentially applicable to operators with SMP operators under the regime in force which can mean operators with 25 per cent. market share. Whilst this might in practice be a theoretical point (given that incumbents tend to have a virtual monopoly) it sets a wrong precedent and is an example of how hybrid systems may result in the misconceived application of competition principles ex ante without the necessary economic conditions.

6.5 Pricing: the Directive and the Commission Recommendations

Operators with significant market power must set interconnection charges which are transparent and cost-oriented and have the burden to demonstrate that their costs are
derived from actual costs including a reasonable return on investment. NRAs may request an operator to provide full justification for its interconnection charges.\textsuperscript{117}

Article 11 of the proposed Access and Interconnection Directive allows NRAs to impose obligations for accounting separation to achieve transparency in the wholesale prices and internal cross transfers within vertically integrated undertakings, in situations where the operator concerned provides input facilities that are essential to other service providers, while competing with them on the same downstream market.\textsuperscript{118} Article 13 allows NRAs to impose price controls, including obligations for cost orientation of prices for the provision of specific types of interconnection and/or network access in situations where a market analysis indicates that a potential lack of effective competition means that the operator might be capable of sustaining prices at an excessively high level or apply a price squeeze, to the detriment of end users. In doing so the Directive requests NRAs to take into account the investment made by the operator and the risk involved.

Recital 14 of the proposed Directive expressly refers in this respect to the Commission Recommendation 98/195/EC of 8th January 1998 on interconnection pricing in a liberalised telecommunications market.\textsuperscript{119} The purpose of the Recommendation is to provide NRAs with information on interconnection prices and account separation. Considering that the current Interconnection Directive imposes cost oriented

\textsuperscript{117} Article 7.2 of the Interconnection Directive; the provision of Article 7, except Article 7.2 did not apply to Mobile Services or Networks operators notified to the NRAs as having SMP; see now Article 13 of the Access and Interconnection Directive on price control and cost orientation, Article 9 on transparency.

\textsuperscript{118} In this respect the Directive refers to in recital 12 to the Commission Recommendation 98/322/EC of 8th April 1998 on interconnection in a liberalised telecommunications market (part 2 accounting separation and cost accounting) (OJ 1998, L 141/6). The Recommendation on that the purpose of accounting separation is to provide an analysis of information derived from the accounting records to reflect as closely as possible the performance of parts of the business as if they had operated as separate businesses. According to the Commission (Point 6 and Explanatory Memorandum, para. 3.4), currently most incumbents have accounting systems based on fully distributed historic costs which were developed in monopoly environments. The use of historic cost would lead to excessive pricing in a competitive environment and is not consistent with the approach outlined below. The Commission recommended NRAs to require the implementation by incumbent of accounting systems based on current costs and activity based accounts. In particular it recommended in the accounting separation Recommendation that NRAs require operators to desegregate operating costs, capital employed and revenues into at least core network activities, local access network activities, retail activities and other activities. It recommends that desegregation be made on the basis of cost causation, and asset valuation on the basis of forward-looking or current value of an efficient operator, in accordance with current cost accounting methodology. Finally, it recommends that the accounting information provided by an operator be made available to interested parties at a sufficient level of detail to ensure that there has been no undue discrimination and to enable the average costs of unbundled interconnection services to be identified.

interconnection charges the Recommendation analysed the costs involved in a telecommunication network. The Commission remarked that those costs are mostly one-off costs which are incurred when the facilities are installed, purchased or programmed. On-going costs also occur for maintenance, switch reprogramming and administration. In a fixed network the Commission regards as a fundamental yardstick of evaluation the quality of service required during the period of peak traffic load which it will be required to handle. However, if a network has to handle peak hour traffic from other interconnected networks, additional capacity will become necessary in order to maintain the desired level of quality of service in the terminating network. Capacity investment therefore represents the bulk of the additional costs incurred by a network when terminating interconnected traffic. An analysis of the capacity costs required to provide that quality of service will enable costs to be apportioned among interconnecting parties. Whilst the Commission recognises that in an "ideal situation" (presumably meaning an effectively competitive market), where an industry comprised established market players with relatively stable market shares, capacity-based charging would be the most efficient interconnect pricing rules, it recognises that in a newly liberalised market these conditions do not apply. The Commission considers that the usual basis for interconnect pricing is traffic based, with adjustments for time of the day or day of the week, variations such that "the total traffic related forward looking interconnection costs of an efficient operator are recovered." If on the one hand the Commission's remarks support the idea of the continuing need of pricing regulation in the first stages of the liberalisation process, on the other those remarks do not rule out the possibility of considering other forms of analysis and costing calculation methodologies in cases where, due to the market conditions, regulation will no longer be necessary and an antitrust analysis of excessive or predatory pricing will be required.

Without ruling out other methodologies the Interconnection Directive recognised at Recital 10, that "charges for interconnection based on a price level closely linked to the long run incremental costs are appropriate for encouraging the rapid development of an open and competitive market". In its recommendations, the Commission - implicitly

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120 Recommendation, Explanatory Memorandum para. 3.2.
121 See below.
considering that the latter is the stage of development currently experienced - refers to this methodology and notes that there is a clear word-wide trend in liberalised markets to use a forward-looking long run average incremental costs approach. Recital 14 of the Access and Interconnection Directive appears to consider this approach still valid although the text of Article 13 now refers to taking into account "the investment made by the operator and the risk involved."

The Commission explains in its Memorandum to the Recommendation that in a competitive market, the price a firm pays for an asset or investment is not what governs its return. From the moment the investment is made (i.e. the time when the investment cannot be reversed without significant cost) the asset's value to the firm depends on what the firm can do with that asset (i.e. either sell it to the highest bidder or use it to produce a good or service which the firm sells to generate an income). At this stage competition would be faced and therefore the market players would be forced to compete on efficiency grounds rather than continuing to price on the basis of their embedded or historic costs. Interconnection charges based on historic costs prevent competition and protect an incumbent from the real pressure of a competitive market.

The Commission considered that the forward looking approach is implicit when identifying and assessing the economic costs associated with an increment in input and where the increment is a single unit, incremental costs will be the same as marginal costs. The Commission submits that in the short run the size of any increment is limited by the capacity of the firms' existing productive assets, whilst in the long run, firms can undertake capital investment to increase this capacity. Within this timeframe undertakings can adjust (downwards or upwards) all of their inputs to meet a decrement or increment in the volume of production. The entire investment cost of any point of connection, and any investment in network and switching capacity required to handle interconnected traffic, would be captured by a long run incremental cost measure. The total of such measures (which include the incumbent operator's own increment in traffic), would then form the total of all incremental interconnection costs. This would then be divided up in a fair and transparent manner between the notified operator and
those interconnecting, with the result that the cost of interconnection to any party is the long run average incremental cost.

Charges which are based on such costs may include justified "mark-ups" to cover a portion of the forward-looking joint and common costs of an efficient operator as would arise under competitive conditions. The Recommendation specifies interconnection charges based on best current practice to provide guidance to NRAs when assessing charges for call termination proposed by operators with SMP until calculated costs for interconnection based on forward looking long run average incremental costs are available. Where an operator with SMP charges rates above these amounts, the relevant NRA should request a full justification of its charges.

The identification of the long run average incremental costs ("LRAIC") of telephone networks involves a two-fold exercise. It entails building "bottom-up" models whereby an economic/engineering model of an efficient network is developed, from which interconnection costs can be calculated by aggregating the costs of individual network elements. The results of these models must be compared to prove their accuracy with "top down" models which take as their starting point the current cost accounts of an operator and then seek to obtain an interconnection cost by a process of allocation and elimination of cost elements. The Commission recognised that at the present time very few countries appear to be in a position to calculate interconnection charges based on actual estimates of LRAIC and, therefore, it has adopted an alternative ad interim system, the best current practice to identify the appropriate interconnection charges.\textsuperscript{122} This is based on the three lowest priced Member States.

As explained by the Commission, in general the interconnection charge per call minute (for call termination) varies with the path taken by the call. The number of switching stages and inter-exchange links involved in delivering a call depends on the location of both the point of interconnection and called user. The approach taken in the Recommendation examines interconnection charges to the incumbent fixed public
network under three different scenarios: local level interconnection,\textsuperscript{123} single transit interconnection (metropolitan level),\textsuperscript{124} and double transit interconnection\textsuperscript{125}

Like retail tariff interconnection charges may also include time of day variations reflecting the network operator's need to manage demand and network capacity jointly. The recommendation examined only the highest peak rate as the duration of peak and off-peak tariff periods vary considerably between Member States. This makes it difficult to compare average prices.\textsuperscript{126}

7. From licensing to authorisation

7.1 The licensing Directive regime

Directive 97/13/EC (the"Licensing Directive") provided a common framework for authorisation by NRAs of Member States for the provision of telecommunications services or the establishment and/or operation of telecommunications networks. It mandated that where Member States required a licence for the provision of telecommunications services or the establishment and/or operation of a network, the licensing procedures must be transparent. Any conditions must be those provided for in the Annex to the Directive and must be objectively justified in relation to the service concerned, be non-discriminatory, proportionate and transparent. The Directive was designed to lower barriers to entry by ensuring that any operator which fulfils a minimum set of conditions should be able to provide services or operate a network, as long as this is not inconsistent with the allocation by NRAs of scarce resources. It also required Member States to facilitate the provision of telecommunication services

\begin{footnotes}
\item[122] The charges are between € 0.6 and 1.0/100 per minute for local call termination, between € 0.9 and 1.8/100 per minute for single transit interconnection and between € 1.5 and 2.6/100 per minute for double transit interconnection, in each case at peak rates.
\item[123] Interconnection at the (or nearest to) the local exchange to which the destination user is connected. This is the lowest level of interconnection charge.
\item[124] Interconnection which allows access to all customers in a metropolitan region. This is likely to be the level of interconnection most often demanded by new entrants.
\item[125] This allows access to all customers on the incumbent's network. This is normally the highest level of interconnection charge.
\item[126] It is important to note that charges for international call termination are not taken into account in the best practice comparison as they are currently based on the accounting rate system and they are not cost oriented.
\end{footnotes}
between Member States. The Licensing Directive established two types of authorisation which a Member State may require: general authorisation and individual licence.

A general authorisation permits a person to provide telecommunications services without the need to apply to the NRA for an authorisation specific to that person, but may require that person to register with the NRA before providing the services. An individual licence is granted by an NRA and gives a person specific rights or subjects it to specific obligations in relation to the provision of the relevant telecommunications services. These specific obligations may supplement those contained in a general authorisation.

Member States must ensure that telecommunications services and/or telecommunications networks may be provided either without authorisation, or under a general authorisation, to be supplemented where necessary by individual licences in certain circumstances. Member States could only limit the number of individual licences to the extent required to ensure the efficient use of spectrum or to make sufficient numbers available. Conditions could be attached to all authorisations, both general authorisations and individual licences. Article 13 of the Directive

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127 Individual licences rather than general authorisations may be issued only: (a) to allow access to radio spectrum or numbers; (b) to grant access to public or private land; (c) to impose the mandatory provision of publicly available telecommunications services and/or networks including universal service obligations; or (d) to impose specific obligations on licensees which have significant market power, in accordance with competition rules. The provision of publicly available voice telephony, PSTN and networks which use spectrum may also be subject to individual licensing requirements. Where a Member State wishes to issue a limited number of licences for particular services, it must: (i) give due weight to the need to maximise user benefits and to facilitate the development of competition; (ii) enable interested parties to express their views; (iii) publish its decision to limit the number of licences stating its reasons; (iv) review the limitation at reasonable intervals; (v) invite applications for licences; (vi) grant the licences on the basis of objective, non-discriminatory, detailed, transparent and proportionate criteria; and (vii) following a request, it finds that the number of licences can be increased, publish this fact and invite applications.

128 These are conditions: (i) designed to ensure compliance with relevant "essential requirements" i.e. security on network operations, maintenance of network integrity, inter-operability of services, data protection, environmental and town planning requirements, spectrum planning and avoidance of harmful interference between radio based systems; (ii) requiring the provision of information reasonably required for compliance and statistical purposes; (iii) intended to prevent anti-competitive behaviour; and (iv) relating to the effective and efficient use of numbering capacity.

129 Conditions which may be attached to general authorisations for publicly-available telecommunication services and networks are conditions requiring: (i) the protection of users and subscribers such as the prior approval by the NRA of the standard subscriber contract, the provision of detailed and accurate billing and dispute settlement procedures and advanced notice and publication of changes in tariffs, quality and availability of services; (ii) universal service contributions; (iii) the provision of customer information required for directory services; (iv) the provision of emergency services; (v) special arrangements for disabled people; (vi) interconnection and interoperability, in accordance with the Interconnection Directive and Community Law.

130 Conditions which may be attached to individual licences are conditions: (i) relating to allocation of numbering rights; (ii) relating to effective use and efficient management of the spectrum; (iii) relating to environmental and town planning requirements including access to public and private land and collocation and facility sharing; (iv) the duration of the licence, which must be long enough to ensure efficient use of spectrum, numbers or access to land; (v) relating to universal service obligations, in accordance which the Interconnection Directive and the ONP Voice Telephony
envisages a "one-stop-shop procedure" to allow a person to obtain, in one location, all necessary individual licences and make all notifications required under the relevant general authorisations, in relation to more than one Member State.

Member States may require that a person notifies the NRA that it intends to operate under the general authorisation and provides sufficient information to allow the NRA to assess whether that person will comply with the conditions of the relevant authorisation. The person may be required to wait for up to four weeks before commencing provision of the relevant service after formal receipt by the NRA of all information.

Member States must grant individual licences through open, non-discriminatory and transparent procedures. They must set reasonable time limits, with a maximum period of six weeks after receiving the application. In objectively justified cases, this period may be extended to four months, which may be extended to eight months in the case of comparative bidding procedures. In cases of non-compliance, the NRA may disqualify and/or impose measures on the relevant person to ensure compliance provided it is done in a proportionate manner.131

Information on conditions attached to all authorisations and procedures must be published to provide easy access and reference to that publication must be made in the national official gazette of the Member State. Member States may amend conditions attached to all authorisations in objectively justified cases and in a proportionate manner. Notice of their intention to do so must be given so that interested parties can

131 The relevant person must be given a reasonable opportunity to state its views on the application of the conditions and to remedy breaches within one month of the NRA's intervention, other than in the case of repeated breaches individual licences where immediate action can be taken. If within two months of the NRA's intervention, the breaches are remedied, the NRA must annul or modify its decision. If not, it must confirm its decision and, in each case, it must give reasons. It must inform the person of its decision within one week of adopting it and must lay down a procedure for appealing against its decisions to an independent body. Member States must also provide an independent appeal mechanism for disqualified persons.
express their views. Fees imposed under an authorisation must be set to recover the costs of management, control and enforcement of the relevant authorisation.\textsuperscript{132}

7.2 Problems of the licensing Directive system and aims of the authorisation regime

The Commission realised that in 2000 the Community was still a patchwork of fifteen national regimes which were widely divergent in their basic approach and specific details. In particular it appeared that the licence categories created by Member States varied from only one to no less than eighteen. Member States required different kinds of information from service providers ranging from no requests in the lightest regime to forty-nine in one of the heaviest. In summary it appeared that the current Licensing Directive has not prevented certain Member States from developing a heavy-handed market access regulation. This of course hampers the full attainment of pan-European services which the Commission intended to encourage.

Against this background the Commission proposed a new Directive\textsuperscript{133} which covered all electronic communications services and networks under a general authorisation (requiring at most notification or registration, but no explicit decision) and limiting the notification procedure to the bare minimum (i.e. identification of the undertaking, contact persons and description of services). Pursuant to the general authorisation, undertakings will have the right to provide electronic communications services to the public and negotiate interconnection with other public services providers, to establish electronic communications networks, and to apply for the necessary rights of way.

The use of specific rights is limited under Article 5 to scarce resources (i.e. radio frequencies and numbers). The Directive requires open, non-discriminatory and transparent allocation and assignment procedures including clarification on

\textsuperscript{132} In the case of individual licences the fees must also be proportionate to the work involved and, where the relevant authorisation allows access to scarce resources, the fees may also reflect the need to ensure optimal use of these resources. They must be published in an appropriate and sufficiently detailed manner so as to be readily accessible.

transferability and secondary trading of usage rights. A separate proposed Decision\textsuperscript{134} intends to create a policy framework to address the strategic planning and harmonised use of radio spectrum in the Community.\textsuperscript{135} It is important to note that Article 7(3) states that, in the granting of rights of use for radio frequencies which can be done on the basis of non-discriminatory and transparent selection criterion, any such selection must give due weight to facilitate the development of competition.

The Directive seeks to further limit the number of conditions which may be imposed on service providers and requires a strict separation between conditions under general law (e.g. taxation, company law, etc.), conditions under the general authorisation and conditions attached to rights of use for radio frequencies and numbers. Article 10 provides for procedural safeguards in case of non-compliance with conditions. Article 11 limits the information to be required from undertakings to what is strictly necessary and proportionate (with no systematic verification of compliance with conditions) and stipulates that no information shall be required prior to, or as, a condition for market access. The Directive also contains provision aimed at reducing fees, charges and their range of divergence within the EU. A provision that is worth noting is Article 13 which appears to put on an equal footing radio frequencies, numbers and rights of way and states that Member States may allow the assigning authorities to impose fees for the right to use them.

The Commission recognised that during the period of consultation some demand emerged for the creation of a single European license. However the majority seemed to agree with the approach by a simplification of national regimes.\textsuperscript{136} The Authorisation Directive decreases the level of regulation and will hopefully be successful in strengthening the internal market with the elimination of a number of administrative hinders.

\textsuperscript{135} Pursuant to Article 2 of the Decision Radio Spectrum includes at least radio waves frequencies between 9KHz and 3000 GHz; radio waves are electromagnetic waves propagated in Space without artificial guide.
\textsuperscript{136} The Commission recognised that the harmonisation of licensing conditions and procedure through the European Conference of Postal and Telecommunications Administrations (CEPT) under the current Licensing Directive has not be successful and even the one stop-shop procedure ha not materialised. However in the area of radio frequency, co­ordination with the CEPT has been relatively successful. The Commission intends to continue to rely on the CEPT in the assignment of radio frequencies.
8. Universal Service and Users’ Rights

8.1 Aims of the Directive

Universal Service is an important element in the regulation of communications. In particular this concept by nature applies in case of market failures, and hence failure of competition law. It constitutes at the same time the hard core of regulation and the outer limit of the system based on competition law. The scope of the obligations imposed in the name of Universal Service has to strike the difficult balance between the goal of reaching completely competitive environment (in which the asymmetries created by Universal Service obligations are, arguably, minimal) and the economic reality which may jeopardise users’ rights where market forces fail and no competition is reached. A new proposed Directive\textsuperscript{137} intends to consolidate and rationalise the notion which was previously dispersed across a wide array of legislative provisions within the EC Telecommunication Regulatory Package.\textsuperscript{138} The Directive also aims at creating a process for reviewing the scope of Universal Service obligations, to lay down specific users and consumers rights to allow NRAs to take measures for their benefit and underpin the industry’s efforts to ensure interoperability of consumer digital television equipment.

8.2 Universal Service obligations

The Universal Service Obligations are dealt with in Chapter 2 of the proposed Directive. Article 3 sets out the services that comprise the scope of those obligations and requires Member States to implement such obligations in line with public interest whilst minimising departures from normal commercial conditions and avoiding distortions to competition. Article 3 states that services set out in Chapter 2 are to be made available “at the quality specified to all users in their territory, independently of geographical location, and, in light of specific national conditions, at an affordable price.”

VII below will reconstruct the historical origins of the notion of Universal Service. Article 3 expresses the current interpretation of it under EC law highlighting the two tenets of the concept: geographic universality and social inclusiveness through affordability. The provision Member States shall determine the most efficient and appropriate approach to ensure the implementation of universal service. In doing so they are required to seek to minimise market distortions.

Article 4 specifies that Member States have to ensure that all reasonable requests for connection to the public telephone network (this may take place via wireless as well as wire-line means) at a fixed location and for access to publicly available telephone services at a fixed location are met at least by one operator. The connection provided shall be capable of allowing users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit Internet access. Other services where service is guaranteed include directories and directory enquiry (Article 5), provision of public pay telephones (Article 6), and measures for disabled users or users with special needs (Article 7). The Directive contains specific measures on the affordability of services which mandate to offer special terms and conditions to assist users with low income with special needs (Article 9), and help customers to monitor and control their expenditure (Article 10). Article 8 provides that Member States have the power to designate one or more operators to guarantee part or all of the universal service obligations. The designation method may include public tenders and public auctions. This will logically entail a Dutch auction mechanism given that these methods must have the aim of ensuring that universal service is provided in a cost-effective manner and as means of determining the net cost of the universal service obligations.

Articles 11 to 14 deal with the monitoring and publication of information regarding the quality of services and costs. Article 15 requires the Commission to periodically review the scope of Universal Service obligations with a view to changing or re-defining it in accordance with the procedure set out in Article 251 EC. The calculation of the net cost of universal service obligation and establishing recovery and sharing mechanism is

138 Both in the Interconnection and the Voice Telephony Directives.
regulated by Article 12 and 13 in conjunction with the principles set out in Annex IV. The net cost of the obligations are to be calculated as the difference between the net cost for an organisation of operating with the universal service obligations, and operating without those obligations. This calculation will also have to assess non-financial costs (presumably this will include the brand value of being considered a universal service provider) although is not clear how these benefits will be quantified.

8.3 Users' and consumers' interests

Chapter 3 of the Directive relates to the users' and customers' interests rights. These provisions form the body of regulation which, as opposed to the rules on access and interconnection, is aimed at the protection of users and customers, the ultimate beneficiary of any competition policy. The premise of those provisions is of course market and competition failure and they aim at upholding a minimum set of users' and consumers' rights in those situations. The provisions relate to tariff regulation (Article 16), quality of services (Article 17), transparency on information to customers (Articles 18 and 19), right to entry in directories and assisted calls (Article 21), maintenance of the European wide emergency number (Article 22) and single international access code (Article 23). Article 23 also introduces the use of a new European regional code. In addition, Article 24 extends the obligation of providing additional facilities (tone dialling, calling line identification and itemised billing) to all public access operators (not just SMP or designated universal service operators). I will not examine in detail those provisions.

Article 25 concerns number portability. It extends the obligation of number portability to mobile operators and carries forward the existing obligations for carrier pre-selection and pre-selection to be made available to users by SMP operators. The existing regime can be traced back to November 1996 when the Commission published its Green Paper on a Numbering Policy for Telecommunications Services in Europe. This presented various options to reach a common approach towards certain numbering issues within a single liberalised telecommunications market. The result of the consultation process
was set out in the Commission’s Communication to the European Parliament and the Council.\textsuperscript{139} It also contained a concrete action plan on call-by-call selection, carrier pre-selection and operator number portability. The Council and the European Parliament issued two resolutions (respectively 22nd September 1997 and 17th July 1997) which resulted in a Proposal to amend the Interconnection Directive.\textsuperscript{141} The final Directive on operator number portability\textsuperscript{142} obliges NRAs to encourage the introduction of operator number portability whereby subscribers (who so request) can retain their number(s) on the fixed public telephone line and the ISDN. Furthermore it will require the organisations operating public telecommunications networks and notified SMP organisations to make available call-by-call carrier selection (which allows a subscriber to select an alternative long distance carrier by dialling a prefix before each call). Under the Directive carrier pre-selection had to be available by 1st January 2000 but a number of Member States have failed to implement the provisions in time.\textsuperscript{143}

The availability of operator number portability and permanent carrier pre-selection by the subscriber with the facility to override the pre-selected choice on a call-by-call basis by dialling a short prefix makes it easier for consumers to choose an alternative service and/or network provider and enables them to benefit directly from competition in the telecommunications market. By offering consumers a non-discriminatory and user-friendly way of choosing between different providers of telecommunications services, the legislature envisaged that consumer choice would act "as a catalyst in the process of achieving better quality telecommunication services at more competitive prices."\textsuperscript{144}

With regard to the specific point of carrier pre-selection, the Commission believed that the benefits of the system outweigh the disadvantages noted by those who oppose the reform. It has been argued that carrier pre-selection arrangements reduce profit margins for a local access provider by opening the market for long distance and international

\textsuperscript{139} COM (96) 590 final, 20th November 1996.
\textsuperscript{140} COM (97) 203 final, 21st May 1997.
\textsuperscript{141} OJ 1997 C 330/07.
\textsuperscript{143} The Commission opened infringement proceedings against Belgium, France, Italy, The Netherlands, Austria and Finland (see IP/00/307 of 29th March, 2000) and Germany and the UK (see IP/00/619 of 15th June, 2000).
calls to stronger competition. Carrier pre-selection would be a disincentive for subscribers of the incumbent to switch to new entrants if the former was offering carrier pre-selection. The Commission submitted that the carrier pre-selection system combines benefit for consumers with economic efficiency by eliminating those barriers to services which restrain infrastructure competition. Duopoly for local access is not regarded as a guarantee of sufficient competition and furthermore it might create an incentive for infrastructure investment which may not be sustainable in the longer term. The newly liberalised environment is intended to create a reduction in long distance and international calls and the Commission expects investment in the local loop to be driven increasingly by the provision of multimedia services rather than by competition in traditional voice telephony. 145

With regard to networks established for radio and television broadcasts the Commission noticed that Member States currently impose “must carry” obligations. Article 26 recognises that Member States should be able to lay down proportionate obligations on undertakings under their jurisdictions in the interest of legitimate public policy considerations but requires that such obligations should be imposed where they are necessary to meet clearly defined general interest objectives and should be proportionate, transparent and limited in time. Finally, another provision touches on the broadcasting area and in particular digital TV. That is Article 20, a consumer protection measure designed to ensure that all equipment sold in the EU for reception of digital television is technically compatible with the relevant European standard.

8.4 Leased lines

Leased lines are fundamental building blocks in the communications market as they are used by service providers as the basic transport infrastructure upon which their

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144 COM (97) 480, 1st October 1990, para 2.
145 Furthermore, and more controversially, the Commission considers that the fact that the obligation is only imposed on SMP operators will give alternative local access providers an important advantage as because, “unlike the incumbent operators, they will be able to continue to provide the complete telecommunications package to their subscribers without the risk of these customers migrating to other service providers for parts of the package” (COM (97) 480, 1st October 1990, para 5). Of course the opposite will be equally arguable and it could be said that the mechanism would disincentive the customers from leaving the current arrangements with the incumbents by benefit of the increase choice on parts of the calls.
wholesale services are built, and by large business users as the means of linking their locations world-wide for transport of their internal voice and data communications traffic. The proposed Directive also makes sure that the obligations set out in certain provisions of the ONP Leased Lines Directive are maintained.\textsuperscript{146} Article 27 however includes a sunset clause to remove those provisions once NRAs have determined that there is effective competition. The importance of leased lines for European communications induced the Commission to take an interventionist approach in relation to pricing and competition Commission.

The Commission issued a Recommendation\textsuperscript{147} on pricing on leased lines which, by providing recommended price ceilings, follows the same approach and methodology (based on the three lowest prices observed in the Member States) used for Recommendation 98/511/EC on Interconnection Pricing described above. The Recommendation covers short distance line part circuits of lengths of up to 5km and in this sense can be seen as a provisional measure which is effectively a surrogate for full unbundling of local loop. In fact the Recommendation also encourages the unbundling of the local loop which is now pursued vigorously through the Regulation described above. The Recommendation complements the wider three-phase sectoral inquiry launched by the Commission into telecommunications, whose first phase concerned leased lines tariffs. The inquiry was launched on 22nd October 1999 under the Commission's powers pursuant to Article 12 of the procedural Regulation 17.\textsuperscript{148} The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{146} These are Article 3 and 4 on availability of information, in respect of leased lines, offerings on technical characteristics, tariffs, supply and usage conditions, licensing and declaration requirements, Article 6, on access conditions usage conditions and essential requirements, Article 7 on provision of minimum set of leased lines and Article 8 control by NRAs (both already referred to by the Framework Directive) and Article 10 on tariffing principles and cost accounting.
\item \textsuperscript{147} Commission Recommendation on leased lines interconnection pricing in a liberalised telecommunication market of 24th November 1999, C (1999) 3863.
\item \textsuperscript{148} Under Article 12 of Regulation (OJ 1962, 204/62), the Commission may initiate general inquiries into those sectors of the economy where it believes competition might be restricted or distorted. The aim of this provision is to allow the Commission to investigate suspicious pricing structures or other practices indicating a possible anti-competitive situation across a whole industry. No indications are required that specific companies have infringed the EC Treaty. Once the Commission has decided to start such an inquiry it has the powers to request and obtain all necessary information from Governments and competent Member State authorities as well as from companies. For instance, Article 11 of Regulation 17 empowers the Commission to obtain all necessary information from companies and associations thereof whether or not they are suspected of any infringement of the EU competition rules. Pursuant to Article 13(1)(b) of Regulation 17, the Commission may fine companies or associations thereof between up to 5,000 euros where they supply incorrect information upon a request (Article 11(3) and (5) or Article 12) or do not reply within the deadline set by an Article 11(5) decision. The initial results of the inquiry on Leased lines were published on a working document on 8th September 2000 and were followed by a public hearing on 22nd September 2000. More information together with the presentations made can be found on http://europa.eu.int/comm/competition/antitrust/others.
\end{itemize}
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Chapter II

Antonio F. Bavasso

second phase on mobile roaming was launched on 4th February 2000. At the time of writing a questionnaire had been sent to incumbents relating to the third phase access and use of the residential loop.

In summary, the proposed Universal Service and Users' Rights Directive is a mixed bag of regulatory provisions which appear to be linked on the basis of their addressees. The direct beneficiaries of this form of regulation are end users. Chapter 5 contains some procedural provisions on consultation with interested parties, dispute resolution, notification and monitoring. These provisions touch directly on their interests in the field of communications. Most importantly this proposed Directive consolidates and clarifies the notion of universal service which was previously scattered across a number of provisions within the Telecommunications Regulatory Package. In doing so the Commission creates a legislative interface for the application of competition law. It codifies one of the facets of public interest in communications which is an essential point of reference in the application of antitrust law in the field. Indeed, the obligations imposed as a result of this Directive create market asymmetries and potential inefficiencies to the extent that there may be lack of entry into the subsidised sectors. The aim of this regime seems to be to minimise those risks with a vigilant, efficient and cost-effective action of the NRAs aimed at ensuring that competition and choice is the primary form of "regulation" whenever market conditions allow it.

9. Conclusion

The European liberalisation process was initiated in the eighties against a landscape of national monopolies. At that stage the rationale for reform stemmed principally, in legal terms, from the elimination of an economic and legal system which was at odds with the internal market. At the early stages of this process there was a political tension which had the jurisdictional character typical of any attempt to shift the focus of regulation from the national to the European perspective. National monopolies were a hindrance to the full attainment of the internal market but their elimination also involved a reduction

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of the effect of national sovereignties on strategic parts of the economy. In relation to communications, the slow and difficult implementation of the 1987 model was completed in 1996 when, at wider European level, a fuller legal accomplishment of the internal market had been achieved. At that point there was an increased political and industrial awareness of competition as a self-standing value within the Community legal system. Despite retaining a derivative nature vis à vis the very idea of internal market, competition law and the principle of undistorted competition had obtained an independent standing due mainly to the effects of the ECJ's case law and the increasingly active enforcement policy of the Commission. The further political support of the liberalisation process inspired the push towards full liberalisation measures which, in a relationship of mutual cause and effect, reinforced even further the importance of competition law.

At an industrial level, within the wide range of public utilities, communications had acquired a pivotal role for the development of new forms of economic development and the supportive role of what increasingly appears as a new societal organisation. This contributed to the renewed vigour with which liberalisation was pursued in the run up to the 1998 deadline for full liberalisation in an area of paramount economic importance and public awareness of a culture of competition such as voice telephony. Whilst this made communications a forerunner of European liberalisation it also created new challenges. An increasing level of regulation was brought about as a result of the liberalisation process. The difficulty for the Commission has been and still is striking the balance between the need to guide the liberalisation process (which arguably is temporary in nature) with the aim of supporting the nascent forms of competition with flexible and effective action, without imposing excessive regulatory burdens.

Another industrial character has had a profound impact on the legislative framework in this sector: the (so-called) phenomenon of convergence between various forms of communications (which will be described better in the next Chapter) which greatly influence the very basis of European communication law. In particular, television broadcasting and the digital interactive services which can be provided with it were originally outside the scope (or at the margins) of the regulatory package. They are now,
increasingly, at the centre of attention alongside the more traditional forms of telecommunications. The Internet, which has revolutionised the world of communications (as well as the economy at large), has blurred the boundaries of communications and increased the impact of this sector on the society at large. One of the most striking consequences of the industrial aspects on the legal analysis and regulation of this sector is that technological development makes it particularly difficult for legislative measures (or measures of general nature) to keep up with the pace of change. Provisions of general application become (relatively) rapidly obsolete, and may become inadequate to prevent the creation, reinforcement or abuse of market power. This has led to the reinforced emphasis on competition law as clearly stated in the policy objectives of the 1999 Review. The new SMP test based on dominance introduced by the proposed new Framework Directive does not represent the replacement of regulation with competition law. At most it represents the use of a test firmly based on competition as a basis for imposing obligations of a regulatory character, on an ongoing basis, on particular undertakings. The increased influence of competition law in regulation calls for an integrated approach of NRAs and competition authorities (and of course the Commission). This is blatantly clear in relation to the new antitrust-driven approach to the notion of significant market power under the Framework Directive and the necessity to perform market analysis as a premise of \textit{ex ante} regulation. This of course does not necessarily imply that competition law can, on its own, solve all the issues stemming from dominance, and even a dominance-based test for regulation may difficult to manage for NRAs.

In particular, the effects of the new test are hard to predict, both in markets where a single incumbent predominates and in markets where there are a limited number of players and significant barriers to entry (such as certain mobile markets in which frequency is a scarce resource). The single incumbent may in some cases be in a position to argue successfully that it is not dominant. The uncertainties as to the test for joint dominance give rise to doubts as to whether, in some apparently obligopolistic situations, asymmetric regulation under the current SMP will be replaced by regulation of all players, or none. There is considerable scope for argument, in the communications sector as in other industries, as to the scope of application of the concept of leveraged
dominance under Article 13(3) of the Framework Directive. This will make it difficult for an undertaking which is dominant in one market to predict whether its behaviour in another market will be subject to regulation. We will see more clearly in the next chapters, in relation to pricing, that competition law may not be an entirely satisfactory solution either because of the level of competitive development of the market, or in the light of the structure of the relevant market (such as the for call termination).

One of the most difficult challenges facing the European institutions, particularly the Commission in its role of enforcer (and often adjudicator), lays in an harmonious application of the general principle of competition law in individual situations and the enforcement of measures of regulatory nature. We have seen above how the ECJ’s ruling on the legal basis of the initial liberalisation measures on telecommunications terminals by upholding the adoption of measures of general nature (as opposed to the use of individual Member States failure procedure) effectively opened the way to the liberalisation process. After almost two decades, in a more mature phase of liberalisation, the application of competition law to individual or collective (through sectoral inquiries) cases and its co-ordination with the existing body of regulation at EU and national level is one of the biggest challenges facing European institutions.
Chapter III

Relevant markets in communications

1. Introduction

The aim of market definition, as recognised by the Commission, is to identify the actual competitors of the undertakings concerned which are constraining those undertakings' behaviour and preventing them from behaving independently of effective competitive pressure. Its ultimate goal is to determine the degree of market power of a firm. In general terms the market definition is therefore the necessary starting point of any antitrust analysis.\(^1\) For the purposes of the present work, however, a market analysis also allows an exegetical definition of the bounds of the study and provides, at once, the justification for dealing with the communications sector and the basis for a possible critique of the convergence process under an antitrust analysis.

The definition of relevant market is a fundamental and complex task. It is no coincidence that various markets are referred to within a single sector. This has both economic and antitrust policy explanations. As far as the economic reasons are concerned we have seen that the communications sector (i.e. telecommunications and broadcasting) is technologically characterised by convergence. The very notion of convergence is somewhat elusive and difficult to define. It can be be defined as the blurring of technical and regulatory boundaries between sectors of the economy.\(^2\) The Commission recognised this process and in December 1997 issued a Convergence Green Paper dealing with the far-reaching implications of these developments. The results of the consultation document have been used to introduce the reforms described in Chapter II. In fact the Convergence Green Paper dealt only with “broad future

\(^1\) For an interesting critique based on economic reasoning see D. Harbord and G. Von Graevenitz, "Market Definition: Some Anomalies", (21) ECLR 2000, 151.

trends" and did not purport to define markets for the purposes of the application of Community competition law. Nevertheless the analysis contained therein is still a useful tool to highlight the development trends of the markets from the perspective of competition policy enforcement.

The Green Paper described convergence as (a) the ability of different network platforms to carry essentially similar kinds of services or (b) the coming together of consumer devices such as telephone, television and personal computers. If read from an antitrust perspective these definitions highlight the impact of convergence on respectively supply-side and demand-side substitutability. More generally within communications, convergence occurs in both networks and services and, as a result, it has an impact on corporate organisation and market structure as a whole. At networks level convergence describes the sharing of resources and, potentially, the integration of communications systems and networks. With regard to services, convergence describes the emergence and launch of new hybrid services as new uses of the existing ones. In either case convergence can potentially lead to either consolidation (and reduction) or increase in competition in the products or services available.

A study carried out for (what then was) DG XIII refers to three different levels of potential change which will result from convergence: technology, industry and services markets. Technological convergence is already happening and will further consolidate in different areas. The Commission suggested the second stage of the process is industry convergence which appears in alliances, mergers and joint ventures aimed at exploiting or maximising the potential of the technological convergence. This has been confirmed over the recent years by an unprecedented level of mergers and joint ventures in the sector which indicate industry convergence both at horizontal and vertical level. In terms of corporate organisation, almost invariably convergence will lead to concentrations and cross ownership. The increasing degree of interdependence of the various activities and the potential impact of this process on the pattern of consumption justify the reference to a single sector. However, the single features of each activity

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both in technological terms but, more importantly, in terms of their current use require a separate competitive analysis.

In regulatory and antitrust policy terms it is of paramount importance to reconcile an assessment of the current market strength of the economic players with the potential for expansion within the sector. The features of communications imply almost invariably the existence of facilities that constitute essential gateways to competition in neighbouring markets. Within this sector access and interconnection are key notions relevant not only to the relationship between the economic players but also to different product and service markets.

The Commission has made various attempts to provide a systematic approach to market definitions in different areas within the sector. It has published specific Guidelines on the application of EEC competition rules in the telecommunications sector\(^5\) (hereafter the "Guidelines") and, more recently, a Notice on the definition of relevant market for the purposes of Community competition law\(^6\) (hereafter the "Market Definition Notice") which reflects the case law developed by the EC Courts over the previous years.\(^7\) Finally, the Commission has published a Notice on the application of competition rules to access agreements in the telecommunications sector\(^8\) (hereafter the "Access Notice") which is expressly intended to "build on" the Guidelines.\(^9\) These will be discussed throughout this thesis.

With regard to market definitions, the Guidelines seek to identify the possible partition of the market. Subsequently, particularly in the Access Notice, the Commission acknowledged the difficulty of defining the market in general terms without reference to the precise circumstances. In any event, it was recognised that there were at least four distinct services markets, namely terrestrial network provision, voice

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\(^4\) Squire, Sanders & Demsey, *supra* note 1-44 above.
\(^6\) OJ 1997, C 372/03.
\(^8\) OJ 1998, C 265/02.
\(^9\) See para 3 of the Access Notice.
telecommunications, data communications and satellites. This partition was (and still is) subject to rapid development linked with technological progress. The Access Notice looks at the market definition in telecommunications from a different and more general viewpoint. It points out that:

"In the telecommunications sector there are at least two types of relevant market to consider - that of a service to be provided to end users and that of access to those facilities necessary to provide that service to end users (information physical network, etc.)."\(^{10}\)

The approach adopted by the Commission in the Access Notice is understandably general. Establishing a detailed product market definition without an analysis of the particular circumstances has been carefully avoided in order to preclude the risk of the Notice rapidly becoming inaccurate or irrelevant. According to established practice, when there are alternative possible definitions of relevant market (and even the narrowest possible definition) if no competitive concerns arise the Commission leaves the definition open. Furthermore industry convergence and the composite relationship in the structure of supply within the sector imply that a general definition is not only likely to render any economic analysis into a sterile and frustrating exercise it also will be inappropriate in terms of competitive policy. Nevertheless this dynamism of the market has in itself an impact on the outcome of the competitive analysis. In fact the converging and dynamic nature of this industrial sector paradoxically pushes towards the adoption of a narrow market definition on the assumption that a narrow approach in the market definition is the logical premise of a more stringent enforcement policy particularly for "cross market" activities.\(^{11}\) Finally the Commission's approach in individual cases analysed below might have an impact within its activities set out in the proposed Framework Directive described in Chapter II.\(^{12}\) It will be recalled that the Framework Directive envisages a mechanism whereby the Commission, in co-operation with Member States' NRAs and the High Level Communications Group, issues

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10 Ibidem, para 46.
11 See below for the impact of the doctrine of joint dominance, extended dominance and cross subsidisation.
12 See para 5.3 above and Article 14 of the proposed Framework Directive.
decisions on relevant product and service markets addressed to Member States. These decisions are intended to identify those products and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of the regulatory conditions set out in the Regulatory Directives. Whilst this power is without prejudice to the markets that may be defined in specific cases under competition law, arguably this mechanism calls for an enhanced harmonisation between general policy and individual decisions even in these more factual aspects of the Commission's analysis.

This Chapter analyses the general principles on market definition and then examines the case law concerning the relevant product market definition in the communications sector.

2. General principles of market definition

The definitions adopted in the Market Definition Notice are based on well-established case law, enforcement practice as well as on the definition adopted in section 6 of the Notification Forms CO and A/B to be used for, respectively, concentrations and exemptions or negative clearances. The Notice reiterates the basic distinction between relevant product market and relevant geographic market.

Relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and intended use. The complementary notion of geographic market is defined in the Market Definition Notice as follows: “The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”

Although these definitions apply to competition law in general the different objectives of the Community competition policy pursued by the Commission might, in some cases,
lead to different interpretations. For instance, the prospective analysis required in the
assessment of a concentration might differ from the evaluation which is appropriate in
the case of past behaviour.

2.1 Competition constraints

In the Market Definition Notice the Commission refers to three main sources of
competitive constraints which are relevant in the assessment stage of the competition
analysis: demand substitutability, supply substitutability and potential competition. In
the Access Notice it is recognised that "... in practice [supply substitutability] cannot be
clearly distinguished from potential competition." Below is an evaluation their impact
in relation to communications.

2.1.1 Demand substitutability

Demand substitutability is considered the main tool used to define the product market.
In making this determination the main focus of the analysis has to be on prices and,
particularly, on demand substitution arising from small (in the range of 5% to 10%) but
permanent changes in relative prices. Accordingly, the Commission will start its
analysis from the type of products that the undertakings involved sell in the area in
which they sell them. Additional products will be added or excluded depending on
whether competition from these products or areas has an impact on the pricing of the
parties' product in the short term. The question is whether customers would switch to
readily available substitutes or to suppliers located elsewhere in response to a
hypothetical small but permanent relative price increase in the products or areas being
considered. This exercise is to be repeated until the set of products and geographical
areas is such that the increases in prices will be profitable because there are no longer
substitutes which produce a loss of sales.

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\(^{13}\) Ibidem, para 41.

\(^{14}\) This is equivalent to the SSNIP test which stands for Small but Significant Non-transitory Increase in Price see S.

\(^{15}\) This process has some anomalies. The most famous one is the so-called Cellophane Fallacy which is the result of an
economic theory that "... any profit-maximising firm will always set process at a level where demand is elastic. As a
consequence, with the existence of monopoly power at monopoly price levels, many products may appear to be close
substitutes whereas, at a competitive price, substitution would not take place." See S. Bishop and M. Walker, *supra*
note III-14 above, at 49.
2.1.2 Supply substitutability

In the Access Notice the Commission states that “[supply] substitutability may in appropriate circumstances be used as a complimentary element to define the relevant market.” This aspect is nevertheless dealt with at length in the Market Definition Notice. Supply substitutability comprises an analysis of whether suppliers are able to switch production to the relevant products and market them in the short term without incurring additional costs or risks in response to small and permanent changes in relative prices.

The impact of this competitive constraint is regarded as particularly relevant when companies market a wide range of qualities or grades of one product. In those circumstances even if the different qualities are not substitutable for the final customer they will be grouped into one product market provided that most suppliers are able to offer and sell the various qualities immediately and without incurring additional costs. As we will see, this type of analysis can be particularly important in a convergent sector such as that of communications.

2.1.3 Potential competition

The Commission regards potential competition as a less important element in the definition of the relevant markets. This type of constraint relates to the conditions of entry into the market. Effectively an analysis of potential competition is usually carried out once the position of the undertakings involved in the relevant market has already been ascertained and that position gives rise to concerns.

Whilst these are the basic principles applied by the Commission in most cases, additional considerations might also be taken into account depending on the circumstances. For instance the definition of the relevant market might be influenced by constraints on substitution imposed by conditions in the connected markets. In cases in which compatibility between primary and secondary markets is important, this might lead to a narrowing of the market definition of the latter.
2.2 The geographic dimension

With regard to the geographic dimension, the criteria of homogeneity which are referred to in the definition adopted in the forms A/B and CO, in the Market Definition as well as in the Access Notice have to be supplemented with wider considerations mainly based, once again, on demand-side substitutability. The Market Definition Notice states that the assessment should establish whether companies in different areas do really constitute an actual alternative source of supply for consumers. In this respect the Notice points towards an analysis of demand characteristics such as importance of national or local preferences, current patterns of purchase of customers, product differentiation and branding.

However, the Commission states that once the initial assessment is made, it is necessary to carry out “...a further check on supply factors”. According to the Commission “...this analysis will include an examination of requirements for a local presence in order to sell in that area, the condition to access to distribution channels, costs associated with setting up a distribution network, and the existence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements of administrative authorisations [...] in short the Commission will identify possible obstacles and barriers isolating companies located in a given area from competitive pressure of companies located outside that area.” The Access Notice stresses that in the telecommunication services and access markets the “...regulatory conditions such as the terms of the licences, and any exclusive or special rights owned by competing local access providers are particularly relevant.”

In the communications sector, there are often several links between upstream and downstream activities as well as between horizontally linked or neighbouring markets. In some cases those links are inherent in the structure of the markets, which require various activities at different levels of the supply chain. In other cases they are the result

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16 Market Definition Notice, para. 30.
17 Ibidem, para 55.
of the convergent nature of the sector. If this is coupled with the relevance of regulatory barriers to entry, these links inevitably have an impact on the geographic assessment of the market: in fact there are markets which, despite not being subject to regulatory barriers at national level, are inextricably linked to other activities subject to national regulatory barriers. In other cases some "gateway activities" are simply performed in markets dominated by companies which have inherited monopolistic positions over facilities that are essential for the control of competition in related areas.

Therefore, although the continuing process of market integration\(^\text{18}\) and the irrelevance of national borders in terms of technological integration may point towards the creation of wider geographic markets, in some cases, the economic reality of the market concerned can lead to narrow definitions along national lines on the basis of the methodology described above. Furthermore at this stage of competitive development in the EU, a narrower market definition which highlights the competitive strength of certain companies produces a more stringent action of the Commission aimed at stimulating or guaranteeing more competitive conditions in the marketplace. In general terms the scope of the geographic definition is often linked to the degree of development of the market and thus to the temporal dimension of the competitive assessment.\(^\text{19}\)

### 2.3 Temporal dimension of the antitrust analysis

Market conditions are normally assessed "...on the basis of present demand and not of developments that could take place at some unspecified time in the future."\(^\text{20}\) In evaluating the relevant market the Commission would consider it necessary to look at developments only in the short term. The substitutability analysis carried out in order to define the relevant market is focused on the consumer's perspective. The temporal dimension of the assessment is therefore normally confined to the present characteristics of the demand.

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\(^\text{18}\) The need to take into account this aspect is recognised expressly in the Market Definition Notice, para 32.

\(^\text{19}\) For a discussion on this point see Case IV/M.538, Omnitel, OJ 1995, C 96/3, Commission Decision of 27 March 1995, paras 21-23.
However, in a converging sector, the relevance of a supply-side analysis is undoubtedly enhanced: in fact technological developments can steer the patterns of consumption and demand by increasing the substitutability of products or services. It is because of the prevailing importance of the innovation produced on the supply-side that a shift in the focus of the assessment on this aspect of substitutability is required in certain circumstances. This process might also have an impact on the temporal scope of the antitrust assessment.

In certain cases the Commission recognises expressly that a market for particular products or services might not exist at present but is expected to develop rapidly due to the change in the supporting technology. The Commission is always wary of regarding future developments of a market as sufficient elements to change its approach in the market definition, however likely those developments may be. It normally restraints the temporal dimension of its market analysis to the present circumstances. However the balancing act lies between the assessment of the present economic situation in the relevant market and the avoidance of a creation of position of market power (particularly in the case of merger cases). The Commission's practice in relation to communications shows a particular commitment in relation to emerging markets and converging services. Certainly the Commission is eager to ensure that there is no potential competition between activities which are in their infancy. This has a significant impact on the competitive analysis which is a dynamic exercise and can incorporate a more forward-looking approach.

Another conceptual category which complements that of convergence in a varied sector such as communications is ancillarity.

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22 See for instance Case No IV/M.993 Commission Decision of 27 May 1998, OJ, 1999 L 53/1, para 18 where in the context of the impact of digitalisation on the division between pay TV and free TV the Commission stated: "As digitalisation continues to spread, there could admittedly, with the passage of time, be a certain convergence between pay-TV and free TV, particularly if, at some future stage, free-TV channels too should largely be supplied in digital bouquets by pay-TV operators. However, this possible future development is not enough now to justify the acceptance of a common market for pay-TV and free TV."
23 This again highlights the strict interrelation between the market definition and assessment of market power.
2.4 Ancillarity in market definition

The relationship between different markets within the same sector is often described in the light of the notion of ancillarity. Indeed this, rather than convergence, appeared to be the position of the Commission in its Notice on the status of voice telephony on the Internet.

The notion of ancillarity can be subject to criticism when its effect is to confine excessively the scope of a market. This has occurred in Tiercé Ladbroke, a case decided by the CFI which illustrates some of the problems that are likely to arise. The case concerned an appeal against a decision of the Commission to reject a complaint without proceeding to formal decision. The complaint regarded the rights to the films and commentaries of the French horse races. The ten French associations which organised the races licensed their performing rights of the races for broadcasting live through a company PMU. PMI, a subsidiary of PMU, was authorised to license outside France with the specific consent of the relevant association each time. PMI had licensed DSV under the condition of not transmitting the films outside Federal Republic of Germany and Austria. Various complaints were made as a result of this arrangement. In Belgium a Ladbroke subsidiary was refused a licence for the films of the French races by both PMI and DSV (the German licensee). The Commission held that the market for the transmission of films was ancillary to the betting market, therefore the geographic market for the former is limited to that of the latter. The Court of First Instance upheld the Commission's approach.

The use of ancillarity and the consequences that this had on the geographic definition of the market may be seen as controversial. Undoubtedly, as it has been remarked, the Market Definition Notice defines product and geographic markets by reference to substitutes mainly on the demand side, it contains no qualification based on ancillarity.

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25 Para 105.
26 Korah, supra note III-24 above, at 170.
Moreover the EC Courts have "... been hostile to the view that complementary products should be treated as a single product."\textsuperscript{27} Whilst these criticisms and concerns appear reasonable and legitimate in the circumstances, these considerations may have a different application in the context of the communications sector.

On the one hand, the notion of ancillarity implies an assessment of importance. This is increasingly meaningless in a converging sector where the essential element of the analysis is not so much the degree of relative importance of the converging markets but the relationship between them. However, in a sector were various markets are often linked and where there are strategic positions which are the gateways to profitable markets, where cross subsidisation tends to be practised by large economic players and the technical complexity needs to be balanced by integrated services which are more "consumer friendly", the links between separate markets cannot be overlooked. In particular demand-side substitutability can be an inadequate or rather insufficient tool to define a market where consumers tend to balance technical complexity with product integration. This affects not only product but also geographic definitions because of the market position that certain undertakings have as a result of their past enjoyment of exclusive rights.

Certain narrow market definitions might have been used to highlight a situation of market power. In policy terms it may be attractive to construe certain markets narrowly (particularly in geographical terms) at the present stage of competitive development to reach an integrated and contestable market in a more mature phase of competition. On the other hand, the competitive impact of the links between different markets both in terms of product and geographic scope should not overshadow the instrumental function of market definition in antitrust analysis. Some issues are in fact more appropriately dealt with in the context of dominance assessment (under Article 82 or the Merger Regulation) and the market definition should have an important role but one which is limited to supporting that analysis.

3. Relevant product markets in communications

The Access Notice states that in the telecommunications sector there are “clearly” two types of relevant markets to consider: that of services to be provided to end users (e.g. the provision of voice telephony services) and that of access to those facilities necessary to provide that service to end users (e.g. interconnection to the public telecommunications network). However, the same distinction will not be followed with regard to other forms of communications. This distinction is ultimately based on the trade relationship between the service provider and the customer. In communications this relationship is often a complex one. Almost invariably, due to the composite nature of the service provided and to the integrated structure of the economic players, certain undertakings operate both downstream and upstream being at once trade partners and competitors. Clearly this raises specific issues in the competitive analysis which will be considered in the subsequent chapters. Furthermore, to a certain extent, it also renders unsatisfactory an attempt to describe in a systematic and meaningful way the various relevant markets whose bounds are continuously blurred by the flexibility on the supply side. In fact the distinction between access and services appears particularly inappropriate in the case of broadcasting. In this area the relevant markets are defined by a blend of factors which require a specific approach.

In communications in general and in broadcasting in particular, content is also very important as it can act as a driver for development as much as much as a potential instrument for foreclosure and tying. For the purposes of this study communications content will be referred to only to the extent that this factor influences the type of service offered and has an impact on the competitive conditions in the markets for communications. Finally, a wide market area which might be included in the definition of relevant product market is that of equipment. The latter would include not only consumers’ hardware products such as telephone, televisions, PCs or network equipment, but also the software which is and will increasingly become an essential element in the communications market. The equipment market often constitutes the
downstream market where the benefits of the upstream market position are enjoyed. The general relationship between the downstream and upstream connected markets. As will be shown below a number of factors influence market definition in the communications sector. However, a common thread which links the various markets in this sector is the "promiscuity" in the use of infrastructure or networks and the relations of mutual and increasing influences in the various types of services offered over these networks. Effective competition in network facilities is attained when technology development allows the creation of alternative (and competing) networks. As far as telecommunications are concerned, at present the construction of a new network which, in any event, would depend to a large extent on interconnection with other networks, could in many cases create insurmountable cost entry issues. Nevertheless, the liberalisation of the markets has already led to the improvement of network competition through the utilisation of existing fixed networks created for large utilities groups and the Commission expects that a liberalised environment will create the conditions for the development of new, alternative networks.

In the majority of cases of network provision the incumbents are vertically integrated operators which act both as suppliers to their competitors in the network facilities market and direct competitors in the provision of services. Thus, a large portion of competition operates by means of regulatory obligations. Nevertheless, the risk of anti-competitive cross market behaviours on their part is particularly high. The Commission is especially vigilant as to the various forms of abuse (unjustified delay in allowing access, reluctance to allow access, willingness to provide access only under disadvantageous conditions) which can arise in these scenarios. Therefore, particular care is used in the assessment of areas which constitute a potential source of competition such as cable networks. Cable operators offer services (especially based on broadband frequencies) which are vital to the development of the information society and reduce the potential creation of bottleneck situations in any of the areas of supply.

See Chapter VI.
Access Notice, para 53.
On 22 March 2000 the Commission launched a second phase investigation in relation to the acquisition of joint control of a UK cable industry operator (Case COMP/JV.27, OJ 2000, C 94/6); the case was withdrawn as a result of the
Over recent years the EC Courts and, particularly, the Commission have had various opportunities to analyse the different markets in the communications sector. In particular the Commission has often assessed competition issues arising with regard to activities which were merely in the process of being launched to the general public. Despite the universally recognised influence of technological developments which introduce innovations at a considerable pace, the existing case law is still a point of reference of paramount importance to enable a parallel development in the legal assessment of the sector.

Despite the elements of convergence affecting the sector on the supply side a distinction (albeit blurring) between telecommunications and broadcasting can still be drawn in a strict market definition exercise. With regard to the telecommunications sector the Commission market definition seems to revolve around a number of criteria: the provision of infrastructure, subscriber access to services and operators access to networks (or interconnection), mobile telephony, business data communications and Internet services. Within some of them a distinction can be drawn between three segments: local loop, which is the network between subscribers and the point of interconnection; long distance, essentially the network of cables and switching equipment which connects the local exchanges to higher levels of exchange known as transit exchanges; and international, the network of cables and related switching equipment which leads traffic from the international gateway, via backhaul cables to the international cable head or landing point, and hence out of the country and to the PTOs in other countries.
3.1 Provision of telecommunications infrastructure

Within infrastructure one can distinguish between local, long and international infrastructure. The first requirement for obtaining telephone service is the physical connection with a public switched telephone network (PSTN) which is usually done by allocating to a subscriber a twisted copper pair to his/her nearest local exchange. This creates demand on the part of subscribers and telecom entrants for connection to the local loop.

To a certain extent, alternative competitive local telecommunications networks already exist. Certain economic literature suggests that in voice telephony alternative competitive local networks can be found in direct PTO competitors, cable, national utility networks, switched telephone services, AM broadcasting, FM broadcasting, leased point-to-point lines, mobile telephone, cellular mobile telephone, GSM, Universal Mobile Telecommunications Services ("UMTS"), the Internet, private mobile radio, private microwave, resale paging, text paging, email. Whilst there is a number of networks or transmission systems which can potentially be considered substitutable, under a closer analysis of the features of each system of communication, they have not been (and arguably would not be) considered by the Commission as forming part of a single relevant market. In the BiB/Open case the Commission considered the existence of the market for the provision of local customer access telecommunications infrastructure. This was defined as including only the traditional copper network and cable networks of cable operators. The Commission discarded the inclusion in the product market definition of customer access infrastructure for telecommunications and related services, wireless fixed networks and digital mobile networks based on GSM and DCS 1800 standards on the basis of the fact that they cannot provide the same range of services as copper and cable based infrastructures. However, it appeared to recognise

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34 Ibidem, paras 86-83. The Commission concluded that long distance and international could be assessed together.

35 This is a pair of copper wires twisted in a particular fashion, it can be thought of as a loop consisting of one elongated piece of wire which starts on the main distribution frame and runs down to the subscriber, is connected across the handset, and returns via the return wire to the main distribution frame, where all the loops of the area are connected.

36 C. Veljanoski, supra note 1-8 above.
that the introduction of UMTS technology may change the product market definition in
the medium to long term.38

With regard to long distance and international infrastructure, traditionally the providers
of the physical network of cables and of the required means of switching were telephone
companies. More recently other utilities such as gas, electricity and rail companies have
emerged as possible providers of some capacity in their private networks. Demand for
long distance transport comes from entrant PTOs, companies running private networks
such as Internet Service Providers, suppliers of business data communications and
companies seeking to "self provide" by constructing their own data network. The
Commission recognised that a distinction may be drawn between wholesale offerings
(operator to operator only) and retail offering (to end users, normally business) and
usually consist of private lines. However, in Telia/Telenor, it concluded that from the
"...the point of view of the persons buying access to such infrastructure, the offering of
suppliers such as utility companies may represent a substitute for offerings traditionally
provided by PTOs."39 The Commission also recognised that there could be other
differences in demand between services required by telephone companies seeking
infrastructure and those required by private buyers who need interconnection with the
incumbent. However, the conclusion reached was that the market could be defined as
including both types of demand.

In its decision in the BT/MCI concentration40 the Commission examined the market of
capacity on transatlantic transmission facilities. The Commission accepted the
argument that cable and satellite transmissions are not substitutable due to the
unreliability of satellite for international voice telephony services and therefore focused
on cable capacity.41 Transatlantic submarine cable capacity was developed by consortia
of telephone operators who had a percentage interest in the cable proportional to their

312/6, ("BiB/Open Decision") para 39.
38 Para 37.
39 Para 80.
Decision").
41 Ibidem, para 13.
level of contribution to the costs of the venture. The Commission explained that at the
time of constructing a cable, each consortium member purchases the capacity required.
However, a cable also has built-in spare capacity which is held in common reserve. At
the request of the consortium members and subject to the other members’ agreement,
this capacity can be assigned to them provided that they pay historic costs and
maintenance and service charges in respect of the share they are acquiring. Due to the
regulatory constraints which up to recently existed with regard to facilities licences at
both ends of an international cable, the whole circuits could only be used for transit. If
the circuit was used to exchange bilateral international direct dial (IDD) traffic over a
public switched network, it was configured in the form of a matching half circuit
(ownership of the cable is split fifty-fifty between the two facilities operators at each end
of the cable). The traffic could then be exchanged between the two operators holding
international licences facilities at the two ends. Alternative half circuits might be leased
or assigned.

Once the cable is brought into service it is usually impossible to join the consortium on
the same equity basis as the original participants and any third party wishing to acquire
access must obtain it from the existing incumbents. The market was therefore construed
as encompassing the cable capacity on the US-UK route in which the parties to the
merger would have had the possibility of “self corresponding” (they could carry their
transatlantic traffic over end to end connections owned entirely by them) and
consequently introduce a more efficient internal form of settlement payments.

3.2  Telecommunications services

A number of telecommunications services can be offered on the networks described
above.

3.2.1 Voice telephony: local, long distance and international calls

Basic telephony consists of incoming and outgoing calls. As with regard to
infrastructure the market can be segmented into local calls, long distance calls and
international calls depending on the network or in which they terminate. Additional
segmentation may be applied as between private and business demand or urban and rural segments. A more controversial question is whether separate markets could be identified for incoming and outgoing calls. Subscriber access is normally offered by incumbents on the basis of a bundled product for both call termination and call origination. In fact the Commission noticed that the difficulty in unbundling the individual price elements of the service for a end user (which includes the price paid for the line rental) suggests that incoming and outgoing calls should be treated together. Although it is theoretically possible for a subscriber to have separate lines for outgoing and incoming calls there would not be an advantage in doing that from a demand side.

In relation to long distance calls in the case of vertically integrated operators the transition between loop and long distance merely entails a switching between different exchange levels. The service offered comprises a combination of elements, mainly the transport by the long distance operator over its fibres, and it may include interconnection with the receiving networks at each end. Competition in these segments occurs with resale, carrier pre-selection or carrier call-by-call selection. The same forms of competition apply to international calls.

International voice telephony services are normally provided through the use of public switched networks in both the originating and terminating countries of a call. The provision of those services is closely linked to that of the networks which are used for the delivering of the calls. The largest portion of these services is constituted by international direct dialled (IDD) calls. IDD has been defined as an automatic method of making or receiving telephone calls over the switched telephone network. The calls are then carried by international operators though their transmission facilities. The customers of these services are either at wholesale level (i.e. telecoms companies who

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42 These alternatives were considered and deemed not relevant for the assessment in question in the Telia/Telenor Decision (see para 84 footnote 14); see also Case IV/IV.17 BT/AT&T Commission Decision of 30 September 1999, (info only) ("BT/AT&T Decision").

43 See Telia/Telenor Decision paras 86 and 87.

44 For an economic critique of a narrow market definition based on originating and terminating calls in relation to mobiles, see C. Veljanoski, "Competition in Mobile Phones: The MMC Rejects Oftel's Competitive Analysis, 20 ECLR (1999), 205.

45 See Telia/Telenor Decision paras 89-92.
buy switched interconnection with international transmission facilities) or retail level (i.e. businesses or residential customers).

International voice telephony services are also provided through the use of international private leased circuits hired from facilities based operators. They constitute another way in which international facilities are made available to customers. In practice they consist of contracts for the utilisation of international transmission capacity on a purchase basis typically either by telephone operators or retail business customers with high-use needs.

In relation to international voice telephony in the BT/MCI (II) Decision the Commission took the view that, whilst there are some opportunities for customers to take advantage of price differentials between any pair of countries (for example through calling cards and callback services), for the time being these alternatives do not seem to represent a significant competitive constraint. Therefore, in that case, the relevant market was found to be the provision of international telephone services on the UK-US route. The same approach has been reiterated more recently.

3.2.2 Mobile telephony

The case of mobile telephony is the epitome of the limits of policy convergence versus economic analysis of market definition. In terms of functionality there is a clear overlap between fixed line voice telephony and mobile telephony. However, the Commission has been cautious in expanding its market definition. In one of its first decisions concerning GSM mobile telephony in Italy the Commission recognised that the provision of cellular digital mobile radiotelephony services has specific features which distinguish it from the market in voice telephony and that in other mobile telephone communications services. The distinction was based on the definition of voice telephony contained in Directive 90/388/EEC which differentiates between “services whose provision consists wholly or partly in the transmission and routing of signals on

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46 See BT/MCI II Decision para 19.
47 BT/AT&T Decision paras 80-84.
the public telecommunications network" and mobile radio telephony services which were excluded from its scope. The Commission remarked that, from the point of view of demand substitutability, there was very little interchangeability between mobile and fixed network telephony as users taking out a subscription for a mobile telephone do not normally cancel their earlier subscription for a fixed line telephone. The Commission considered that this distinction was reflected in a very significant price differential.49

In this case it would have seemed more appropriate to qualify the price differential as one of the causes of the distinction rather than one of its effects. In the absence of a significant discrepancy in the type of use, such as the lack of comparable or adequate network coverage, the difference in fees is certainly one of the main dividing factors between the two products. A more price oriented substitutability analysis has been adopted in the Omnitel case50 concerning GSM services in which the Commission also noticed that the degree of substitutability between different countries is expected to increase for a number of reasons: distance insensitive nature of telecoms costs; the development of GSM infrastructure and mobile to mobile interconnection; the ongoing improvement in telecommunications protocols.51 This will lead to an increasing trend towards a European market for the provision of GSM service.52 In reality it seems unlikely that provision of GSM services will ever acquire a true pan-European dimension although the Commission53 has identified new pan-European mobile telecommunications services using GSM standards and the third generation of UMTS standards will enhance the possibility of mobile communications acquiring a pan-European dimension.

The lack of "convergence" between mobile and fixed telephony has been confirmed more recently in the Bi/Bi/Opent case. In that case, the Commission, whilst dealing with infrastructure, stated that wireless fixed networks and digital mobile networks based on

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49 Commission Decision of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy, 95/489/EC, OJ 1995, L280/49, para 10, referring to a OECD study published on 24/02/93.
51 Ibidem, para. 22.
52 See also the Commission observations in Case IV/M1551, AT&T/Mediaone, Commission Decision of 23 July 2000, (the "AT&T/Mediaone Decision") para 15.
53 Vodafone Airtouch/Mannesmann Decision described below.
GSM and DCS 1800 standards constitute a market separate from the one for customer access infrastructure for telecommunications and related services. This conclusion was reached on the basis of the fact that the same range of services provided on copper and cable based infrastructures cannot compete with those networks. However, the introduction of UMTS technology may change the product market definitions in the medium to long term was not excluded.54 The provision of mobile telephone services is therefore consistently treated as a market in its own right. The Commission has also considered and excluded narrower market definitions based on the method of transmission (analogue versus digital) or customer oriented definitions (i.e. business versus private users).55

In the Vodafone Airtouch/Mannesman case the Commission looked at the market for the provision of seamless pan-European mobile telecommunication services to internationally mobile customers.56 These were services which admittedly could not be provided at the time of the Decision but were to become possible due to technological developments such as GPRS,57 EDGE,58 and CAMEL.59 These technologies offer improvement with regard to the amount of information/data transfer and the possibility of networks to interface and integrate. The Commission considered that these new services essentially include the offering of pan-European Internet mobile services and wireless location services.60 In addition the Commission considered that the

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54 Para 37.
57 General Packet Radio Service (GPRS) technology is developed for GSM networks to allow enhanced rates of data transfer. GPRS makes use of free radio capacity left by circuit switched traffic.
58 Enhanced Data GSM Environment or Enhanced Data Rates for Global Evolution represents the final evolution stage within the European Telecommunications Standards Institute. EDGE will enable higher data speeds using existing GSM infrastructure and provide the same data speed for the first phase of third generation mobiles, thereby providing an alternative for providers who will not be UMTS licensees.
59 Customised Application of Mobile Enhanced Logic (CAMEL) is GSM feature name for including Intelligent Network functions into a GSM system. CAMEL allows the provider to monitor and control calls made by its subscribers when they are roaming the home network.
60 These include four types of services: (1) trigger services that are automatically initiated when users enter a predetermined area, for example advertising services; (2) location based services that include local based billing which is specifically attractive to corporate customers and allows the operator to identify and process where the user is across those countries where it has a network - this will allow the operator to offer a home zone rate to their customer when these are at any of the corporate customer's business sites; (3) third party tracking services that include applications whereby information regarding the location of a third party is required; (4) end user assistance services that provide users with a safety net such as roadside assistance and emergency services. See Vodafone Airtouch/Mannesmann Decision para 14.

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combination of these technologies and network integration will make it possible to
implement these technologies in a single integrated network (i.e. the merged entity) and
to offer services such as corporate LAN (Local Area Network) access, video services,
mobile Internet access, mobile e-commerce and unified messaging/media conversion to
their subscribers. Based on third parties' observations the Commission considered there
was a demand or rather a potential demand for these services (which are now
technologically feasible) on the part of, principally, large corporations but possibly also
small and medium sized enterprises and some private customers. Interestingly it was
recognised that the merged entity would have been the only mobile operator able to
meet this demand in the short to medium term.

The example of mobile telephony shows, in clear terms, the dichotomy between market
definition and dominance assessment in an antitrust analysis. The relevant market may
have to be evaluated narrowly, in the short term, in the light only of the present
circumstances and the pattern of demand. However, the dominance assessment can be
extended to consider the evolution of the market, demand as well as the strategic
position of the undertakings and the likely evolutions coming from the supply-side.

3.2.3 Corporate telecommunication services
Most of the pre-1998 decisions pertained to corporate telecommunication services, the
majority of which were already liberalised. Those decisions often involved services
provided to corporate or business customers. Despite the technological and regulatory
developments which have transpired since then many of these services are still regarded
as distinct areas driven by the need to transfer large quantities of data, securely and
quickly, nationally and internationally and are characterised by the fact that demand
comes from companies with substantial communications requirements. Typically,
business data communications connect a company's local area network (LAN) in one
location to its other LANs situated elsewhere but can also link third parties to the
company's network.

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61 Ibidem, para 18.
One of the landmark decisions in this area is *Atlas*\(^{63}\) which concerned the fifty-fifty joint venture between France Télécom and Deutsche Telekom. In this case the Commission expanded on a previous decision\(^{64}\) and considered the market for customized packages of corporate telecommunications services provided using mainly high speed, high capacity leased lines connecting the equipment on customers' premises to the service provider's nodes but also having satellite or mobile radio capacity. These services at the time included data services, value added applications services (such as video conferencing and electronic document exchange (EDE)), voice virtual private network (VPN) services (voice communications between a closed group of users), value added leased line offerings, very small aperture satellite and outsourcing (whereby customers are invited to transfer responsibility and ownership of their networks to the joint venture).

This market is qualified by demand-side characteristics in the sense that the Commission recognised\(^{65}\) that those services are commercially valuable only if provided to a certain type of customer (multinational corporations, extended enterprises or other intensive users of telecommunications generating continuous volumes of high traffic). However, it did not rule out the possibility (which in the circumstances was irrelevant for the purposes of the assessment) of each of the services mentioned above constituting a separate market.

In the same decision the Commission regarded as a separate market that of packet switched data communications services. Packet switching was defined as a means to improve network capacity utilisation and consists of "...splitting data into 'packages', feeding these and other packets into the network optimizing utilization of available capacity, switching to the desired destination and rearranging the packets to obtain data sequences."\(^{66}\) Packet data communication services use different protocols with different characteristics such as X.25, Frame Relay and IP protocols. Within the product market the Commission distinguished different customer segments. The

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markets for customised packages of corporate telecommunications services and packet switched data communications services are jointly referred to as “non-reserved corporate communications services”. In *Telia/Telenor* the Commission referred to business data communications as including services involving the transfer of large quantities of data, securely and quickly, nationally and internationally.67

In a subsequent decision68 audio-conferencing has been treated as a distinct market. This activity involves the use of a computer managed system known as a "bridge" in which telephone conversations with several conference participants are joined. The conference may be facilitated by an operator or set up automatically. The *Phoenix* decision69 also referred to a market for traveller telecommunication services which include calling card services, specialised voice services and selected data communication systems services. In the *Unisource* Decision the Commission also included the pan-European GSM mobile services developed by the undertaking within the definition of the market for traveller services.70 However, it has not ruled out the possibility of considering GSM mobile services within the market of non-reserved corporate telecommunications services bearing in mind that they are also seen as a GSM mobile extension to corporate customers' private or virtual private networks (VPN).71 This area is in constant evolution. However, even more recently the Commission has reconfirmed the validity of its previous approach identifying in the *BT/AT&T* case a market for the provision of packages of customised enhanced and value added global corporate telecommunications services.72 Nonetheless, Internet services have undoubtedly to be looked at separately and arguably the notion of mobile

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67 See paras 101 to 104 of the Decision.
68 *BT/MCI (II)* Decision, para 16.
69 Case IV/35.617 *Phoenix*, Commission Decision of 17 July 1996, OJ 1997, L 239/57; express reference to the market definition of the *Atlas* and *Phoenix* Decisions was made in Case IV/35.738 *Unisource*, Commission Decision of 29 October 1997, OJ 1997, L 318/24 ("*Unisource* Decision"), whilst in Case IV/35.830 *Unisource*, Commission Decision of 29 October 1997, OJ 1997, L 318/1 ("*Unisource* Decision") the same product market definitions were adopted; the *Unisource* was the joint venture between the Dutch PTT Telecom BV and the Swedish Telecom International, a subsidiary of Televerket (the predecessor of Telia AB) which was expanded to Swiss PTT in 1993 and then to Telefónica. The latter modifications had originally been notified under the Merger Regulation but the Commission, in its decision of 6th November 1995 concluded that the transaction was not a concentration; following the decision the parties requested the conversion of the original notification to an application for negative clearance and a notification to obtain an exemption from Article 85 for a new modified structure which did not include Telefónica. *Unisource* was the joint venture between Unisource and AT&T.
70 *Unisource* Decision, paras. 26 and 27.
71 See the Commission’s conclusions in the *Telia/Telenor* Decision in relation to seamless pan-European telecommunications services to internationally mobile customers which also use LAN as described above.
telecommunication services to internationally mobile customers adopted in Vodafone Airtouch/Mannesman overlaps with this earlier approach.

### 3.3 Operator access to networks and carrier services

In Telia/Telenor the Commission noted that in the same way as subscribers need access to networks in order to make calls, operators need access in order to terminate calls on other networks or to receive calls for termination. On this assumption the Commission operated a segmentation on the basis of local loop on the one hand and long distance and international networks on the other as in the case of subscriber access.

In addition the switched transit, dedicated transit, re-origination, less cost routing and hubbing services may also give rise to a separate product market which, unlike the market for international calls described above, can be analysed without reference to origin and destination pair. In Phoenix the Commission referred to the market for carrier services. This market comprises the lease of transmission capacity and the provision of related services to third party telecommunications traffic carriers and service providers. The services are in fact purchased by both established and emerging carriers. In the latter category the Commission distinguishes between facility based carriers which would use alternative infrastructure and may seek greater efficiency in the transport of international client transport and non-facilities based carriers which would aim to achieve a competitive advantage by avoiding dependence on a local telecommunications operator for international client traffic. In both cases these types of service may prove to be essential to improve competition and consumers' choice.

The most relevant carrier services considered in the Phoenix Decision included switched transit (i.e. the transport of traffic over bilateral facilities between the originating carrier, the transit carrier and the terminating carrier), dedicated transit (i.e. leased line offerings for the transport of traffic through the domestic network), traffic hubbing offerings (i.e.

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72 See para 73 of the BT/AT&T Decision.
73 Para 95.
74 Phoenix Decision, para 11.
the provider takes care of all or part of the international connections of, typically, an emerging carrier who is not obliged to enter into an undetermined number of bilateral agreements) and reseller services for service providers without international facilities of their own. This approach has been subsequently confirmed in a number of decisions. The question of whether the provision of carrier services is to be looked at in terms of country pairs or more on a local basis was left open.

This issue has been looked at more closely by the Commission in the context of its sector inquiry opened by the Commission on 27 July 1999. Suppliers are the so called "carrier's carriers" including not only incumbent but also new carriers constructing alternative network structures. Users of leased lines can be divided into two classes: alternative carriers (in particular mobile operators) who provide domestic, international or combined telecommunications services and business users (i.e. for international lines, multinationals and for domestic lines business such as banks, financial services providers, stores, etc. who wish to construct or purchase various enhanced and value added telecommunications services). The Commission seems to distinguish between national and international leased lines and hint at the possibility of market definitions based on the distinction between short distance and long distance. In geographic terms the national licensing regime can be considered an indication of the national character of the market national leased lines although it is recognised that there is a possibility of narrower market definition in certain cases. For international lines the market appears to be at least Europea-wide.

In any competitive assessment, the substitutability analysis of the product or services in question is a primary element of the equation. In the case of network facilities, this issue is likely to be resolved entirely on technical and costs grounds. However, to a certain extent, it will also depend on the characteristics and requirements of the related markets for services described above.

75 Notably the Unisource Decision para 28 and BT/AT&T Decision paras 74 to 79.
77 See Working Document on the Initial Results of the Leased Lines Sector Inquiry, of 8 September 2000, para 2.2.1.
3.4 Internet

We have described above the historical process which has boosted the rapid development of the Internet network. The Internet is actually a network of networks which are interconnected using the Internet Protocol (IP) running over transmission links leased from telecommunications operators and able to route and transport text, image, motion video and sound. Its potential for multimedia uses application is clear. Two different types of computers are connected to the Internet: client computers and host computers or servers. The consumers have access to the Internet through the information stored by the servers.

The Internet networks are established in a hierarchical form. At the top level there are core Internet backbone providers which are all mutually connected through peering arrangements. A backbone network is the underlying structure of physical connection provided by an existing local or long distance telephone company. This creates a considerable supply-side overlap with other telecommunication network services. Below these networks there are regional providers which connect customers to the top level networks. There are clearly numerous and important upstream/downstream relationships between Internet Service Providers (ISPs) at various levels of the supply chain.

A crucial aspect in the understanding of the Internet concerns interconnection. The majority of interconnections currently in use are based on peering or transit arrangements. Under a peering arrangement one ISP agrees to accept from another ISP all traffic which originates from the latter's customers and which is to be terminated on the former's network. Customer traffic also includes traffic originating from any customers which are themselves ISPs. This service can be considered a transit service which allows an ISP to have his traffic included in the traffic of the transit provider's

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78 For instance the availability of new technologies (e.g. fixed radio access) or the possibility of large corporate users to bypass the local network altogether and to connect directly with the long distance network.
network for the purpose of exchange across a peering interface. In such a system connectivity becomes a service that can be resold on a commercial basis.

The operators in the Internet industry are placed at different levels of the hierarchical structure described above. Internet Backbone Providers or top level ISPs operate their own Internet network and provide Internet connectivity. Top level ISPs ultimately either assume the responsibility for delivering traffic across peering interfaces or return it undelivered. In order to be a top level ISP one has to have a peering agreement with all other top level ISPs. Usually these ISPs are vertically integrated structures whose customers include users as well as resellers. Second tier ISPs have some of their own peering arrangements but might not have sufficiently comprehensive agreements to give adequate connectivity through these alone. Therefore, they supplement their connectivity capacity by buying transit from at least one other top level network. Resellers provide connectivity which is purchased from top or second tier ISP.

A market definition can be difficult. An analysis of the economics of access and traffic services might provide the correct criterion to define the market. Unlike the public switched telephony where an imbalance in traffic is financially advantageous for the party receiving net inflow, the traffic received over a peering interface represents a cost for the ISP. This structure creates a distinction on the supply side which can have a direct impact on prices and on the possibility of behaving independently from competitors. In this respect the different level of supply in the hierarchical structure might provide a valuable point of reference for defining the boundaries of the different markets. This assertion would have to be evaluated by considering whether the top level providers are subject to little competitive constraints from second tier providers or resellers. Whilst this argument might be proved on the basis of factual circumstances the contention does not seem to work in the opposite direction given that the integrated structure of top level ISPs provides a powerful competitive concern if not a gateway facility.
On the basis of this analysis, it might be argued that there are separate markets: on the one hand the market for Internet Access Service in which the ISP provides basic access in the form of hardware, software, network configuration, customer support and billing services as required to enable the customer to make use of his Internet access; on the other the market for top level or universal Internet connectivity. The latter is the necessary complement to the basic Internet and Intranet services (such as VANS or other telecommunications services). The definition of the market for universal Internet connectivity is supported by a SSNIP test analysis and by an assessment of the constraints arising from the resellers activities. In WorldCom/MCI the Commission concluded that "...if the top-level networks increased the price of their Internet connectivity services by, say, 5%, then in principle the cost base of resellers would be increased by the same amount, and that increase would have to be passed on to the customer. Therefore the pure resellers cannot provide a competitive constraint on the prices charged by the top level network." This approach has been confirmed (albeit indirectly) in the Telia/Telenor Decision and in the WorldCom MCI/Sprint case prohibited in June 2000.

Another area which is connected to the Internet and creates emerging markets which have attracted the Commission's attention is that of portals. A portal serves as a gateway through which consumers and businesses can have access to a range of online services and the wider Internet. In the Vodafone/Vivendi/Canal Plus case the Commission identified an emerging pan-European market for horizontal portals

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81 See para 67; in other decisions the Commission did not have to reach a conclusive view on market definition see Case IV/JV.1, @Home Benelux B.V, Commission Decision of 15 September 1998 in which the Commission considered that there were separate markets for (dial-up) Internet access for residential and business customers, Internet advertising, and paid-for content provision; this case followed the approach adopted in Case IV/JV.1, Telia/Telenor/Schibsted, Commission Decision of 27 May 1998 (in which the Commission held that website production may be sufficiently characterised in technical terms to be justify a separate market definition, para 16) and Case IV/JV.5, Cegetel/Canal+/AOL/Bertelsmann, Commission Decision of 4 August 1998; see also Case IV/M.1113, Nortel/NORWEB, Commission Decision of 18 March 1998 in which the Commission had to consider (without having to reach a definitive conclusion) whether there was a market for different access technologies for Internet access.
82 See para 106 where the Commission considered that neither party are top level network providers but mere resellers of transit obtained from such networks.
83 Nyr see IP/00/628 of 28 June 2000, "Commission prohibits merger between MCI WorldCom and Sprint."
84 COM/JV.48 Commission Decision of 20 July 2000, full decision not yet available (see Commission Press Release IP/00/821) ("Vizzavi Decision").
providing WAP based Internet access. The Commission also looked at this market (and the activities of the same portal, Vizzavi) in the context of a subsequent decision. In its subsequent decisions on the Vivendi/Canal Plus/Seagram merger the Commission referred to its previous Vizzavi Decision and distinguished between portals having a broad focus (horizontal) and portals with a narrow focus (vertical). Vizzavi was of the latter category. The Commission confirmed in these two decisions that there is a distinct market for horizontal portals which meet the demand of those who wish to be contacted continuously and/or those who wish to have Internet access without a PC or through mobile phones and digital set top boxes. However, the Commission has not made a final determination as to whether the market should be segmented further into portal markets accessible via mobile phones, via set top boxes or PCs.

3.5 Broadcasting: between access, transmission and services

3.5.1 Technological features
A brief overview of the technological features of broadcasting activities is necessary in order to understand the competition issues arising in this area. TV programmes can be broadcast with either analogue or digital technology. Digital technology allows a signal to be compressed and therefore leads to a considerable increase in transmission capacity. This involves turning the picture, sound and the accompanying data into a series of 1s and 0s. The information is then compressed using a special software which removes unnecessary information. This compression allows a number of services to be broadcast on the same frequency. This process is called multiplexing. The receiver contains a computer which sorts the services chosen by the viewer from the available services in multiplex. It then takes the compressed information and reconstructs the original picture and sound. Digital television receivers may vary in technical complexity and features. They range from receivers of free to air television services broadcast in clear, to pay-TV which include unscrambling systems and modems which enable the receiver to access the conditional access system. In digital television there is

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86 See para 25 of the Vivendi/Canal Plus/Seagram Decision.
no longer a link between a given frequency and a particular service, therefore the receiver will need to have a navigation software to enable the viewers to select the service they wish to receive. Most receivers will in fact include an Electronic Programme Guide (EPG). Furthermore, as the number of functions performed by the receiver increases, it is also required to have the ability to interpret a set of instructions transmitted to it. This task is performed by the Application Programme Interface (API) which interprets a set of commands telling it where to display a graphic or other object on the screen. The majority of digital television is currently broadcast in paid form. For the purposes of market definition the Commission has concluded that there is no reason to distinguish between markets for analogue and digital pay television. It stated that digital television is only a further development of analogue pay television and therefore does not constitute a separate market. In the next few years analogue broadcasting will be completely superseded by digital broadcasting.

Digitalisation and the use of telephone or cable network allows the introduction of interactive services. The interactivity might come in two forms: the first involves an interaction with applications included in the broadcast stream; the second involves the use of the modem to call a remote server. Examples of interactive services include pay per view, video on demand or near video on demand, home banking, home shopping, interactive advertising, audience participation and tele-teaching. The type of interactive services offered may vary according to the business model chosen by the providers. British Interactive Broadcasting/Open (BiB/Open) for instance uses satellite transponders to broadcast a stream of video, still pictures and text in a

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90 The customer selects a programme of his/her choice from an electronic video library.
91 A specific number of feature films available for selection with each being repeated at a specific time of the day.
92 Including calling up for further information on a programme or playing along with a quiz show.
94 See paras 97-100 of the BiB/Open Decision.
continuous cycle. This is done in the same way as teletext services but, due to the higher bandwidth, the service results in richer information (produces better quality) and the ability for viewers to move more quickly. The customer will interact using the modem and the return path over the switched telephone network. Under this model BiB/Open obtain revenues mainly from wholesale services to advertisers, retailers and other service providers who want to use the BiB/Open interactive domain to reach users. Internet via TV devices (Web TV or NetStation) constitute a different model. At present this system uses a television screen to display Web pages received via a modem. In the future it is envisaged that the device will be integrated with the receiver and may use a combination of data delivered by broadcast transmission and data delivered via the modem using the telephone network. Under this model the subscriber pays a monthly fee for the Internet via TV service and may also opt to pay for Internet access at the same time or separately.

The technology used for transmission is closely linked to the type of programmes broadcast and the commercial relationships which it generates between broadcasters, consumers, and, in general, the methods of financing. In particular digital television allows the transmission of many more programmes with a differentiated content broadcast in specialised, mono-theme channels. This in turn expands the scope for a differentiated supply of pay-TV channels.

Irrespective of the technology chosen, TV programmes can be transmitted by cable, satellite or terrestrial frequencies. Whilst a system based on terrestrial frequencies is the most uniformly used, the penetration of cable and satellite transmission varies considerably in different geographic areas. Cable transmission requires the installation of a specific cable network which, however, can also be used for other forms of communications (i.e. telephony, Internet access). In the case of satellite TV, the channel is transmitted via satellite from the studio, the TV signals are sent to an up-link station and then from an earth station to a satellite which retransmits them. The TV signal is eventually received by a satellite dish on the ground. The receivers can be (1) direct to home households with smaller dishes; (b) cable TV operators with one or more larger dishes, which then distributes the programmes; and (3) SMATV operators (i.e. entities
receiving the TV signals using a master antenna and re-transmitting the signal within a smaller network). Therefore there is a close link between satellite and cable in that the latter can be a form of distribution of satellite programmes.

3.5.2 Market definitions
The thrust of the Commission's analysis in this area can be inferred from the main merger decisions which have been opposed. In *MSG Media Service* the Commission examined a joint venture between Bertelsmann, Kirch and Deutsche Telekom, for the provision of pay TV and other communication services including conditional access, subscriber customer management as well as the provision of the technical infrastructure for the supply of those services. Subsequent decisions have specified and built on this analysis.

TV broadcasting can be seen as a single viewers' market, in which broadcasters compete for audience shares and the Commission has recognised this. Audience share is undoubtedly essential for commercially financed TV since it provides a decisive factor contributing to success. Furthermore even in cases in which television is financed mainly through subscriptions or fees, the audience shares remains an "... important indicator of the attractiveness and acceptance of the broadcasting channels". However, these considerations cannot overshadow a further fundamental distinction based on method of financing and the trade relationships between broadcasters on the supply side and viewers on the demand side.

3.5.2.1 Pay-TV and free access TV
Based on the trade relationship criterion the Commission has argued that broadcasters compete in both the market for TV advertising (where broadcasters compete for advertising revenue) and the pay-TV market (where broadcasters compete for subscriptions). In fact while advertising financed television the trade relationship is only between the programme supplier and the advertising industry, in the case of pay-

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TV there is a trade relationship between the programme supplier, the distributor and the viewer. The key parameters in advertising financed free access TV are considered to be audience share and advertising rates. In pay-TV the key factors are the interests of the target groups of viewers and the level of subscription which they would pay.\textsuperscript{98} The main source of revenues for the two types of television is therefore different. This inevitably has an impact on the market definition or, at least, restricts the area in which the market analysis is conducted.

There are of course various elements which might blur the bounds of the distinction. Firstly in some circumstances the financing of pay TV might derive from mixed sources encompassing subscriptions, payment by viewers on a pay per view basis and advertising. Furthermore there is a relationship between the two markets of pay TV and free access TV in that, as recognised by the Commission,\textsuperscript{99} the growth of the pay-TV market is slower where the programmes provided by free access TV broadcasters are relatively varied. In the future the growth of advertising financed TV appears to be limited to the financing capacity of the advertising industry. However, in the Commission's analysis pay-TV at present still constitutes a separate market from commercial advertising financed television and from public television financed through fees and partly through advertising.\textsuperscript{100}

The trade relationship between providers and recipients of pay TV services has some aspects of a compound nature which challenge the distinction which we accepted in the case of telecommunications between access and services. In fact it is very common that pay TV suppliers make their infrastructure available to other pay TV suppliers. In other cases such as that of cable, the infrastructure may be operated by companies which are not programme suppliers. In these circumstances technical services would be an essential part of the service provided to final customers. The contractual relationship for these services will be with programme suppliers whilst the pay TV subscription will be


\textsuperscript{99} MSG Media Service Decision, para 32.

\textsuperscript{100} See also Case COMP/JV.37, BSkyB/Kirch Pay TV, Commission Decision 21 March 2000, paras 23-29; see also Bertelsmann/Kirch/Premiere Decision, para. 18; TPS Decision, para 25; BiB/Open Decision para 24. The issues concerning public television will be dealt with in Chapter VII.
concluded between the programme supplier and the final customers. These relationships operate differently depending on the method of transmission.

The results of a market definition based mainly on the trade relationship criterion is also confirmed and corroborated, according to the Commission, by an analysis of consumers' patterns of consumption. According to a study quoted in the Bertelsmann/Kirch/Premiere decision, pay-TV subscribers devote an average of 90% of their daily viewing time to free TV and only 10% to pay-TV. According to the Commission "...the fact that subscribers, despite a comparatively little use, are prepared to pay considerable sums for pay-TV indicates that the latter is a clearly distinguishable product with specific extra utility." Pay TV services are often supplied in packages of more than one channel. As we will see below the introduction of new transmission technology such as digital broadcasting and the vertical interrelation between various forms of distribution (in particular cable and satellite) creates niche demand in channel supply characterised by the type of content (i.e. premium products such as film and sports) at wholesale or retail level.

3.5.2.2 Pay-TV and interactive TV services
Since the introduction of digital technology broadcasting, particularly pay-TV, is increasingly linked with other type of "interactive" TV services. Digital interactive TV services include the provision to consumers of a package of interactive services including retailing, financial services, information, education, Internet access, e-mail and games. In defining the market for digital interactive services the Commission has expressed the view that this market is separate from PC-based on line services mainly due to the current lower level of penetration of PCs and the switching costs associated in the purchasing of a PC but also for differences in use. More importantly the Commission also drew a distinction between general retail pay-TV and interactive services. This is based on the characteristics and intended use of the services. Whilst

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101 Bertelsmann/Kirch/Premiere Decision, para 18.
102 See a similar remark in relation to the French market in the TPS Decision, paras 88 and 103.
103 Bertelsmann/Kirch/Premiere Decision, para 18.
104 See BiB/Open Decision in which the Commission referred to the markets for the wholesale supply of films and sport channels, paras 28 and 29.
105 BiB/Open Decision, para 11.
retail pay-TV provides an entertainment service to the consumer, interactive services are largely transactional or informational services sought out by the consumer.\textsuperscript{106}

Whilst home banking and home shopping might be seen as separate markets, other interactive services such as pay TV in the form of pay per channel, pay per view and near video on demand can be thought of as constituting part of the same market. This is because the broadcasters alone determine the programme sequence and the timing and the viewer has only a limited choice available.\textsuperscript{107} In theory it could also be argued that further technological advances might lead to pay-per-view TV being regarded as a separate market from general pay-TV. In fact in spite of the fact that the parties to the contracts are the same, it has been suggested that "... the nature of the programmes provided, the fact that the viewer may choose to pay or not to see each programme specifically, and in particular the huge price difference, means that they are separate markets."\textsuperscript{108}

The television services involving interaction are referred to as "enhanced television services" to distinguish them from "basic television services" involving sound, picture and text.\textsuperscript{109} In the relatively near future all television services may involve interactive elements and therefore the distinction between general television services and "enhanced" services will be of little relevance.\textsuperscript{110} The Commission has already recognised that digital pay-TV, which enables the provision of interactive services, does not constitute a separate relevant product market but a mere development of analogue pay-TV.\textsuperscript{111}

\textsuperscript{106} Ibidem.
\textsuperscript{107} Bertelsmann/Kirch/Premiere Decision, para 18.
\textsuperscript{108} See J. Temple Lang, supra note II-17 above, at 397.
\textsuperscript{110} Ibidem, para 2.12.
3.5.2.3 Content based definitions

It would appear that, as for the case of basic television services, further criteria can be utilised to define relevant markets within this service. For instance, channel specialisation based on content and facilitated by the introduction of digital technology, can also have an impact on market definition within the broader category of retail pay-TV (including both digital and analogue). In fact the introduction of digital technology is likely to promote the creation of numerous new content oriented channels with the aim of addressing the demand of specific groups of viewers. In the *EBU/Eurovision* case\textsuperscript{112} the Commission treated the television sports programmes as forming a single market. This was justified on the basis of the particular characteristics of sports programmes\textsuperscript{113} and the consequent launching throughout Europe of dedicated channels. A more sophisticated analysis might now query whether all sports broadcasting are substitutable. Dedicated channels are now emerging in a variety of forms and the degree of substitutability must be measured according to the circumstances bearing in mind that the "... the viewers' rising expectations are making them less substitutable over time."\textsuperscript{114} Finally the language in which the content is programmed can have an impact on a content based relevant product market definition and will undoubtedly have, in any event, an impact on the geographic definition of the market.\textsuperscript{115}

In a number of Decisions the Commission has referred to the market for the acquisition of broadcasting rights for films and sporting events.\textsuperscript{116} In particular in the *Eurovision II* Decision\textsuperscript{117} which followed the annulment of the earlier Commission Decision by the


\textsuperscript{113} Ibidem, paras 13-18.

\textsuperscript{114} See J. Temple Lang, supra note II-17 above, at 394.

\textsuperscript{115} See TPS'Decision paras 34-36; see also Case IV/M.1574, *Kirch/Mediaset*, Commission Decision 3 August 1999, where the Commission suggested (without reaching a conclusion) that there was a distinction between film rights on the one hand and sports rights on the other; BSkyB/Kirch Decision paras 42-46. Also the separate market of the wholesale supply of film and sport channels adopted in the *Bib/Open* decision is conceptually based on a distinction between film and/or sport and other programmes. On that occasion the Commission noted that pay-TV channels composed of recently released films and live exclusive coverage of attractive sport events attract largest viewing figures and subscriptions to such channels (which are usually supplied on a stand alone basis) are most expensive (see para 28 of the Decision).

Court of First Instance, the Commission accepted that sports programmes have special characteristics such as the ability to achieve high viewing figures and reaching an identifiable audience, which is a specific target for certain important advertisers. However, contrary to the notifying parties' contention, they considered that the market did not extend to the acquisition of the television rights to important sporting events in all disciplines of sports irrespective of the national or international character of the event. The Commission considered that the market definition should be restricted further to certain types of sport which attract large audiences. The Commission was however faced with the practical difficulty of quantifying the difference in value terms to apply a strict economic analysis and consequently draw a clear demarcation line between the various types of sport broadcasting rights. It therefore confined its conclusions to the fact that "...there is a strong likelihood that there are separate markets for the acquisition of some major sporting events, most of them international." Most importantly it reaffirmed the fact that "...the acquisition of exclusive TV rights to certain major sporting events has a strong impact on the downstream television markets in which the sporting events are broadcast as part of the broadcasters' offer to viewers and/or subscribers."

More recently the Commission has looked at the combined effect of premium films, first window (i.e. the first period of premium films availability on pay-TV after theatrical exhibition, video rental and pay per view) and pay-TV in the context of the Vivendi-Seagram merger.

3.5.2.4 Conditional access in market definition
Pay-TV services require a special technical infrastructure, called conditional access system, to ensure that only subscribers can receive the channels. A conditional access system is based on the use of an encryption system in which messages are encrypted.

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119 See para 43 of the Eurovision Decision.
120 Ibidem, para 45. The issue of vertical integration between broadcaster and broadcasting rights also apply in similar terms to TV production in relation to which the commission seem to adopt an equally narrow approach distinguishing between in house production and independent production. See the Telefónica/Endemol case (IP/00/755 of 12 July 2000, "Commission clears Telefónica buy of Endemol").
The system consists of a decoder equipped with a decryption facility and a security processor, a subscriber management system (SMS) and a subscriber authorisation system (SAS).

Decoders are needed to unscramble the encrypted analogue or digital television signals. Encryption systems can either be closed or open. In the case of closed systems (which are the most widely used in Europe) only broadcasters signing an agreement with the owner of the system are allowed to encrypt. The use of closed systems implies that the customer has to purchase or lease a special decoder to receive TV channels encrypted in this form and additional decoders if they want to receive TV channels encrypted in other systems. An open system operates by means of smart cards. The same decoder can be used to receive different channels: the data stream and the TV signal is received and scanned by the decoder containing a smart card which confirms the identity of the receiver. If the smart card finds its unique key the decoder deciphers the TV signal and passes it onto the TV set. Any broadcaster can normally acquire from the owner of an open system the right to use it.

Following the introduction of digital television, the system might include a device which converts a digital signal into analogue form. In both the case of analogue pay TV and digital TV there exist the issue of financing these devices. For pay TV in the early years the decoders were expected to be purchased by the broadcasters and rented by subscribers. In the case of digital television the companies introducing the services in certain cases offer decoders or receivers to subscribers at a price subsidised by the broadcasters in order to accelerate the take up of new products and services. Certain conditions (such as the consumer’s agreement to purchase the service provided by the subsidising company) might be attached to this price.

In the MSG Decision the Commission stated that the series of services connected to pay TV constitute a further separate market and referred to them as administrative and

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122 For example, Videocryp used by inter alia BSkyB and Syster/Nagravision used by Canal + and Premiere.
123 For a comprehensive description see Nordic Satellite Distribution Decision, paras 14-26.
technical services for pay TV. These services include the making available of decoders, handling of conditional access (e.g. SAS), subscriber management in respect of pay TV customers (e.g. SMS) and the settlement of accounts with programme suppliers.

3.5.2.5 The impact of method of transmission on market definition

The method of transmission of television signals raises important issues and has a significant influence on the market definition. More specifically the Commission has repeatedly regarded the provision of TV satellite capacity and the operation of cable TV networks as separate markets. Various arguments have been made to allege substitutability in the different forms of transmission. It has been argued that the introduction of digitalisation will eliminate the need to distinguish the operation of cable television networks as a separate market as there will no longer be shortage in transmission capacity. The Commission rejected this argument remarking that "Whether an economic item is available to customers in limited or sufficient numbers does not determine the existence of a relevant market for such an item. The decisive factor is whether trade relationships based on payment exist in respect of a good or a service." The Commission concluded that is and will remain the case with the transmission capacity for television signals whether in digital or analogue form. Whilst one might infer from this reasoning that the relevant market is that of transmission of television signals, the Commission rejected this conclusion mainly on the basis of a substitutability analysis.

The argument that cable, satellite and terrestrial frequencies are regarded by the consumer as interchangeable and entail comparable financial charges for viewers and

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124 See also Bertelsmann/Kirch/Premiere Decision, para 19.
125 In the UK, the regulatory authorities also refer to of Access Control Services which include services for authenticating identity, and services for encrypting or decrypting digital services that are not intended to be available to all. The digital services that might be controlled include home shopping and home banking services delivered via a set-top box or an integrated digital television set. Access Control Services are not supplied directly to end users but are supplied to third parties (such as retailers or banks) who wish to supply digital services to end users. On 31 August 1999 a Class Licence for the provision of Access Control Services ("the Access Control Class Licence") was granted. Access Control Services are construed services which control the supply of certain digital telecommunications services to end users. In September 2000 OFTEL issued a set of guidelines which set out the approach the Director General of Telecommunications expects to take when considering a Regulated Supplier determination. A Regulated Supplier determination can only be made in respect of Access Control Services.
126 MSG Media Service Decision, para 43.
for programme suppliers was not accepted by the Commission in the MSG Decision. On the contrary in that decision it was concluded that cable and satellite are to be considered as separate markets on the basis of the differences in both the technical conditions of the market and the financing of the systems. It was remarked that while terrestrial transmission and satellite television only require the viewer to install an aerial or a satellite dish at his own expense with a substantial one-off disbursement, cable television presupposes the maintenance of a cable network financed through cable fees. The different system of financing and of access to the signal were deemed to be the decisive distinguishing features.

The Commission acknowledged a certain degree of substitutability due to the availability of instalment payments. The impact of these factors which point towards substitutability was, in the Commission's view, counterbalanced by other elements. Firstly the cost of supply: if a supplier broadcasts solely via satellite (as opposed to both satellite and cable) he has significantly higher costs than a cable broadcaster. Secondly and perhaps more importantly, cable and satellite are considered separate markets because of the different household penetration. This difference can be caused by saturation in cable growth, as well as by limitations in the purchase of a satellite dish on "aesthetic" or administrative grounds. As a result of these limits in penetration of one of the two systems, customers often do not have a choice and experience in a lock-in effect once they have made the choice between one of the two systems. Whilst the risks of lock-in effects and the cost of switching appear a substantial threat to competition, it is doubtful whether this consideration would necessarily have an impact on the market definition. In fact in the BiB/Open Decision the Commission seems to have adopted a quite different approach at least in relation to pay TV services in the UK. It states that "Pay-television services provided by one means of transmission act as a competitive constraint using other means. [...] It is clear from end-user behaviour that the services are considered as substitutes."\textsuperscript{127} This led the Commission to conclude that in the UK there is a single market for pay television with no distinction between analogue and digital, nor between modes of transmission. Also in the Telia/Telenor Decision the Commission concluded that there are aspects which indicate that a certain degree of
substitutability may exist between cable, DTH and SMATV activities both in downstream retail TV distribution and in content buying.\footnote{\textsuperscript{128}}

Within satellite distribution the Commission has reiterated its analysis and found in *Nordic Satellite Distribution* two separate markets. The market for the provision of satellite transponder capacity and related service to broadcasters, which consists of launching and operating satellites and leased transponders to broadcasters for the transmission of TV signals. It also includes delivering their TV channels to distributors of cable TV and direct to home customers. Additionally, there is the market for the distribution of pay TV and other encrypted TV channels direct-to-home.

A broadcaster can therefore have a commercial relationship directly with the final viewer either by direct-to-home transmission or indirectly by obtaining transmission by cable operators. Therefore, a supplemental distinction needs to be made between the supply of television services at wholesale level (by satellite and other broadcasting companies to cable TV companies) and at retail level (to viewers and households).

Due to this composite relationship the Commission has preferred to keep a separate definition for the second market that, i.e. that of the distribution of pay TV and other encrypted TV channels direct to home. In the market for direct to home distribution, a company sells the channels direct to households and provides the subscriber with the necessary smart card for decryption. This market is in turn distinguished from that of operation of cable TV networks which again provides another form of composite relationship. In fact cable operators also aim at final viewers in that they sell and market TV channels and provide maintenance of the network.\footnote{\textsuperscript{129}} However, cable TV is also an important (sometimes predominant) form of transmission for satellite-distributed TV. The complex upstream/downstream relationship between the two forms of transmission has induced the Commission to treat them as separate markets. There is no justification for this on a demand level as recognised in the *BiB/Open* Decision. However, this

\footnote{\textsuperscript{127} Para 26.\textsuperscript{128} See paras 267-279.\textsuperscript{129} *Nordic Satellite Distribution* Decision, para 61.}
interrelation has created further market segmentation based on the level of the supply chain at which pay television firms operate (e.g. wholesale or retail).  

4. Conclusion: market definition between economic analysis and industrial convergence

The purpose of market definition is strictly linked to the assessment of market power. In competition law enforcement such an exercise must be based on a strict economic analysis along the lines of the criteria described above. However the very links between market definition and the competition assessment of market power and collusion create a confluence between the economic analysis and enforcement policy considerations. It is in this respect that convergence can have an impact on this exercise. There is widespread recognition of the convergence process which is occurring at industrial level within the communications sector.

At this stage, the higher level of convergence is to be found in networks rather than in consumer devices and, therefore, on the supply rather than on the demand side. Telecommunications operators are major players in the Internet access as well as backbone infrastructure. Broadcasters' ability to provide data services has been dramatically enhanced by the prospects of digital television and interactivity. Cable operators provide a range of telecommunication services (including voice telephony) in addition to the traditional television programming distribution and have become important players in the provision of Internet access.

The liberalisation process and competition together with the increases in capacity of broadcasting and telecommunications networks is converting transmission and delivery services into a low-margin high volume business. This has sparked a wave of horizontal and vertical mergers and joint ventures. In this context, horizontal alliances are normally aimed at increasing volume in the core activities of the undertaking operating at this level of the supply chain. At the same time economic players are repositioning

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130 It is against this background that the Commission's reference to the "markets for the wholesale supply of films and sports channels for pay television" contained in paras 28-29 of the BiB/Open Decision is to be read.
themselves through vertical alliances to take advantage of opportunities at different levels of the chain (that of content provision and packaging) where margins are higher. The risk is that in this process network operators are likely to move up the chain and abuse of their power in supply of infrastructure to reduce competition in service provision or packaging.

The most uncertain level of the convergence process is the last one involving services and markets. At this level the whole process will eventually have an impact on the final consumers. Nevertheless this delayed impact is foreseen by the industry as an attempt to obtain a position of control of the customer's choices. It is for this reason that supply substitutability plays a more important role in the assessment of market dominance. The new patterns of consumption which result from the convergence process, although unclear, will nevertheless play an important role. These new patterns will have to be predicted on the basis of the current characteristics of demand. This is an established practice of the Commission. This still appears to be the main criterion for the Commission's assessment of market definition.

The substantive assessment of the competition authorities has to try to keep the pace of the market's dynamism which generates the process of industry reshaping. Past behaviours or new market structures (in the form of agreements or concentrations) which come under the scrutiny of antitrust authorities have to be evaluated as far as possible by adopting the same perspective and breadth of analysis. Various potential examples of convergence in different areas concern the use of Internet for telecommunications and multimedia applications, or the utilisation of cable networks for both broadcasting and telecommunications access. However, it is unlikely that convergence will have an immediate enlarging impact on market definition. The awareness of the industrial process (despite all its elements of uncertainty and arbitrariness) might produce the opposite outcome. It could be argued that wider policy consideration might induce the Commission to combine narrow market definitions (deriving from the current economic and technological conditions or the present pattern of consumption) with more stringent action in the evaluation of the competition assessment.
The next Chapter examines how the traditional approach to market power analysis can be adapted to tackle actual or potential anti-competitive practices in the converging industrial environment of communications.

131 See as an example the Commission analysis with regard to the use of digital interactive TV services described above.
Chapter IV

*Market power and its obligations in a converging sector*

1. The legal context

Under EU law an undertaking's market position in the communications sector gives rise to a number of regulatory and antitrust obligations and implications. A set of regulatory obligations are currently imposed on communications companies which are deemed to have a significant market power. However, EU regulation is complemented by the crucial role performed by competition law in general and in particular the Treaty provisions on dominance and market power. In addition the principles developed in the interpretation and enforcement of competition law interact with and influence the regulatory provision to the extent that the current proposals for the overhaul of the EU communications regulatory package suggest the replacement of the notion of significant market power with that of dominance.

Traditionally the provisions concerning dominant position (i.e. at European level, Article 82 EC) have been used as an *ex post* (or after the event) repressive tool of abuse. However, the repressive function performed by Article 82 is integrated by the essential and increasingly preventive role of the EC Merger Regulation ("ECMR"). The latter allows the Commission to monitor new and developing markets both in terms of acquisition of market power obtained through the structural changes (i.e. mergers, acquisition or joint ventures) and, to a certain extent, in terms of the undertakings' cooperative strategies. *Market power* is therefore addressed at EC level by three sources of obligations: *ex ante* regulation; Article 82 *ex post* actions; and the ECMR (and

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1 See Chapter II.
Article 81 exemptions) “preventive” provisions. In Chapter II the ex ante legislative and regulatory framework was analysed. The next three chapters will look at how EC competition law operates in this sector.

Article 82 EC does not prohibit bare dominance but does seek to prevent the abuse of this position. This can be inferred from a literal reading of the provision:

"Any abuse by one or more undertakings of a dominant position within the common market or in substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."

The three fundamental components of Article 82 are commonly regarded as the existence of a dominant position in a substantial part of the common market, the abuse or the abusive exploitation of a dominant position and the effect on trade between Member States. To these one should also add the negative condition of the absence of objective justifications which, in any event, can be regarded as part of the analysis on the abuse. Chapter III described the variety of associated markets that form part of the communications sector. In this context abuses of market powers can arise in a number of situations: (i) conduct on a dominated market having effects on the dominated market; (ii) conduct on the dominated market having effects on the markets other than the dominated market; (iii) conduct on market other than dominated market having effects on the dominated market; and (iv) conduct on a market other than the dominated market having effects on a market other than the dominated market. One of the greatest advantages of applying antitrust rules to this sector is that the flexibility of the interpretations of the provisions on market power enables a very effective enforcement policy and judicial application. This flexibility enables the capture of a wide array of possible abuses which arise in the interrelated markets forming part of the communications sector.

See Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ 1998, C 265/02 ("the Access Notice"), para 81.
2. **The concept of dominance or market power**

The assessment of the dominance of an undertaking is strictly linked to the definition of the relevant market. In the previous chapter the difficulties which arise in a sector such as communications were examined so many factors and markets are in a relationship of mutual influence. A finding of dominance under EC law triggers a special responsibility on the dominant undertaking. It is therefore essential that dominance is detected and correctly evaluated in the different relevant markets as this notion constitutes the bedrock of the application of the provisions prohibiting abuses in the marketplace.

The classic definition of dominance within the meaning of Article 82 is to be found in the ECJ's *United Brands* judgment, where it was held that it consists in:

"...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers."\(^4\)

The method of determining dominance and its assessment depends on a number of variables. These include the level of market shares in absolute terms and relative to competitors; characteristics of demand such as its elasticity; the existence and the level barriers to entry of economic, legal and administrative nature; and other factors such as the size of the operation, access to financial resources, vertical integration, and breadth of product range.\(^5\)

Communications are a network based activity and networks constitute a typical example in which consumer co-ordination arises. Joining a network which enables the exchange

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Chapter IV

Antonio F. Bavasso

of messages or information in general is valuable because many other users obtain components of the same overall system. The value of membership to one user is positively affected when the network is enlarged by new memberships. Such systems are said to produce network effects or externalities. In a network, including a communications network, the demand for a good or service is a function of both its price and the expected size of the network. In the Commission's Notice on the application of the competition rules to access agreements in the telecommunications sector ("Access Notice") the Commission has accordingly recognised that the economic significance of obtaining access also depends on the coverage of the network with which interconnection is sought. In order to address this aspect the Commission will take into account not only the turnover figures but also the number of subscribers. The market power will therefore be calculated also "by the number of subscribers who are connected to termination points of the telecommunications network of that undertaking expressed as a percentage of the total number of subscribers connected to termination points in the relevant geographic area."

Of course the dominance test ultimately depends on the circumstances and, without a precise reference to them, it is impossible to describe conclusively the criteria to determine its existence or indeed to have a mathematical benchmark. Nevertheless consistent case law echoed in the Access Notice states that a market share of 50 per cent. indicates dominance. However other factors will also have to be taken into account. For instance there may be constraints which prevent an undertaking from behaving anticompetitively, such as the existence of competitors or, more generally, supply-side substitution, barriers to entry or exit, buyer power or even the conduct of an undertaking itself.

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8 Access Notice, para 72.
9 Ibidem.
10 See in particular AKZO, supra note II-89 above.
11 Access Notice, para 73.
In particular barriers to entry may create absolute advantages for incumbents if they have access to important assets and/or resources that are not accessible to a potential entrant or are accessible only at a substantial cost. They may create strategic advantages which typically are a consequence of being the first to enter the market or of tipping (i.e. pulling away from rivals once the undertaking has gained an initial edge). However, strategic advantages may also derive from the achievement of economies of scale or scope, or even information on the cost of production. Barriers to entry may also be created by exclusionary behaviour on the part of the undertaking that is already operating in the market when, for instance, an incumbent is able to exclude small rivals from interconnecting with its network, allowing interconnection only on unfavourable terms or degrading the quality of interconnection. In assessing the impact of barriers to entry authorities will normally look at cost of entry as well as history of entry to and exit from the relevant market.

For the purposes of the obligations imposed by the current ONP Directive, an organisation is presumed to have significant market power when it has a share of more than 25 per cent of a particular telecommunications market in the geographical area in a Member State within which it is authorised to operate. As we have seen in Chapter II above, SMP determinations relate to broad pre-determined markets set out in the Interconnection Directive (i.e. fixed public telephone networks and services, leased lines, and public mobile networks and services). There are differences between market definitions used in the application of EC or national competition law and the markets to which SMP determinations apply. In addition the approach adopted in the SMP determination currently in force can be criticised to the extent that it relies on a form

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12 In the context of Merger control see Case IV/M.856, BT/MCI (II), OJ 1997, L336, in which the Commission took the view that a dominant position in the markets for international voice telephony services on the US-UK route could be created due to the limited capacity of international transmission facilities coupled with the parties’ entitlements on existing transatlantic submarine cables between the UK and the US. Furthermore, as a result of the merger BT/MCI would have been able to carry transatlantic traffic over their own end-to-end facilities and the cost advantages produced by this could not be easily achieved by competitors. More recently see Case COMP/M.1439, Telia/Telenor, Commission Decision of 13 October 1999 (the “Telia/Telenor Decision”) in which the Commission considered the impact of branding, technical/financial support, proximity of relevant supporting networks and bargaining position; and Case COMP/M.1795, Vodafone Airtouch/Mannesmann, Commission Decision of 12 April 2000 (the “Vodafone Airtouch/Mannesmann Decision”).

13 See again the Telia/Telenor Decision but also in relation to Internet backbone Case IV/M.1069, WorldCom/MCI, OJ 1999, L116/1; similar issues arise in the context of broadcasting in relation to conditional access.
based approach which does not take into consideration important elements other than market shares which may indicate (or exclude) market power besides market shares.\textsuperscript{15} This invariably requires a detailed analysis of all the circumstances affecting the market including its definition. The significant market power threshold does not and should not necessarily imply dominance in antitrust terms. However, most recently the Commission’s proposals for a reform of the regulatory package seem to have aligned the notion of significant market power to that of dominance under Article 82.\textsuperscript{16}

The Commission generally evaluates the situation in the short term in accordance with its analysis of the relevant market. However, we have seen how the supply-side substitutability analysis performed in the definition of the relevant market must interact with the substantial assessment of dominance to permit an evaluation of an undertaking’s behaviour. The Commission itself declares in the Access Notice that, in assessing dominance, it will examine the existence of alternative infrastructures or the existence of other network providers. Furthermore it is possible to envisage an impact of alternative means of communications, which can be technologically developed to increase their substitutability. The pace of technological developments of certain markets as well as the strategic importance of the communications sector, requires the Commission to take a more long sighted perspective to the issue of dominance and a subtle approach in the evaluation of the possible abuses. In assessing the market power of an undertaking the discretion of the Commission should extend to the likely potential development of a sector as a whole and to the links between distinct but related markets within.

The Commission has set out its policy with regard to the assessment of an undertaking’s conduct in different but linked markets in the context of telecommunications in the recent Access Notice. The document contains various references to the concept of essential facilities in the substantial obligations imposed on the dominant undertakings.

\textsuperscript{14} Article 4(3) of Directive 97/33/EC on interconnection in telecommunications with regard to ensuring universal service and operability through application of the principles of Open Network Provision (ONP).

\textsuperscript{15} See A. Tarrant, \textit{supra} note II-86 above.

\textsuperscript{16} See Chapter II above.
This doctrine will be dealt with specifically in Chapter V. The Commission recognises that in the complex telecommunications system, in order to provide services to end users the service provider will often require access to one or more upstream or downstream facilities. In the final version of the Notice\textsuperscript{17} the Commission remarks that:

\textit{``to deliver physically the service to end users, [the service provider] needs access to the termination points of the telecommunications network to which these end users are connected. This access can be achieved at the physical level through dedicated or shared local infrastructure, either self provided or leased from a local infrastructure provider. It can also be achieved either through an access provider who already has these end users as subscribers, or through a service provider who has access directly or indirectly to the relevant termination points ...''}

\textit{In addition to physical access, a service provider may need access to other facilities to enable it to market its service to end users; for example a service provider must be able to make end users aware of its services. Where one organisation has a dominant position in the supply of services such as directory information, similar concerns arise as with physical access issues.''}\textsuperscript{18}

The issue of access is undoubtedly the \textit{conditio sine qua non} for the effective establishment of competition in many areas. In Chapter II we have seen the importance that is attached to the issue of unbundled access to the local loop. This is now subject to a Regulation which echoes the obligations deriving in competition law under the essential facility doctrine described in the next chapter. The Regulation, which reflects the political consensus reached on the need to proceed quickly with the opening up of the markets in this area, combines these substantive obligations with the legal certainty of a legislative measure thereby seeking to remove delay and discretion involved in the implementation process. With the advent of convergence which also affects

\textsuperscript{17} This did not appear in the draft (COM(96) 649).

\textsuperscript{18} Access Notice, paras 49 and 50.
broadcasting, the relationship between different markets or facilities which influence neighbouring markets can have a great impact on the successful establishment of a competitive environment. In this sector, the provision of services and the access to facilities is often characterised by an interrelation between upstream and downstream markets. In particular the provision of services may depend on access to facilities which enable the provider to reach end users or from interconnections with other service providers which can indirectly provide access to those end users.

The examples given by the Commission in the Access Notice show only some of the concerns that are likely to arise in the communications sector at large. These considerations can potentially be replicated in a vast number of cases and, due to the converging nature of communications, various means of communications are increasingly linked by using infrastructure which was originally designed or conceived for more restricted use: voice telephony over the Internet is one example, but also interactive services, broadband switched services, the use of cable infrastructure for both telecommunications and broadcasting, and the envisaged usage of TV terrestrial frequencies for mobile communications. Moreover very important issues arise in connection with conditional access and gateway facilities in digital platforms.

A demand-side analysis remains undoubtedly very important in the context of market power assessment. As mentioned above within the communications sector various markets are affected by network externalities whereby the utility that a user derives from a good or service increases with the number of other users who are in the same network and with the consequent bandwagon effects.19 When such network externalities exist, consumers must form expectations regarding the size of competing networks. This generates demand-side economies of scale which vary with consumer expectations. Equilibria verified at an economic level demonstrate20 that if consumers expect a seller to be dominant then “they would even be willing to pay more for the firm’s product, and it will in fact be dominant.” Furthermore, in communications networks, compatibility

19 M. L. Katz and C. Shapiro, supra note 1-6 above, at 424.
20 Ibidem, at 425.
permits the expansion of two networks to include the membership of both. In this industry the number of externalities is therefore essential and is certainly one of the most important assets of a company. These arguments which originally were particularly relevant with regard to private communications (such as the services of voice telephony) now also include Internet connectivity and the various TV interactive services.

The dominance assessment should not overlook this potential relationship between different levels of service provision (i.e. upstream and downstream). In a market which has network effects there is a natural tendency towards standardisation and using the same system. If two systems are incompatible and compete they are subject to “tipping” which is described by economic literature as the tendency of one system “to pull away from its rivals in popularity once it has gained an initial edge.” Whilst it has been found that compatibility relaxes competition in the early stages of a product cycle, it prevents one undertaking from gaining control of the market and tends to intensify competition in a subsequent stage. These types of effects are to be distinguished from first mover advantages. In the case of tipping the advantage does not derive from the timing of a commercial strategy, but from the achievement of a “decisive lead” over competitors.

Tipping effects can arise both in broadcasting and with regard to telecommunications networks. In the former case when consumers believe that two mutually incompatible TV standards will not both survive, they will be inclined to deal with the market leaders in order to avoid the risk of buying TV equipment which will become useless. This effect might prove crucial in the switch over from analogue to digital TV. In telecommunications networks the tipping effect will normally derive from the attractiveness of the expected size of the network. Access and interconnection, the

21 M. L. Katz and C. Shapiro, supra note IV-6 above, at 109.
22 Ibidem, at 106.
24 J. Temple Lang, supra note II-17 above, at 402.
gateways to compatibility, are therefore two crucial factors to maintain, develop or improve competition. In broadcasting the tipping effects are related to the content and the source of financing. In pay TV as well as the advertising financed TV a tipping effect may arise because television which attracts more viewers (hence subscription fees and/or advertising revenues) may have more financial resources to purchase more and better programmes. This will in turn attract a larger audience. Undoubtedly, the evaluation of tipping effects will have an important role to play particularly in the preventive authorisations of concentration or Article 81 exemptions.

3. **Convergence and complex dominance**

The position of the same undertakings in neighbouring (or converging) markets can, in certain circumstances, be a decisive factor in assessing dominance. EC competition law allows a legal assessment of these situations of complex dominance. Complex dominance refers collectively to those situations in which dominance is achieved either by the combined exercise of economic powers by two or more economic players in the same market ("joint or collective dominance") or by the combination of effects in two potentially distinct markets ("extended or leveraged dominance"). In the context of the dominance assessment carried out by the Commission in communications merger cases analysed in Chapter VI below, the Commission has often expressed concerns about the interrelation between the parties' position in neighbouring markets as a result of horizontal or vertical integration. EC competition law allows a legal assessment of these situations of dominance.

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26 See the Telia/Telenor Decision, para 265, in relation to broadcasting on the ability of the merged entity to leverage its position at the infrastructure level into the downstream distribution level. In relation to vertical integration see the example of the recent joint venture between Vodafone, Vivendi and Canal Plus for the creation of Vizzavi an Internet portal which would have developed, marketed and provided a branded multi-access Internet portal throughout Europe providing a seamless environment for web-based interactive services across a number of platforms, such as fixed and mobile telephony networks, PCs and palm tops, as well as television sets. The Commission considered that the transaction would have lead to competitive concerns in the developing national markets for TV-based internet portals and the national and pan-European markets for mobile phone based internet portals. In order to obtain clearance the parties therefore provided undertakings to ensure that the default portal could be changed should the customer so wish. This was intended to remove the potential detrimental and discriminatory vertical effects of the transaction. See Commission Press Release "Commission clears Vizzavi Internet portal venture between Vodafone, Vivendi, and Canal + subject to conditions" IP/00/821 of 20 July, 2000.
In addition we have seen above that, as a result of convergence, a variety of different situations might arise in which dominance, abuse and effects of the conduct may take place across different markets. Whilst the current degree of convergence might not justify new market definitions within the communications sector, it is very likely that a company dominant in one market might seek to leverage its position to exploit it in a different but related market. Conversely, at a more advanced level of convergence, two companies might be in a position of collective dominance in a market which is closely related to the two separate markets where they operate independently.

3.1 Joint or collective dominance

Article 82 also applies when more than one company are jointly or collectively dominant. This is one of the means by which the Commission is seeking (sometimes controversially) to tackle oligopolies. This form of dominance can be critical in a sector with high barriers to entry which favour concentration and may result in an impairment of its technological dynamism. In addition joint dominance can potentially be envisaged if two operators offer similar services in different areas of the same geographic market or even if two undertakings operate alternative and substitutable forms of communications. That may be the case for telecommunications, cable operators or operators of alternative networks of communications conveyance who, jointly, can hold a dominant position on access to various competing methods of communications.

The situation of collective dominance covered by Article 82 differs from that in which two companies collude or make anticompetitive agreements which would fall under Article 81. It entails what economists refer to as “tacit collusion”; that is the situation

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27 For instance a telecommunications company can try to enter the market of visual information or products by using telecommunications networks.

28 Temple Lang gives the example of a company controlling television cables or broadcasting television programmes supplied to households via cable that offers interactive services which may be a duopolist in the market for these services because only it and the national telecommunications company are in a position to offer them on a nation-wide basis, supra note 11-17 above, at 404.

29 T. Soames, “An Analysis of the Principles of Concerted Practice and Collective Dominance: A Distinction without a Difference?” 17 ECLR (1996), 24. In particular, the difference between concerted practice and collective dominance was clearly spelled out by Advocate General Slynn in Zuchner: “A concerted practice, while lacking the consensual nature of an agreement or decision, implies a series of independent acts which between them substitute co-operation.
whereby undertakings co-ordinate their behaviour to charge higher prices or different marketing conditions than they would be able to do without co-ordination to the detriment of customers and ultimately consumers. In legal, as opposed to economic terms (for which the question is irrelevant), this situation falls between Article 81 (on agreements and concerted practices, essentially explicit collusion) and Article 82 (on abuse of dominance). Whilst the Court and the Commission have not excluded the parallel application of the two provisions as well as acting only under one of the two when both apply, there is no explicit constraint under the EC competition rules on the unilateral conduct of an undertaking that is not in a dominant position. The early EC judgments on Article 86 (now Article 82) did not accept the notion of collective dominance and this notion struggled to find its way into the EC case law. Nevertheless the concept of collective dominance has been progressively accepted although, at first, subject to the existence of the “economic links” as a result of which two or more undertakings hold a dominant position vis à vis other operators on the same market. The reference to economic links was first suggested in Società Italiana Vetro and subsequently strengthened in Almelo where the existence of links was treated not merely as an example but as a necessary requirement for the establishment of collective dominance. This approach was reiterated in subsequent judgments which refer back to Almelo. In Compagnie Maritime Belge the Court of First Instance reaffirmed that Article 82 is capable of applying to a situation in which several undertakings together

31 In Hoffman-La Roche, supra note III-7 above, para 39 the ECJ distinguished oligopolistic interdependence from single firm dominance. Article 86 (as it then was) did not apply to interdependence.
33 Case C-393/92, Municipality of Almelo and Others v. Energiebedrijf IJsselmeij NV, [1994] I ECR 1477, paras 41 and 42.
hold a dominant position on the relevant market, but this occurs where links are established. The meaning of "links" remained for a long time unclear.

In particular, it was unclear whether the notion could extend to cover a situation of interdependence where, however, the competitors are not explicitly colluding. Such a wide interpretation could help the ECJ to fill what is regarded as one of the gaps in the Treaty: the lack of control over unilateral facilitating devices and exclusionary practices by oligopolists which may be extremely important in heavily concentrated markets such as some in the communications sector. In the CFI introduced the long awaited clarification and extension of the concept of collective dominance. In that case, in open contrast to the Almelo precedent and an entire line of case law which referred to it, stated that the Court "...referred to links of a structural nature only by way of example and did not lay down that such links must exist in order for a finding of collective dominance to be made." It then added that "...there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate

37 See V. Korah, "The Competition Act Some Foreseeable Problems", in Green and Robertson (Eds.) The Europeisation of UK Competition Law, (Hart, 1999), 61, at 66. The scenario was possibly more confused after the Kali und Saltz judgment (supra note IV-33 above) in which the ECJ, in accepting the extension of the doctrine to the EC Merger Regulation, used the expression "correlative factors" instead of "economic links." Korah argues, based on a literal interpretation of the judgment, that the correlative factors test is not exhaustive. The Court in fact describes collective dominant position as "a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently..." (emphasis added) supra, para 221. This approach seems to subscribe entirely. She also suggests that the expression used by the Court in Kali und Saltz might have a looser meaning than "economic link". Unfortunately however this expression was not intended to introduce a new test for collective dominance (comments made by Judge Edward during the UCL Conference on The Europeisation of UK Competition Law, 10 September 1998). Advocate General Fennelly also confirmed that the expression "factors giving rise to a connection between them" or "correlative factors" did not seem to him to be any different from economic links (see Compagnie Maritime Belge NV, supra note IV-31 above, per AG Fennelly Opinion of 29 October 1998) and therefore the ECJ case law cannot be seen as having taken any step in tackling the oligopolistic practices mentioned above that may arise in a highly concentrated sector such as that of communications.
40 Almelo, supra note IV-34 above, paras 41 and 42.
41 Para 273.
characteristics, in particular in terms of market concentration, transparency and product homogeneity those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by others, so that it would derive no benefit from its initiative. More recently the ECJ in the Compagnie Maritime appeal clarified that whilst it is clear from a literal reading of Article 82 that it applies to dominant positions held by several undertakings, the very concept of undertaking presupposes economic independence. It follows that the expression "one or more undertakings" used in Article 82 "implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity." This is the current definition of collective dominant position in ECJ case law. The Court went on to say that the existence of an agreement or of other links in law is not indispensable to a finding of collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question. Furthermore the Court was very careful in stressing that as for single firm dominance a finding of a dominant position is not in itself a ground for criticism and does not prejudge the fundamental question as to whether the collectively dominant undertakings have abused that position.

3.1.1 Joint dominance in communications

Some types of examples mentioned by the CFI in Gencor by way of examples are likely to occur often in the communications sector. The CFI expressly referred to certain
circumstances which are conducive to a situation of collective dominance, namely "market concentration, transparency and product homogeneity" as a result of which firms are "in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market." In a situation of collective dominance the analysis of abuse and that of dominance are strictly linked and not easily severable. If collective dominance equates to tacit co-ordination and for tacit co-ordination to occur "it is necessary for firms to indulge in a common form of behaviour" there is a behavioural (or dynamic) element in what is normally a static assessment of market dominance. In economic terms the "credibility of co-ordination" is a distinctive element of what lawyers call collective dominance. In other words collective dominance requires that the jointly dominant companies are able to monitor quickly and easily each other's behaviour and to punish deviators, hence Gencor's reference to concentration and transparency.

Furthermore large chunks of it are subject to regulation which by definition increases transparency, for instance by requiring publication of prices. This could have the side effect of supporting oligopolistic behaviours. However the notion of credibility of co-ordination also entails the possibility of retaliatory mechanisms, to be put in place to impose sanctions on those firms that deviate from the common behaviour. It is unclear whether under EC law an effective retaliatory mechanism is accepted as a legal requirement to establish collective dominance. The doctrine of joint or collective dominance has been applied by the Commission, not without controversy, in relation to the activities of tour operators. The Decision in Air-tours/First Choice, which is still one of the most elaborate applications of the doctrine to date, stated that the Commission did not regard "a strict retaliation mechanism, as that proposed by Air-tours in its reply to the Statement of Objections, as a necessary condition for collective dominance in this case; where, as here, there are strong incentives to reduce competitive action, coercion may be unnecessary." The case is under appeal. These uncertainties as to the legal

47 R. Whish, supra note IV-37 above, at 584.
48 This result, although paradoxical, is not altogether unusual; in relation to the possibility of extending a dominant position through the action of a public authority; see J. Temple Lang, supra note II-17 above, at 405-406.
requirements and the economic bases for the application of the doctrine in EC law risk undermining its credibility. This risk is even greater in a regulatory context where the \textit{ex ante} nature of the authorities' action demands greater certainty in the legal basis.

In relation to telecommunications, the Commission's Access Notice set out an the interpretation of the doctrine of collective dominance which is in line with the interpretation subsequently confirmed at judicial level. In that document the Commission points out that the notion of joint dominance should not be used to extend the scope of the relevant geographic market as "two companies, each dominant in a separate national market, are not the same as two jointly dominant companies". In fact the Commission considers that "for two companies to be in a joint dominant position, they must together have substantially the same position vis à vis their customers and competitors as a single company has if it is in a dominant position."

In order to have joint dominance the Commission regards as necessary (although not sufficient) that there is no effective competition between the companies on the relevant market. This may be a consequence of certain types of agreements (in particular co-operation or interconnection). With regard to economic links the Commission expressly stated that it does not consider "that either economic theory or Community law implies that such links are legally necessary for a joint dominant position to exist." According to the Commission, the "kind of interdependence which often comes about in oligopolistic situations" might be sufficient. The Access Notice concludes that the existence of economic links between the jointly dominant companies will \textit{de facto} occur particularly in telecommunications but also in other communications markets. However, such links are not legally or indeed economically necessary to establish joint dominance.

Another interpretation of joint dominance can potentially be envisaged if two operators offer similar services in different areas of the same geographic market, or even if two undertakings operate alternative and substitutable forms of communications. That may be the case for telecommunications, cable operators or operators of alternative networks.

\textsuperscript{50} Access Notice, para 78.
of communications conveyance who, jointly, can hold a dominant position on access to various competing methods of communications.

It is clear that the Commission is determined to use the notion of joint dominance as a basis for both competition law enforcement and regulatory action (as we have seen in Chapter II). In particular the analysis of the development of the application of the doctrine shows that it is unclear whether its economic bases are at this stage sufficiently established to enable a sound application of the regulatory obligations under the new framework. Regulation of oligopolistic dominance, which may be relevant particularly in relation to mobile communications, may not find an adequate bedrock in the current status of development of the concept of collective dominance under EC law either for competition law enforcement or regulatory action. As a result it is unclear whether oligopolistic markets can be effectively monitored ex post or regulated ex ante pending a consolidation of the notion under EC law. On the other hand one of the negative consequences of the proposed codification of the Framework Directive in the use of joint dominance (as defined in Article 13 of the Directive) lies in the risk of a formalistic application of the principle rather than an economic analysis of the causes of joint dominance including the possibility of using retaliation. In any event the notion of collective dominance is likely to play a key role and will perhaps be source of further controversy.

3.2 Extended or leveraged dominance

One of the most flexible interpretations of Article 82 is that it can apply in cases in which the conduct giving rise to the abuse took place in a market other than the dominated market and having effects either on the dominated market, or, most strikingly, on a market other than the dominated. As to the latter scenario, the ECJ

\[\text{Access Notice, para 79 referring to Case IV/M. 190, Nestl\'e/Perrier, OJ (1992) L 356/1, in which the Commission applied the concept of collective dominance to mergers.}\]

52 The most notable examples of this is AZKO, supra note II-89 above.
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ruling in Tetra Pak\textsuperscript{53} (expressly referred to in the final version of the Access Notice) is landmark decision and a point of reference whose \textit{dicta} may have wide ranging application in the communications sector. These interpretations enable the extension the relevance of dominance to the assessment of neighbouring markets and aim at preventing the leveraging of market power in related markets. Therefore the definition of dominance adopted in Tetra Pak may prove to be very important in the future competitive assessments in communications. Although the case does not concern the communications sector, the Commission has acknowledged the impact of this ruling with regard to telecommunications, and one can easily extend this analysis to other markets within the wider communications sector. In addition the proposed Framework Directive on electronic communications analysed in Chapter II above refers to this type of dominance in the definition of operators with significant market power.

In Tetra Pak the dominant company held a market share of 78 per cent. (seven times more than its closest competitor) in the overall market for packaging both aseptic and non-aseptic cartons. The CFI had found that in the aseptic market the company held a quasi monopolistic position which amounted to a 90 per cent. share. The structure of the non-aseptic market was oligopolist and Tetra Pak held 50 per cent. of the market. Tetra Pak was accused of having engaged in predatory practices in the non aseptic market. Following an investigation by the Commission the company was ordered to terminate the infringement and fines were imposed on it. The decision was appealed before the CFI and then to the ECJ.

The ECJ upheld the finding of the CFI according to which, given the extremely close links between the dominated and non-dominated market, and given the very high market share on the dominated market, the Court ruled that Tetra Pak "was in a situation comparable to that of holding a dominant position on the markets in question as a whole."\textsuperscript{54} This justified the application of Article 82 to the conduct in question.


\textsuperscript{54} Para 31.
However the Court was careful to stress that this "can only be justified in exceptional circumstances."

3.2.1 Extended or leveraged dominance in communications

In the communications sector this reasoning is extremely important to sanction disguised abuses which leverage the links deriving from technological developments in general and digitalisation in particular. Furthermore, given the various types of high barriers to entry (both economic and technical), the Commission envisaged an application of the Tetra Pak principle of extended dominance in the case of an telecommunications operator with a very high degree of market power on at least one market as holding "a dominant position on the markets in question as a whole." This reasoning is likely to find an increasing scope for application in a sector in which undertakings are becoming involved in both broadcasting and telecommunications to exploit the commercial effects of convergence.

In fact the services of traditional telecommunications operators have an increasing number of application areas (i.e. content and interactive services), whilst content providers rely on infrastructures to control distribution and gain direct contact with customers. When these services are provided by the same undertaking on different markets there is scope for application of the extended dominance doctrine elaborated in Tetra Pak. However the Commission will have to apply a rigorous analysis to the circumstances, as there is a risk of a superficial interpretation which overestimates the importance of the links between two markets. Conversely in a sector which is technologically driven the assessment must be forward looking as the emergence of links which may appear distant or tenuous at the current stage of technological development may actually very rapidly become important. An analysis of the genesis and judicial application of this doctrine show that its reliance on the factual analysis of the links between markets may create difficulties in the transposition of its application in a regulatory context as envisaged by the Framework Directive. This is due to the fact

55 Para 27.
56 Access Notice, para 67.
that in a regulatory context where a determination of extended or leveraged dominance has general application the doctrine loses its flexibility, and potentially the ability to assess correctly the necessary premise for a finding of abusive practices in the individual cases.

4. Abuses of dominance

Article 82 contains an explanatory list of what abuses may consist of. However this is not conclusive and there is no definition of what constitutes abuse of a dominant position. The notion of abusive conduct for the purposes of Article 82 can be interpreted broadly as encompassing both positive action (such as tying, granting rebates or implementing a predatory pricing policy) and negative action (consisting in a refusal to supply or provide access) or even failing to act (in the sense of not reacting to market demands). An early definition of the concept of abuse in the ECJ case law came in Hoffman-La Roche:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where as a result of the very presence of the undertaking in question in question, the degree of competition is weakened and which through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

The Tetra Pak ruling shows that the major concern of the Court was to preserve the existing competition and to promote its growth in those areas where it was considered

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57 Article 82 provides that: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such an abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

58 Hoffman-La Roche, supra note III-7 above, para 91.
weak. It could be argued that this proactive function (as opposed to a regulatory role consisting of monitoring an existing mature competitive environment) has provided an impulse towards an interpretation of Article 82 as an objective concept.

The test set out by the Court is also based on the notion of “special responsibilities” which need to be respected by a dominant undertaking. In this respect it was held that “a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.” The Court said that the actual scope of the special responsibility imposed on the dominant undertaking must “be considered in the light of the specific circumstances of each case, reflecting a weakened competitive situation.” However, undoubtedly a finding of dominance has an impact on the subsequent (and necessary) evaluation of the abusive character of the conduct.

On the one hand this approach is mitigated by the acceptance of objective justifications, recognised by the ECJ’s jurisprudence, whereby even an undertaking in a dominant position cannot be deprived of the right to protect its own commercial interest as long as they are not aimed at strengthening the dominant position and thereby abusing it. On the other hand, the Court of Justice has ruled that “a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators.” The Commission has recognised that this equality of opportunity is particularly important “for new entrants to a new market in which a dominant operator on a related but separate market is in the course of establishing itself.” Article 82 is therefore aimed at preventing the abuse (or

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59 Michelin v. Commission, supra note II-87 above, para 57.
60 Tetra Pack II, supra note IV-91 above, para 115.
62 France v. Commission, supra note IV-33 above, para 51.
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strengthening) of a dominant position and its extension into separate but related markets by means of abusive behaviour.

The types of abuse covered under Article 82 can be distinguished on the basis of whether they result in a reduction of competition and an alteration of the competitive structure of the market or whether they relate to the unfairness of the competitive behaviour of the market players. Whilst the latter type of abuses are less likely to affect the structure of the market unfavourably a distinction is not always possible or indeed satisfactory. Within the range of the various abuses or abusive exploitation of a dominant position which have been sanctioned under Article 82 we will concentrate on those which result in anticompetitive, exclusionary and discriminatory practices of undertakings which hold not only a dominant but also a strategic position in the communications sector.

4.1 Article 82 and pricing in communications

Article 82(a) expressly mentioned as a form of abuse "directly or indirectly imposing unfair purchase or selling prices." Unfair pricing may be either unfairly low pricing or unfairly high pricing. The former, when it is designed to eliminate competitors, is defined as predatory pricing and will be analysed separately below. As far as unfairly high pricing is concerned charging a price which is excessive in relation to the economic value of the good is normally considered to be abusive conduct. The benchmark for this analysis may be inferred by the prices of comparable goods or by examining the costs of the relevant goods. The Court since United Brands has not condemned excessive pricing. However the Commission has been particularly vigilant about pricing policies where prices vary between Member States without objective justification. This conduct is considered as particularly serious when is used as a method of market partitioning by insulating high prices areas, which leads to a division of the common market. In general a “meeting competition” justification is considered acceptable for discriminatory pricing

64 The prevention of structural strengthening is mostly achieved through the application of the EC Merger regulation.
(not predation) as a purely defensive strategy by a dominant company which is trying to preserve its customer base.\textsuperscript{66}

The issue of pricing is of course critical in both the liberalisation process and the subsequent stage of maintaining a competitive environment in newly liberalised markets. In communications, despite the adoption at European level (and their implementation at national level) of regulatory measures which deal with pricing,\textsuperscript{67} competition provisions including Article 82 will continue to carry an essential function within antitrust enforcement with respect to \textit{ex post} control. In this context the regulatory provisions on prices may be taken into account in the application of the general rules.\textsuperscript{68} However, as we will see, the Commission's focus in relation to pricing seems to be on the exclusionary or single branding effects of these policies rather than on a pure regulatory function of price setting which is better performed, to the extent that it is necessary, by sector-specific regulators.

My analysis of pricing strategies in this sector will start by an evaluation of the issue of cost allocation and of the practice of so-called of cross-subsidisation which is likely to occur in a multi-product sector encompassing several linked markets.

4.1.1 Cross subsidy and cost allocation
Cross-subsidisation has been defined as the "misallocation of common costs between different product or geographic markets."\textsuperscript{69} This definition already contains an implicit negative evaluation of this practice which, in fact, must be assessed against competition law rules and principles. The Commission has adopted a similar definition in its Guidelines on the application of competition rules to the telecommunications sector in which it states that "cross subsidization means that an undertaking allocates all or part
of the costs of its activity in one product or geographic market to another product or geographic market."\textsuperscript{70}

The definition adopted by the Commission does not refer to the common nature of the costs. This aspect cannot be overlooked. If the definition of cross-subsidisation is restricted by definition to the existence of common costs, despite covering the majority of cases involving cross-subsidisation, it leaves out those cases in which cross-subsidisation merely takes place because of "economic links" between undertakings operating in different markets without the existence of common costs of production.

Most cases involving cross subsidisation presuppose a scenario which occurs often within the communications sector: that of an undertaking or a group of undertakings active in different markets in which they might have different market positions. In this respect cross-subsidisation characterises the complex situation that the \textit{Tetra Pak} doctrine of extended dominance addresses in the preliminary dominance test. It can arise in various forms ranging from transfers of resources or misallocation of common costs through an equal pricing policy for different categories of customers or geographical areas (for instance charging subsidising telecommunications in remote areas with charges in prices of highly populated areas) or subsidising one activity subject to potential competition with profits gained in another in which a dominant position is held as a result of economic or legal conditions. Whist the former normally does not result in an illegal practice and is often subject to regulatory obligations such as universal service, the latter type of cross-subsidisation is more likely to be covered by competition law. This type of situation is likely to arise particularly when a company is active in both liberalised and reserved areas.\textsuperscript{71} Furthermore it may be argued that cross-subsidisation may occur if resources are transferred between activities financed by the state (such as public fee based broadcasting) and activities which are supposed to be carried out in an entirely privatised environment.

\textsuperscript{70} OJ 1991, C-233/02.
\textsuperscript{71} L. Hancher and J. Buendia Serra, \textit{supra} note IV-67 above, at 905.
In antitrust terms, the mere transfer of resources does not per se constitute an abuse; in fact cross-subsidisation is simply to be regarded as a descriptive concept which characterises interrelation in terms of cost allocation between various geographic or product markets but does not in itself indicate a particular form of abuse of dominant position. However, cross-subsidisation might indeed constitute an important element of certain abusive practices which are illegal as far as they infringe competition rules. Whilst it usually takes the form of unilateral abusive practices which are sanctioned under Article 82, the issue has often been analysed ex ante by the Commission in the context of Merger Regulation or particularly in the framework of Article 81 notifications for partial function joint ventures in respect of which there are often more complex and closer relationships between parent companies.

The issue of cross subsidy of related activities can describe a dimension of an abuse which, however, would have to be framed in traditional forms of exploitation ranging from predatory pricing (e.g. when predation of one company is financed from subsidies from an affiliated entity) or price squeeze, to tying where a subsidised provision of a service is compensated by tying obligations. The common element in the evaluation of the potentially abusive effects of these practices is to be found in the assessment of subsidy recovery and allocation of costs.

Price squeeze may arise where an undertaking adopts a pricing policy which may force the competitors on the downstream market out of the market. This situation is considered by the Commission in the Access Notice. According to the Commission an abusive price squeeze can be demonstrated by showing that the dominant company’s own downstream operations could not “trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company.” This form of pricing is therefore of paramount importance in the assessment of the behaviour of dominant undertakings operating at different levels of production or

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72 Ibidem, at 910.
74 Paras 117-119.
service provision as well as in related but potentially distinct markets. It is unclear whether in the Commission's interpretation this practice differs from cross subsidisation. According to the Commission, the improper allocation of transfer prices or costs to certain operations which provide access may in itself be considered abusive.

To a certain extent this issue is addressed by regulatory measures such as the Recommendation on Accounting Separation in the context of telecommunications interconnection. However, this in itself does not pre-empt the use of an Article 82 case by case analysis in this as well as in other areas. The analysis to be carried out in these situations is mainly based on efficiency of production. In fact the Commission seems to believe that a price squeeze can be demonstrated by showing that the margin between the price charged to competitors on the upstream market (including the dominant company's own downstream operation if any) and the price that the dominant undertaking (such as the network operator in the case of telecommunications) charges in the downstream market is insufficient to obtain a normal profit. This argument is always open to a rebuttal on the part of the dominant undertaking\(^75\) which could prove the exceptional efficiency of its downstream operations. Even if this occurs in an upstream-downstream relationship, "the improper character" of this practice will still have to be subject to a strict economic appraisal of the cost allocation.

### 4.1.2 Economics of cost allocation

The economic approach to cost allocation may be very controversial. A conclusive analysis of the economic theory in this field is beyond the scope of this study.\(^76\) However, a brief analysis of the main approaches is necessary in order to carry out a meaningful assessment of what constitutes cross-subsidisation in the context of communications. In relation to telecommunications, the activities are characterised by economies of scale\(^77\) in the provision of networks (which derive from the fact that there

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75 In the Access Notice para 118 the Commission refers to its decision in Brown Napier/British Sugar, OJ 1988, L 284/41 in which the margin between industrial and retail prices was reduced to the point where the wholesale purchasers with a packaging operation as efficient as those of the wholesale supplier could not profitably serve the retail market.


77 Economies of scale arise when average cost falls as output increases.
are large elements of cost that do not vary with the number of customers or calls, even in the long run) and economies of scope in the provision of services which stem from the existence of common costs (i.e. costs of productions that are shared between two or more products). The implication of this is that telecommunications companies tend to be multi-product firms and their "pricing policies have to take into account the need to recover both the fixed costs of supplying a service and the common costs." Therefore undertakings in this sector enjoy, subject to regulation, a certain degree of freedom to offer a range of prices and to choose the market from which to recover their costs.

The traditional approach in cost allocation is based on Fully Distributed Cost (FDC) criterion which presupposes that all costs, including common costs, are allocated to particular outputs. However, recent economic debate has concentrated on two approaches and a combination of them: Incremental Cost (IC), Stand Alone Cost (SAC) and "floors and ceilings" approach. The (average) incremental cost of product $i$ is the additional cost caused by producing that product rather than not producing it at all, divided by the number of units of product $i$ holding constant the production of other goods. An activity which at least covers its incremental costs would not be deemed to be the recipient of a cross subsidy. The (average) Stand Alone Cost is the cost per unit of producing $i$ in isolation. These concepts can be combined by putting them into a "floors and ceilings" relationship. The assumption is that there is an absence of subsidy when customers are being charged prices that reflect the cost of serving them and no more. Therefore there is no subsidy if prices paid by consumers lie in the so called core area the floor of which is defined by incremental costs and ceilings of which are delimited by stand-alone costs. The alleged benefit of this system is that new

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78 Economies of scope exist where average cost falls as more types of products are produced.
80 L. Hancher and J. Buendia Serra, supra note IV-67 above, at 906 which refers also to the Fully Distributed Cost approach which consist in allocating all costs, including common costs, to a particular output.
83 This is the so called Faulhaber rule; see G. Faulhaber, "Cross-subsidization: Pricing in Public Enterprises" American Economic Review (1975), 966; W. J. Baumol, J. C. Panzar, and R.D. Willig, supra note I-35 above; G. B. Abbamonte, supra note IV-76 above.
entrants are protected from predation by the incremental cost floor and customers are protected from excessive pricing by the stand alone ceiling.

In the communications sector we can think of the example of a telecoms operator which decides to use its structure to provide a new "convergent service". If the fees charged for the new service generate revenues equal or in excess of the additional cost of providing the service they will satisfy the floors and ceiling rule even if such fees are not sufficient to cover an equal or proportionate share of the common costs. Some criticisms have been made of this approach particularly with regard to cost calculation. One of the main problems remains that of the time horizon of the analysis. Costs may be calculated from an historic perspective or on a current cost basis in the long or short run. In the context of telecommunications this aspect will be dealt with more in relation to predatory pricing. It is doubtful whether this approach can provide a viable benchmark to establish predation or indeed other forms of exclusionary pricing practices.

4.1.3 Predatory pricing

"Predatory" describes the pricing policy which occurs when a dominant undertaking sets prices at such a level that a firm which is at least as efficient would make economic losses when operating in the market. It has been rightly remarked that the immediate consequence of the definition given above is that at such a level of prices the dominant undertaking must be making losses otherwise a more efficient competitor could undercut his prices and still make a profit. In economic terms predatory pricing must satisfy two conditions: (1) low prices which truly induce the exit of a competitor; and (2) that the exit of that entrant or competitor will lead to a recoupment of the losses.

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84 See Abbamonte, supra note IV-76 above, at 417 who notes that in a similar situation the fees will not pass the FDC test.
85 See L. Hancher and J. Buendia Serra, supra note IV-67 above, at 908.
incurred. The test to be adopted in order to assess the predatory nature of a pricing policy can be controversial.\footnote{For a summary of the main arguments see E. P. Mastromanolis, "Predatory Pricing Strategies in the European Union: a Case for Legal Reform", 19 ECLR (1998), 211; for a comprehensive analysis see P. Giudici, I prezzi predatori, (Giuffrè, 2000).}

In the US, many courts have followed the so called Areeda/Turner\footnote{P. Areeda and D.F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", 88 Harv. L. Rev. (1975), 697.} test which is based also on a criterion of efficiency: prices are treated as predatory if they are below Short Run Marginal Costs ("SRMC") or Average Variable Costs ("AVC").\footnote{AVC is the sum of all variable costs (costs that vary with changes in input) divided by output (e.g. raw materials). Average Fixed Costs are those that do not vary as production increases or decreases (e.g. rent of a factory). Average Total Costs (ATC) encompasses AVC and AFC.} The latter are easier to ascertain than the former so that both US and EC courts tend to refer to that test. The rationale of the test is that sales make no commercial sense without the hope and probability of eliminating a competitor and raising prices at a subsequent stage.

In the EC, the Average Variable Costs have been used as an important point of reference in the most authoritative rulings. In AKZO, the first case on predatory pricing, the ECJ concluded that:

"Prices below average variable costs (that is to say those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced."\footnote{AKZO, supra note II-89 above, para 71.}

The Court recognised that a particular item of cost is not fixed or variable by nature. It must be determined according to the circumstances whether the relevant cost varies
according to the quantities produced. In AKZO for instance the ECJ accepted that labour costs should be treated as fixed rather than variable. The time horizon can be crucial in this respect as almost all costs are variable over the long term and almost no cost are variable over the short term.\(^1\) Areeda-Turner refer to the short term. It has been argued that the relevant time horizon is that over which the price in question prevailed or could reasonably have been expected to prevail,\(^2\) even though this might be hard to judge.\(^3\)

In Tetra Pak the Commission, confirmed by both the CFI and, on appeal, by the ECJ accepted that carrying on an activity which did not cover total costs may be economically justified in the short term if the activity contributes in part to covering fixed costs, but that activities whose profits remain permanently inadequate to cover variable costs must normally be given up.

Economic and legal literature has not failed to stress that this assumption is not always true as undertakings frequently do not cover even their variable costs when first introducing a product into a market. Conversely when products become technically obsolescent they are not always worth what they historically cost.\(^4\) Moreover, a cost based test has a number of other drawbacks. It is not always possible to identify which costs are variable and the average variable cost of a by product may be arbitrary. There is also the problem of information in the sense that very often neither the alleged predator nor the victim are likely to know what their AVCs are. Finally this cost based test is increasingly inappropriate in sectors such as communications where there are enormous sunk costs and variable costs tend to zero.

The Commission decision in AKZO was largely based on evidence which consisted of internal memoranda and threats by the dominant company. Although abuse under Article 82 is considered an objective concept which presupposes dominance, the Court

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\(^1\) V. Korah, "Compagnie Maritime Belge collective dominant position and exclusionary pricing", in Dony and De Walsche (Eds.), Liber Amicorum Michel Waelbroeck, (Bruylant, 1999), note 50.


\(^3\) J. Vickers, supra note IV-82 above, at 21.
appeared to apply a stricter test in the context of an intentional plan to drive out a competitor. The Court in fact stated that:

"Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan to eliminate a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them."\(^{95}\)

Again this two tier approach based on intent is not immune from criticism. There might be legitimate reasons for selling below total costs. As put by Korah, "investment in sunk costs is water under the bridge, and even if turned out badly, it would be silly to prevent a dominant firm from reducing price and selling, making at least some contribution to the overhead."\(^{96}\) Apart from the inconsistencies with the concept of abuse as an objective concept as interpreted in *Hoffmann-La Roche*, the approach of the Court which considers predatory pricing below ATCs only if intent is proven seems appropriate. The main critique to this approach is that intent is difficult to prove and sometimes evidence of intent might be misleading. It would therefore be more advisable to re-introduce or attach more importance to an "objective" evaluation which is widely recognised by economic theory as one of the necessary elements of predation: recoupment of losses.

In the US, Section 2 of the Sherman Act makes it a criminal offence to monopolize or attempt to monopolize any part of the trade or commerce between several states. Discriminatory pricing in general and in particular predatory pricing fall within the prohibition of the Act. Furthermore under the US legislation the Clayton Act, as amended by the Robinson-Patman Act, provides further safeguards against price discrimination. The US Supreme Court considered that the alleged future flow of

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\(^{94}\) V. Korah, *supra* note IV-66 above, at 127 ff.

\(^{95}\) *AKZO*, *supra* note II-89 above, para 72.
profits appropriately discounted with losses must exceed the present size of losses. The plaintiff in a predatory pricing claim must prove not only that an undertaking has achieved monopoly power but also that it will be able to maintain monopoly for long enough both to recoup the losses and to obtain additional gain. According to the US Supreme Court\textsuperscript{97} predation would also not occur when there is insufficient monopoly power to recoup losses.

This issue seems to be much more weakly recognised in Europe. In \textit{AKZO} the ECJ condemned predatory pricing when a dominant firm expects to be able to recoup its price reductions when the new entrant has left.\textsuperscript{98} Although we have seen above that in \textit{Tetra Pak} some attention was paid to the period during which the predation occurred, the ECJ concluded that in the circumstances it would have not been appropriate to require additional proof that Tetra Pak had a realistic chance of recouping its losses. Despite the ambiguity of the statement, it appears that the issue at stake in \textit{Tetra Pak} was the onus of proof rather than the relevance of recouptment of losses.

4.1.4 An economic solution

Finding an appropriate benchmark for predation in economic terms in general and in particular as applied to the communications sector may be controversial. Baumol\textsuperscript{99} suggests that the appropriate test is a “generalised Areeda-Turner” AVC consisting of an average avoidable costs test. Avoidable costs are those that a firm saves over a relevant period if it ceases production measured at the level of demand generated by the allegedly predatory price. Avoidable costs are the same as incremental costs except that sunk costs are ignored.\textsuperscript{100} The idea is that a test based on avoidable costs should provide a “meaningful evaluation of whether a more efficient incumbent would survive in the market”\textsuperscript{101} because only if prices remain above that level the dominant firm would be worse off ceasing production. There is however, a number of cases in which pricing

\textsuperscript{96} V. Korah, \textit{supra} note IV-92 above, at 26.
\textsuperscript{97} \textit{Brook Group Ltd. v. Brown and Williamson Tobacco Corp.}, 405 US 209, 113 S.Ct. 2578 (1993).
\textsuperscript{98} Para 71.
\textsuperscript{99} W. Baumol, \textit{supra} note IV-93 above.
\textsuperscript{100} J. Vickers, \textit{supra} note IV-82 above, at 21.
\textsuperscript{101} W. Bishop, C. Caffarra, K. Kühn, R. Whish, \textit{supra} note IV-87 above, at 13.
below (short run) Average Avoidable Costs should be allowed. Furthermore imposing such a test in economies of joint production might lead to an increase in all prices. It is suggested that the correct solution is that of a safe haven condition combined with procedural onus of proof: prices above the benchmark should be interpreted as non-predatory and not an indication of anticompetitive behaviour. In case of prices below this level the onus would be on competition authorities to demonstrate that, in the light of the market structure, predatory pricing has a significant chance of being successful. In such an analysis the ability to recoup losses from predation will be an important factor. Thus a further shift is required in the European approach from a position which tends to facilitate entrants or competitors whether or not they match the incumbent’s efficiency towards consumer welfare. The opinion of Advocate General Jacob in *Oscar Bronner* has rightly stressed this aspect.

A controversial aspect may be that of areas in which there are high costs of entry such as newly liberalised telecommunications markets. In these markets it might be argued that allowing pricing as low as average avoidable cost might prevent the efficiency enhancing effect of competitors which are marginally less efficient. In the Access Notice the Commission appears to favour a solution adopting the benchmark of average incremental costs over a period longer than one year. The provision of a new service can be regarded as an increment. Given that incremental costs take into account sunk cost the time horizon is critical. In fact in the short term some costs, in particular capital costs, are fixed and in the long run all costs, including capital, are variable. The idea underpinning the use of long run incremental costs is that given that the provision of communications services is characterised by high levels of capital costs it will generally be appropriate to use the long run time horizon as the cost base. However, this approach must be adapted to make sure that in case of services which fall

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102 Ibidem; examples may be introductory offers or learning by doing situations.
103 Ibidem.
104 See F. Miller, *supra* note IV-77 above, at 87.
105 *Oscar Bronner*, *supra* note I-49 above, para 58.
106 Paras 114-116.
108 By contrast the use of short rule marginal cost, which excludes capital cost, would result in excessively low prices.
in economies of scope the undertakings charge prices which enable the recovery of common costs.

Applying antitrust rules to pricing abuses in a sector characterised by economies of scale or scope can be particularly challenging. Intervention in these situations will still have to be kept to a minimum. The operation of forces that might improve competition on the basis of variety or superiority in technology will have to be allowed. Situations in which entry is extremely inefficient would be better dealt with under regulation than by means of interventionist competition policy. In particular regulatory action rather than competition policy intervention has the advantage of relying on a detailed knowledge of the industry and imposing a permanent price control based on that information. However price setting regulatory measures may in itself bring about other opportunities for cost misallocation and consequently more subtle forms of abuse. In particular one can envisage that if an undertaking is regulated so that the price in its monopoly market is based on reported costs, it then has a specific incentive to misallocate unregulated business costs to the regulated sector. It has been remarked that “cost-based regulation may create a causal connection between output in the unregulated market and price in the regulated market that is generally absent in completely unregulated contexts.”

Whilst the risk of predation in the regulated parts of the communications sector is substantially reduced, the convergence process poses new challenges to the Commission and NRAs to ensure that asymmetries on cost information do not create the opportunity for misallocation of costs.

4.1.5 Rebates

The occurrence of discriminatory pricing is governed principally by the wording of Article 82 which states that an abuse of a dominant position may consist in, *inter alia*, “applying dissimilar conditions to the equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.” Therefore special rebates

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granted by dominant firms in return for securing all or an increased proportion of purchases may infringe Article 82 in the absence of objective justification. The principles described below can find an application in the communications sector.

In general, discount systems in which the price advantages granted are based not on the difference in costs borne by the supplier in relation to the quantities supplied but on the fact that a dominant undertaking supplies all or a very large proportion of a customer's requirements would be considered abusive. This is based on the assumption that such a practice may restrict competition from smaller firms and make it harder for them to compete on their merits. The relevant test for deciding whether a discount system is abusive was given by the Court in *Michelin*:

"In deciding whether [an undertaking] abused its dominant position in applying its discount system, it is ... necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition."\(^\text{111}\)

In *Michelin* the Commission reiterated the approach already expressed in *Hoffman-La Roche* whereby "...with the exception of short term measures, no discount should be granted unless linked to genuine cost reduction in the manufacture's costs". Different types of discount practices can be found to be in breach of Article 82. Loyalty rebates are offered by a dominant supplier on the condition that all or a high percentage of the customer's business is placed with the supplier.\(^\text{112}\) On this basis the ECJ has ruled in

\(^{111}\) *Michelin*, supra note II-87 above, para 73.

\(^{112}\) For example if Company A is entitled to a 2 per cent. discount on the price of all its purchases if it buys at least 60 per cent. of its requirements from the dominant Company B, Company C (a competitor of B) would need to offer a price very much lower than that of Company B to counteract the lost 2 per cent. discount on both the 40 per cent. and on the previous 60 per cent. Furthermore in a case in which the same discount system is applied and a buyer is dependant on the dominant firm for a substantial part of the supply of products it needs, a fidelity rebate will have the effect that
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Hoffmann-La Roche\textsuperscript{113} that a company in a dominant position which ties purchasers, even at their request, into obtaining all or most of their requirements exclusively from the dominant company is in breach of Article 82. The fact that the rebate has been willingly accepted is immaterial since the abuse consists in the weakening of competition in the relevant market in which the company is already dominant.

A special form of fidelity rebate which was condemned by the Commission is the granting of rebates at progressive rates tied, not to the quantity purchased, but to the percentage of requirements supplied. In Hoffman-La Roche,\textsuperscript{114} the ECJ upheld the Commission's finding of abuse of a dominant position in relation to a formula by which the percentage of the discount increased depending on whether a greater or lesser percentage of the purchaser's estimated requirements had been placed with Hoffmann-La Roche. The ECJ found that:

"...although the contracts at issue contain elements which appear at first sight to be of a quantitative nature as far as concerns their connection with the granting of a rebate on aggregate purchases, an examination of them however shows that they are in fact a specially worked out form of fidelity rebate."\textsuperscript{115}

The ECJ has equally condemned the use by a dominant company of a system of discounts conditional on the attainment of sales targets.\textsuperscript{116} In its decisions against competing suppliers will be foreclosed not only for the 60 per cent. of products which can be supplied only by the dominant firm (in which there would be no competition anyway) but also for the further 40 per cent. requirement.

\textsuperscript{113} Hoffmann-La Roche, supra note III-7 above.
\textsuperscript{114} Ibidem.
\textsuperscript{115} Ibidem, para 98.
\textsuperscript{116} In Michelin (supra note II-87 above, para 81) the discount system in question involved an annual variable discount, the percentage of which was determined according to the dealer's turnover in Michelin heavy vehicle, van and car tyres in the previous year, with no distinction of category on the basis of a progressive discount scale. The discount was paid in instalments but the full rate of discount was not obtained until the dealer had achieved during the year in question a sales target fixed at the beginning of the year. As opposed to loyalty rebates of the type considered in Hoffmann-La Roche in this case there was no requirement for exclusivity or for a specific proportion of the dealer's requirements to be purchased from Michelin. The Court found that: "The discount system in question was based on an annual reference period. However, any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period. In this case the variations in the rate of discount over a year as a result of one last order, even a small one, affected the dealer's margin of profit on the whole year's sales. [...] In such circumstances, even quite slight variations might put dealers under appreciable pressure." The Court also found that the lack of transparency of Michelin's discount system, the rules of which changed on several occasions during the relevant period, together with the fact that neither the scale of

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Solvay and ICI\textsuperscript{117} the Commission found that Solvay and ICI were not only colluding in breach of Article 81, but also that each company was dominant in its respective geographic markets for soda ash. Furthermore each had abused that position by the use of "top slice" discounts.\textsuperscript{118} The effect of the "top slice" was to make it difficult for smaller competitors to compete as secondary suppliers given that they could not supply a customer's entire requirements.\textsuperscript{119}

Finally it is important to note that in \textit{Hilti} the Commission fined the company for \textit{inter alia} selective discounting and expressed clearly that the abuse did not hinge on whether prices were below cost but rather on the intention of the dominant company to damage competitors.\textsuperscript{120} This approach was confirmed by the CFI which stated that a selective and discriminatory policy such as the one in question impairs competition "\textit{inasmuch as it is liable to deter other undertakings from establishing themselves in the market}."\textsuperscript{121}

Such an importance attributed to the subjective element of intent has been criticised as introducing into this area of law an undue element of arbitrariness and may eliminate "the legitimate discretion of the firm to compete."\textsuperscript{122} To a certain extent the remarks made in the context of predatory pricing would also apply in this situation. However this at the very least can be taken as an indication of the importance that is attached under the Commission's enforcement policy, as upheld by the CFI and ECJ, to the discriminatory function and exclusionary effects of these pricing policies. Recent decisions confirm that these practices are principally assessed from the perspective of

\begin{footnotes}
\item[118] These are rebates granted on marginal volume, i.e. rebates on volume over and above the customer's basic requirements. For example, Solvay gave a quantity rebate of 10 per cent. on the majority (80 per cent.) of the customer's total annual requirement and a rebate of 20 per cent. on the "top slice".
\item[119] The CFI found in \textit{BPB/British Gypsum} (supra note 111-89 above, on appeal Case C-310/93, \textit{BPB/British Gypsum} (II), [1995] ECR I-865) that rebates by a dominant supplier of plasterboard in the form of contributions to advertising and promotional expenses in return for exclusivity were abusive rebates. The CFI recalled the ECJ's remarks in \textit{Michelin} that an undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition. A similar strategy is that of group commitment bonuses where a dominant supplier offers to grant a rebate to the members of a buying group on the basis of exclusive purchase from the dominant company by all the members of the buying group; see also Commission Decision, \textit{Napier Brown-British Sugar}, OJ 1988, L284/41.
\item[121] \textit{Hilti AG v. Commission}, supra note III-27 above, para 100.
\item[122] See W. Bishop, C. Caffarra, K. Kühn, R. Whish, \textit{supra note IV-87} above, at 27.
\end{footnotes}
their exclusionary dimension (and the single branding effects). Whilst there have been no relevant decisions in this area in respect of communications, it is conceivable that these forms of abuse will acquire a considerable importance particularly in a phase in which incumbents still benefit from the position of market power inherited as a result of historic monopolies but, at the same time, are subject to a certain degree of competition in a liberalised environment. Against this background one can imagine commercial practices aimed at retaining a large client base which may have an abusive character.

4.1.6 Discriminatory, selective and excessive pricing
In general terms price discrimination can be defined as the sale of different units of a product at prices not corresponding to differences in the cost of supplying them. Price discrimination covers non-linear pricing as well as cases where different (or uniform) terms are offered to customers in different markets despite common (or different) cost conditions. Under Article 82, unless there is an objective justification, price discrimination may be considered abusive when a dominant undertaking does not treat like cases alike. This is also the basis upon which excessive pricing can be prosecuted under EC competition law. Whilst Article 82 contains explicit references to price abuses formal decisions in this area are rare. As a result there is little case law so far. Nevertheless the very notion of non-discrimination is of paramount importance in antitrust law. In the communications sector this notion has extended to regulation and a number of provisions in the current proposed EC regulatory package are informed by it. In addition, as we will see in Chapter VI, this notion is often used in the behavioural remedies imposed under the Merger Regulation.

The ECJ has defined excessive price by reference to “the economic value of the service provided.” However this test might be difficult to determine in practice without a comparison to other terms of reference. In United Brands the Court held that an excess

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124 R. Whish, Competition Law (3rd ed.) Butterworths, at 503.
could be determined objectively "if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production." Again this test might prove unsatisfactory in practice particularly when this exercise involves sophisticated and controversial processes of cost allocation. In particular many telecoms operators have made a number of investments under a regime of legal monopolies and public budget rules, and in highly vertically integrated structures. All these factors render the exercise difficult. Clearly the Commission could find guidance in the principles developed in the regulatory context which suggest that the use of long run average incremental cost is currently the appropriate cost base for network access. The ECJ has confirmed the validity of such an approach. Prices can also be regarded as excessive if they allow an undertaking to sustain profits higher than it would expect to earn in a competitive market. Proving this situation can be very onerous. An indication of the abusive character of this scenario can be derived from the absence of innovation and or successful entry, or loss of market share.

In practice the prices charged for the same services in different geographic markets could act as a another point of reference for the comparative analysis. In fact a dominant undertaking may seek to maximise its profits by charging what each market can bear and possibly insulating the high price areas. When evaluating the Commission policy in this area it must be analysed borne in mind that market integration in the Community is one of the most important principles derived from the EC Treaty and this principle informs both the Commission enforcement policy and the EC courts' case law. Market partitioning will be therefore regarded as a particularly serious breach of competition law even if it is the indirect effect of a geographically discriminatory pricing policy. In United Brands, the ECJ upheld the Commission's finding that United Brands had applied a policy of differing prices and by applying dissimilar conditions to equivalent transactions with other trading parties, had placed

125 Case 26/75, General Motors Continental, [1975] ECR 1367, 12.
126 United Brands, supra note 87 above, para. 251.
128 Ahmed Saeed, supra note 34 above, para 43; In Case 322/88, Grimaldi, [1989] ECR 4407 the Court has also stated that in interpreting Community law a national court should also have regard to recommendations issued by the Commission.
those parties at a competitive disadvantage. This had created a rigid partitioning of the geographic markets at artificially different price levels which was reinforced by various restrictions on the resale of products and reduction in the deliveries of the quantities ordered. The Court held that when an undertaking holding a dominant position imposes prices for its services which are appreciably higher than those charged in other Member States and where a comparison of the fees levels has been made on a consistent basis, that difference is to be considered as indicative of an abuse of a dominant position. In such a case, it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member States concerned and the situation prevailing in all other Member States.

The Commission has expressly stated in the Access Notice that comparison with other geographic areas can be used as an indicator of an excessive price. This might have the advantage of creating a virtuous circle between on the one hand areas where liberalisation is at a more advanced stage and on the other areas where monopoly prices are still charged. Furthermore price discrimination would be difficult to justify in the field of communications where the geographic partition has little bearing on costs.

However, in general terms an approach which transforms the aim of European integration into an undue uniformisation of economic conditions may be criticised on economic grounds as "where there are significant sunk costs, discrimination in accordance with what each market can bear leads to more of a product being supplied, and pays not only a monopolist but also consumers in both the cheaper and the expensive market." The conclusion of such a compelling argument would be that if the conditions in two markets are different, the price differential is not discriminatory or excessive. In reality in the communications sector the comparative analysis might be

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130 United Brands, supra note II-87 above, paras 226-229 and 233.
133 V. Korah, supra note III-24 above, at 172.
even more difficult, if not impossible, as the cost allocation of former legal monopolists have until recently operated under different public budget rules.

The existence under US law (section 2(b) of the Robinson-Patman Act) of a statutory basis for the "meeting the competition" justification as a legal defence to an alleged price discrimination has sparked the legal debate over this economic issue. Under EC law the allegation of price discrimination is regarded as justifiable by a "meeting but not beating competition" argument. However, the scope of this justification must be restricted to a defensive use and every attempt to use discriminatory strategies to expand an existing dominant position would be considered abusive. Indeed such a justification shifts the focus of the analysis from the relationship between costs and prices of the alleged abuser to the relationship between two undertakings or the prices that they charge. Whilst this justification might promote anticompetitive duopoly pricing, the defensive value of the doctrine might justify its existence.

The Commission has assessed a number of cases of excessive prices in the telecommunications sector. In practice in order to carry out the necessary cost allocation analysis it will seek the support of expert studies. The price differentials resulting from such studies can be used as an indication of abuses. If the difference is substantial there will be a prima facie case for abuse of a dominant position. The developing process of liberalisation and the compliance with regulatory provisions on cost allocation will also aid investigation of cost allocation by competition authorities. Whilst the Commission has expressly declared that it has no intention to establish itself as a price setting authority, its role in this area may be all but marginal particularly

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136 United Brands, supra note II-87 above, para 189; see also W. Bishop, C. Caffarra, K. Kühn, R. Whish, supra note IV-87 above, at 28.
137 See the ITT Promedia complaint for prices for access data for the publication of telephone directories which was terminated after the complainant withdrew its complaint (Press release IP/97/292 of 11 April, 1997); a complaint brought against Deutsche Telecom ("DT") in respect of its business customer tariffs as a result of which DT reduced its tariffs (Press Release IP/96/975 of 4 November 1996); the Commission investigation on DT's fees for carrier pre-selection and number portability (Press Release IP/98/430 of 4 May 1998); and the Commission investigation into Mobile Telephony Pricing (Press Release IP/98/707 and IP/98/1036).
138 M. Haag and R. Klotz, supra note IV-135 above, at 38.
when assessing whether abusive conducts prevent market entry in the liberalised communications markets.

4.2 Tying

The practice of making the conclusion of contracts subject to acceptance supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts is expressly considered by Article 82 to be abusive. The typical form of tying occurs when a dominant undertaking only supplies the product for which it is in a dominant position if the customer also agrees to buy another product from the dominant firm. Pricing policies might interact with bundling marketing strategies. The concept of a tying clause itself implies the supply of two distinct products rather than a combination of components in a single product. The question of determining whether the tying and tied products are distinct products or not is a question of fact which can prove difficult to resolve. Tying clauses may also potentially infringe Article 81(1).

Very often companies may subsidise the purchase of products which are essential gateways to their services (for instance consumer equipment) in order to accelerate the take up of new products or services. In these cases (such as the introduction of TV digital services) the subsidised equipment is normally given in return for the consumer agreeing to purchase services provided by the subsidising company. Furthermore, in many cases, these agreements with the customers are complemented by mechanisms of conditional access aimed at avoiding the situation whereby access of "free rider" competitors does not undermine the initial investment. The recovery of subsidies is linked to access charges. In most cases the subsidising company will seek to recover the amount spent in the subsidy by means of access charges to third parties.

The evaluation of the legality of such subsidies will depend on an appraisal of the distortive effects on competition (both in terms of tying of consumers and in terms of access of competitors) produced by the subsidised system. Such a system will be
assessed on the basis of the legitimate expectation of the investing company but also, arguably, with a proportionality test: using a reasoning which is familiar to the ECJ the overall mechanism and the distortive effect on competition will be checked against alternative, commercially viable solutions. Furthermore the benefit deriving from the introduction of a subsidised innovation will have to be weighted against the potential restraint to further innovation. In certain cases these issues are covered by regulatory or licensing obligations. Nevertheless such practices remain subject to competition law. In practice, these restrictions often result in complex and lengthy ex ante negotiations with the Commission within the framework of Regulation 17 or ECMR notifications.

In the UK the OFT has expressed the view that the amount of subsidy eligible for recovery via access charges to third parties should be reduced to take into account the value of possible tie-in obligations on the customer. However, it is also necessary to take into consideration the abatement which has already taken place and, in doing so, one must consider the appropriate time-frame of the contractual relation in order to have a point of reference. This is an extremely difficult exercise to carry out in the case of the introduction of a new technology which involves a prospective analysis. In the case of subsidies for equipment for digital TV the OFT has proposed as a point of reference the "life" of a customer with subsidised equipment calculated on the basis of the available data for analog direct-to-home satellite customers. Again the economic analysis of this behaviour will be a primary focus. However, the competitive assessment in this case is also influenced by the evaluation of the tying obligations imposed on customers. Therefore a mere economic justification would arguably not be sufficient to discharge the possible allegations of anticompetitive behaviour. With regard to access of third parties the situation would be slightly different and will be relevant in terms of refusal to supply.

139 For instance in the UK BDB and S4C Digital Networks have been awarded licences for multiplexes and one of the criteria for the award of the licences laid down by the Broadcasting Act 1996 is the promotion the take up of digital terrestrial television, including the provision of subsidy for consumer's equipment.

140 See most notably the Bib/Open case on interactive services.

4.3 Withdrawal and refusal to supply

A rich body of case law has established and defined the illegality of refusal to supply. These principles are of paramount importance in relation to network industries in general and, in particular, communications. The leading case on refusal to supply is Commercial Solvents which is also widely regarded as the foundation of the essential facility doctrine in EC law. In fact most of the cases which are presently referred to as “essential facilities cases” refer to the strand of authority that has been developed with regard to particular forms of discriminatory abuse: namely exclusivity conditions or refusal to supply. The essential facility doctrine is discussed in next chapter.

In Commercial Solvents a dominant company was in an oligopoly situation and it had refused to continue to supply a raw material to a downstream competitor as it was planning to start direct downstream production of a product for which the raw material was an essential component. The Court upheld the order of the Commission to resume supplies and stated that:

"an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers), act in such a way as to eliminate their competition, which in the case in question would amount to eliminating one of the principal manufacturers of ethambutol in the common market. Since such conduct is contrary to the objectives expressed in Article 3(f) of the Treaty and set out in greater detail in Article 85 and 86 [now Articles 81 and 82], it follows that an undertaking which has a dominant position in the

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142 OFTEL Consultative Document, para 4.28.
market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86 [now Article 82].”

Clearly the outcome of the case was influenced by the factual circumstances in which the dispute arose: the refusal to supply had a considerable impact on the specific market; and the dominant undertaking had spare capacity which it did not need to use for its own needs; the refusal to supply was not otherwise justified. These aspects will be of paramount importance in the construction of a general principle. The situation envisaged in Commercial Solvents is the paradigm of a case in which the abuse derives from conduct on the dominated market having effect on markets other than the dominated one.

In Commercial Solvents the refusal to supply was directed towards a competitor. However, since United Brands the Court has also developed case law regarding the refusal to supply to a distributor, which despite being a non-competing customer, nonetheless had taken part in a sales campaign for a competing brand. The facts of United Brands are commonly known. The Court stated that:

“an undertaking in a dominant position for the purpose of marketing a product - which cashes in on the reputation of a brand name known to and valued by the customers - cannot stop supplying a long-standing customer who abides by a regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.”


146 United Brands, supra note II-87 above, para 182.
Chapter IV

One of the important aspects of this refusal to supply case is that the Court applied the rule vertically to entities at different levels of the economic process. *Telemarketing*\(^{147}\) in which the ECJ reiterated that monopolies, albeit not prohibited, remain subject to Article 82, show how this principle can be used to sanction the abusive practices which derive from horizontal or vertical links between undertakings providing different types of services. On the facts it was ruled that if a television station makes advertising time available only to those advertisers who use phone lines and services of a phone-in marketing company associated with the TV station, this amounts to a refusal to supply the TV stations services to another competing phone-in marketing company.

Of course the relevance of this behaviour or form of abuse presupposes not only dominance on the part of the alleged abuser but also a particular pertinence in the economics of the abused's activity. These type of exclusionary practices are particularly recurrent in the context of a sector such as that of communications due to the numerous vertical and horizontal links between activities (including narrow markets and ancillary activities) and economic players. The importance of this type of abuse in the sector requires that it is subjected to a more detailed critical examination, which is carried out in Chapter V on a comparative basis.

5. Conclusions

Before analysing in detail the application of the essential facilities doctrine in communications we can draw a few preliminary conclusions on how market power in communications is assessed and what its consequences are under EC competition law.

The first issue which emerges from the analysis carried out in this chapter is that EC competition law offers a variety of instruments to evaluate market power in communications. The flexibility of antitrust law and its ability to take into account the effect of a position of market power and all its possible detrimental effects on

\(^{147}\) Centre Belge d'Études du Marché 'Telemarketing' SA v. Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux SA, supra note II-89 above.
competition make this area of the law a privileged instrument to ensure the preservation of the public interest in the converging field of communications. In fact not only the notion of simple single firm dominance but also that of collective dominance and extended (or leveraged) dominance allow the enforcement authorities to adopt a dynamic perspective in the evaluation of the market in its current stage and its likely development. This enables an enforcement policy which is at once repressive and forward-looking in the preservation of competition. The Commission appears determined to use the notion of joint dominance as a basis for both competition law enforcement and, as we have seen in Chapter II, for sector specific regulation. However, the analysis of the development of the application of the doctrine shows that it is unclear whether the economic bases for it are at this stage sufficiently clear to enable a sound application of it either for competition law enforcement or regulatory action. As a result it is unclear whether oligopolistic markets can be effectively monitored \textit{ex post} or regulated \textit{ex ante}, pending a consolidation of the notion under EC law.

More generally the case law and principles elaborated in other sectors provide useful guidance in more specific sectoral application in communications. Those principles interrelate with regulation and we have seen in Chapter II that recent proposals for the regulatory framework increasingly draw from the body of antitrust case law and principles. The analysis of the case law on market power in this chapter also shows that the Commission is rightly reluctant to establish itself as a price fixing authority. Its action and the case law of the EC courts is rather focused on the detection, repression and prevention of exclusionary effects of pricing policies. In this respect \textit{ex ante} regulation, even if based on an antitrust model for assessing the prerequisite of its application, retains an important role which complements competition law. This relationship of complementarity works both ways as the principles or recommendations on pricing provide a useful yardstick of evaluation of the undertakings’ behaviour in relation to their pricing policy even in the context of an evaluation on the structure of competition and exclusionary effects.
In this industry access is a fundamental instrument of competition from which consumers can benefit. It is therefore of paramount importance to examine the impact of the principles of competition law principle on this area. Next chapter will be dedicated to this aspect.
Chapter V

Essential facilities in communications

1. Introduction

Pursuant to Article 82 EC the obligations of a dominant undertaking consist not only of refraining from abusive conduct but might also extend, in certain circumstances, to a duty to actively promoting competition by allowing other undertakings to have access to the facilities which it has developed. The Commission has been very active in this respect particularly in the transport industry and has qualified some of its rulings as "evidence of the [its] determination to act against holding dominant positions" aimed at giving to undertakings (in this case airlines) which, in a liberalised industry, are making use of new opportunities for competition a "fair chance to develop and sustain the[ir] challenge to established carriers." This instrumental use of a repressive measure such as Article 82 by the Commission aims at promoting the opening up of markets, and reducing dominant positions (if not establishing competition altogether). This aim is confirmed by the temporal dimension of the remedies imposed: the Commission pointed out that new entrants should not be able to rely indefinitely on the services provided by their competitors but should be allowed to do so only for as long as necessary to establish themselves as a credible competitive force. The impact of this policy is therefore of paramount importance in telecommunications and broadcasting which has been and still is subject to liberalisation and in which new technology continuously creates new markets which are closely related to each other.

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1 Oscar Bronner, supra note 1-49 above, para 34 per A.G. Jacobs.
3 Ibidem.
The circumstances in which the duties of a dominant undertaking to share its facilities with actual or potential competitors arise and the legal implications are commonly (albeit somehow controversially) referred to as the "essential facility doctrine". The essential facilities doctrine is certainly a valuable and flexible instrument to tackle those practices which are not covered by legislative measures and it has the potential to address the distortions that might re-emerge in both the initial and a more mature phase of the liberalisation process.

In EC competition law the development of the doctrine is necessarily based on the interpretation of the existing legislative provisions and the case law on abuses of dominant position. Article 82 EC sets out a non-exhaustive\(^5\) list of abusive practices. Amongst them an abuse of dominant position may consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. This provision, despite being based on an objective concept of abuse,\(^6\) does not apply regardless of the distortive and discriminatory effects on competition. In fact neither the Court nor the Commission have rightly ever gone as far as interpreting it as imposing a general duty on the dominant company to supply. Furthermore Article 82 expressly prohibits tying and monopoly leverage practices such as "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." These practices can relate to the possibility of the owner of the essential facility imposing its power in relation to other products which a horizontally integrated entity can offer.

One could wonder whether the so called "essential facility doctrine" in EC law entails a novel concept with specific legal implications or whether it is simply a refusal to or withdrawal of supply, with the consequences established under Article 82 case law. One could distinguish between determining what is an essential facility and establishing the legal consequences of its existence. The assessment of whether an essential facility exists is to be carried out mainly on an economic basis. This does not imply that the test

\(^5\) Continental Can, supra note II-92 above, para 26.
\(^6\) Hoffman-La Roche, supra note III-7 above, para 91.
is of mathematical certainty. In fact the notion of essentiality in itself might imply some public interest considerations within the bare economic analysis. With regard to the legal assessment of the implications of an essential facility, the situation is different. Whilst ad hoc regulatory provisions are more suitable to address the specific issue of essential facilities, it is necessary to examine how this principle applies in the flexible environment of general EC competition law. The main instruments of analysis must therefore be Article 82 and the relevant case law.

The uncertainties and inconsistencies which surround this doctrine have raised questions as to its judicial application under competition law constitutes an appropriate instrument to address the issue of bottleneck foreclosures in the market. One commentator argued particularly strongly against it by saying: "The essential facility doctrine should not be invoked unless there is a pre-existing regulatory agency capable of adequately supervising relief, and there a number of reasons for completely eliminating the doctrine as an antitrust cause of action. Essential facility issues are best addressed on an industry-wide basis, through legislation or administrative regulation."\(^7\)

Although essential facilities issues are best addressed through legislation and sector regulation, this doctrine nonetheless constitute an important guideline, an overriding principle which can inform both legislative and administrative action and eventually be reflected on judicial rulings. The role of this doctrine can vary in accordance with the economic environment and the stage of industry development and integration. Typically the principles developed by competition law inspire regulation in appropriate circumstances, particularly in a field such as communications.\(^8\) However, one of the aims of antitrust law is precisely to avoid unnecessary regulation and the imposition of exceedingly onerous burdens on companies can easily lead to that slippery slope.\(^9\) The retention of this more ductile role is of paramount importance for the system as a whole. Section 2 below discusses the economic definition of essential facilities and Section 3 does on to look at to the legal analysis on a US-EC comparative basis.

\(^8\) For instance in licensing requirements for telecommunications operators or broadcasters.
\(^9\) Oscar Bronner, supra note 1-49 above, para 69 per A.G. Jacobs.
2. Definition of essential facilities

To define a concept such as that of essential facilities with all its implications in terms of competition and regulatory policy is a difficult task. Of course a simple definition will hardly ever be satisfactory. Nevertheless a useful starting point is the definition adopted by the Commission in the Access Notice whereby an essential facility is “a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means.” A comprehensive analysis of the doctrine requires a more detailed economic and legal analysis. The economic structure in which an essential facility would typically arise is likely to occur frequently in the communications sector.

2.1 The economic structural analysis

The economic structure in which essential facilities arise can be described by a “simplified model” which constitutes a useful term of reference in the competitive assessment. This scenario involves the existence of (at least) two related activities which are necessary components of the product or of the service provided to the consumer. To describe these two activities we shall refer to upstream and downstream operators (although essential facilities might also arise in the case of horizontally related activities). Typically undertaking X holds the gates of the economic activities in a particular sector by controlling a bottleneck facility (for instance the local loop, an existing network or a digital platform). Furthermore, it may provide a service or supply a product which derives from the combination of upstream and downstream activities.

The issues arise when another undertaking (usually an actual or potential competitor)
wants to gain access to the upstream facility in order to provide a bundled service or a combined product.

In this scenario on the one hand a company would allege that the combination of the incumbent’s position and its refusal to deal prevent that company from entering the market and, as a result, reduces consumer choice. Typically this would be done to protect the incumbent’s position in the downstream activity and would result in a reduction of the downward pressure over prices. The necessary premise is that the costs of establishing a competing upstream facility are prohibitive and uneconomical. On the other hand the incumbent would argue (at least in economic terms) that keeping an integrated structure of both upstream and downstream facilities would produce intrinsic efficiencies (in terms of economies of scope) which would ultimately be reflected in consumers. Furthermore, it would argue that the benefit that the new competitor intend to distribute to consumers through a decrease on prices constitutes the economic reward of the costs paid to build up the facility to which access is sought. This would be equivalent to an expropriation of their legitimate economic expectation and, in the long term, would be a disincentive to investment and research to the detriment of the consumers.

The situation described does not in itself help in identifying the existence of an essential facility. It has been rightly remarked\(^\text{12}\) that disadvantage to a competitor cannot be treated as a sufficient condition for the existence of an essential facility as this would provide a cause of action (and possibly require regulatory intervention) in all the cases in which an undertaking obtains an envied advantage. Along the same lines, disadvantage to consumers is not a credible yardstick to measure the essential nature of a facility as the “\textit{tension between static and dynamic incentives for efficiency within a market economy}”\(^\text{13}\) will always leave scope for unrealised potential consumer gains. Both these aspects referred to may therefore be necessary but are not sufficient elements. More importantly, the drawback of an analysis based on the market structure is that most of the services provided or products supplied are subject to a multi-stage

\(^{12}\) \textit{Ibidem}, at 447.

\(^{13}\) \textit{Ibidem}.
production process. Therefore the situation described can potentially be extended to any field in which a bottleneck situation can be created and bottleneck can be perceived in an indefinite number of situations.

Areeda\textsuperscript{14} was maybe the first commentator to voice his concerns over the expansion of the concept of essential facilities and was a forerunner in suggesting that its scope be limited. He rightly believed that there is a need for a limiting principle which would contain the effects of too broad an interpretation. He summarises his concerns over this issue as follows: "...you will not find any case that provides a consistent rationale for the doctrine that explores the social costs and the benefits of the administration of costs of requiring the creator of an asset to share it with a rival. It is less a doctrine than an epithet indicating some exceptions to the right to keep one’s creation to oneself, but not telling us what the exceptions are."

It has been suggested that the key to solving the problem is "to assess whether the owner of the allegedly essential facility is subject to effective competitive pressure, either in the form of the existing assets also competing at the upstream level, or in the form of potential assets that other firms might create."\textsuperscript{16} This leads to the deduction that "only where competition has seriously broken down or cannot be expected to operate that a case for compulsion arises."\textsuperscript{17} The logical conclusion of this reasoning is that the vast majority of cases will be limited to natural monopoly cases. If the existence of a natural monopoly conclusively satisfies the test, it would also be perfectly conceivable to extend this concept to all those cases in which the facility is "vital to the rivals' competitive viability", critical (not only desirable) and non-capable of duplication. In the communications sector there are a number of these situations.

This interpretation would rule out many cases which have been labelled as essential facilities\textsuperscript{18} without substantial justification. However, if this test can work reasonably

\textsuperscript{15} Ibidem.
\textsuperscript{16} Ridyard, supra note IV-145 above, 448.
\textsuperscript{17} Ibidem.
\textsuperscript{18} For instance Mars argued that the existence of a network of retail display cabinets supplied for free by the market leader and the exclusivity condition imposed by them was anticompetitive. Assuming that it would have been able enter the
well in cases of withdrawal of supply the test might create more difficulty in the case of potential competitors or at least new entrants. In fact swapping the notion of essentiality with that of "vitality" does not take us very far in clarifying the boundary of the doctrine and carries the same risks of creating unnecessary regulation. Therefore the preliminary economic analysis has to focus not only on the static structural analysis of the market positions of the undertakings involved but, more widely, on the dynamic assessment of market access.

2.2 The public interest element: the early cases

In legal terms, the essential facilities doctrine founds its jurisdictional basis on the traditional common law doctrine of common carrier. This expression referred to the occupations with a prohibition on discrimination against members of the public and an obligation to serve all at reasonable rates. It is the American interpretation of the FCC which has re-evaluated the idea and has given a new impetus to the development of this strand of authority in the context of telecommunications.

In the very early stages of telecommunications history, the judicial interpretation of the common carrier obligation was construed as not including the duty to serve competing telephone companies. This interpretation arose in the context of the railroad “Express” case when the US Supreme Court decided that the obligation to serve the public indiscriminately did not apply to those already subject to the obligation. In other words the companies subject to common carriers obligations did not have to be “common carrier of common carriers.” This interpretation was subsequently extended to telephone cases. The FCC reviewed this notion in the regulation of common carriers by selling its products through the competitor’s cabinets, Mars held that the network of cabinets was an essential facility. The argument was rejected by the MMC; another example of a UK case with a similar outcome is FT Profile. Both these cases have been unfairly criticised by consumers lobby as being anti-consumers (see S. Locke, “A New Approach to Competition Policy”, Consumer Policy Review, July 1994).

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19 T. Cowen, The Essential Facilities Doctrine in EC Competition Law Towards a Matrix Infrastructure, Fordham Corp. L. Inst (1995), 521, at 528. Chief Judge Holt in Lowe v. Cotton (14d Raym 645 (1701)): "If a man takes upon him a public employment, he is to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse ... against an innkeeper refusing a guest when he has room ... against a carrier refusing to carry goods when he has convenience, his wagon not being full.

20 Federal Communication Commission Reports, 84 FCC 20.

21 117 US 601 (1882); but also Postal Telegraph Cable Co v. Hudson River Telephone Co 467 Supreme Court (1887).

22 Dane County Telephone Co v. Western Union Telegraph Co, Box 1298, AT&T-Bell Labs Archives; Syracuse Standard, 2 July 1898, Box 1166, AT&T-Bell Labs Archives.
under Title II of the Federal Communication Act 1934.\textsuperscript{23} In its interpretation the FCC recognises the evolving nature of the concept which depends on economic development and market structure.

The concept of common carrier, at least originally, required the existence of two characteristics which are equally important: on the one hand the public interest and the essential nature of the service provided, on the other a specific position in the market of the service provider. Thus if the interest pursued must have a public character, the obligations derived apply equally to both private or public carriers which render their activities essential. The common carrier doctrine focuses on the "quasi-public character" of the service provided with the aim of preventing discrimination against direct consumers. It is evident that the concept of common carrier has an evolving nature and, therefore, activities which could be considered common carrier in the 15th or the 19th century do not perform this function anymore in modern society.\textsuperscript{24} The FCC has clearly stated what it regards as a common carrier:

"[There are] two prerequisites for a common carrier: (1) a 'quasi-public character' which arises when a carrier 'undertakes to carry for all the people indifferently,' whether the carrier is under a legal compulsion to 'hold [itself] out indiscriminately to the clientele [it] suits to serve,' or if it in fact does so without any legal compulsion; and (2) provision of service over which customers 'transmit intelligence of their own design and choosing'."\textsuperscript{25}

The "genetic" origins of the essential facility doctrine are of paramount importance. In the current interpretation of the notion, the essential nature of a service or a product is often simply inferred by the market structure which creates a foreclosure to competition. This concept could include the public nature of a service or products whose market is foreclosed rather than merely the structure of the market. In fact the public character of the product manufactured or the service supplied would justify the strong limitation to

\textsuperscript{23} FCC Reports, 84 FCC 20.
\textsuperscript{24} T. Cowen, supra note V-19 above, at 529.
\textsuperscript{25} South-Western Bell Telephone Co. et al. Application for Authority to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fibre Service, FCC 93-165 (revised March 29 1993).
the private initiatives and freedom of determination inherent in the essential facility doctrine.

It is undoubtedly crucial to spell out that the essentiality of a facility itself is to be determined with reference to the interest of the public at large not to the interests of competitors who are merely instrumental to the pursuit of public instrument.\textsuperscript{26} This theme recurs often in the different approaches of competitive analysis. In contrast with the common carrier doctrine however, the interest of consumers in an essential facility is not that of access to the product or the service nor that of non-discrimination. This need is addressed by the separate but linked notion of universal service which is mainly and more efficiently pursued by regulatory measures and action. From the perspective of citizens and consumers, the issue is that of increased choice through competition. Clearly enhanced choice must be reconciled with long term benefits for the public at large such as price reductions, quality control, and technological advancement. These used to be seen as the prerogatives of non-profitable entities such as public utilities. In the context of essential facilities discrimination has to be prevented and access is to be guaranteed \textit{vis à vis} both actual or potential competitors. Those who will benefit from the essential facilities' regime and the consequent right of access would in the first instance be competitors and only indirectly, through them, consumers. The modern interpretation of the essential facility doctrine originated in the United States and therefore an analysis of that jurisdiction is the necessary starting point of our reconstruction.

The origins of this notion lie in the \textit{Terminal Railroad} case\textsuperscript{27} of the beginning of the century. In that case the essential facility actually consisted in a group facilities: bridges, ferries, tunnel, connecting tracks, terminal buildings and even the Saint Louis Union Station which were all gradually acquired by the \textit{Terminal Railroad Association}. In particular the association owned the only Mississippi river railroad bridge which controlled the passages in and out of St Louis. A second bridge was built and initially

\textsuperscript{26} Oscar Bronner, \textit{supra} note 1-49 above, para 34 per A. G. Jacobs.

Congress, in authorising the construction, prohibited the Association from acquiring an interest in the bridge company. Once the ban was lifted *Terminal Railroad* took majority control over the new bridge company. This transaction put the merged entity in a position to exclude competitors from passing through St Louis which was an important railroad junction. The litigation which followed was brought by the Missouri Attorney General and reached the US Supreme Court. The Court recognised the monopoly and the potential harm for competition which could result from the take over. However, instead of requiring a divestment, it imposed a behavioural remedy. The Association would have had to eliminate surcharges on freight shipments originating or terminating in St Louis. It was also ordered to allow other railroads to join the Association and eliminate discrimination against non-members in the use of the facility.

Another important but more controversial precedent can be traced in another association case: the *Associated Press*. In this case 1,200 newspapers had formed an association whereby each member was given access to news produced by other members. Associated Press also had its own staff which constituted a further source of information for the benefit of the associates. The association aimed at achieving economies of scale and accepted new members under the condition that they did not compete with an existing member. In this case the anticompetitive behaviour consisted of a concerted discriminatory action. It is somewhat controversial to consider this as an essential facilities case. The Court in examining the circumstances came to the conclusion that the Association ought not to be required to adopt an admission policy of free unconditional access. Nonetheless it ruled as unlawful the practice whereby applicants were not accepted solely on the basis of the fact that they were competitors.

This case is particularly interesting for the position adopted by Justice Frankfurter whose opinion was critical in obtaining the final majority. His opinion has actually been regarded as the only one supporting an essential facility notion. He considered a press association to be a public utility inherently entrusted with a public interest to serve all.

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29 See in particular pp. 23-25 (Douglas J. concurring).
30 P. Areeda, *supra* note V-14 above, at 843.
31 *Supra* note V-28 above, at. 28-29 (Frankfurter J. concurring).
He specified that the term ‘public utility’ in that context did not have to be obscured or read in the light of the “specialized notions that have gathered around [his] legal concept”. In his opinion the expression ‘public utility’ was used to describe the services offered by the association in relation to the function that the free press performed in a democratic society. Justice Frankfurter linked the notion of essentiality to that of utility of the public and to constitutional values pursued in the public interest.

Whilst this opinion has been regarded as “an exceedingly limited approach”, it is extremely interesting for the development of the concept of essential facility and in the reconstruction of a set of coherent guiding principles for the application of this doctrine. As we have seen above the notion of essentiality could in theory be linked to overriding public values or interests. In this sense Areeda’s are to be shared. He imagines the torment suffered by Justice Frankfurter in seeing his noble concept of public utility invoked in cases which do not meet the interest of the public. Many of the circumstances in which the essential facilities doctrine has been invoked, particularly before the US Courts, do not actually seem to require the reinforced support of this doctrine. Particularly, the interests which are intended to be protected do not appear to justify on balance the duties which can be imposed on the incumbent, as a result of its acceptance.

In fact the idea of using the essential facility doctrine only when public interests are at stake is an intriguing one. In legal terms this might lead to a use restricted to the protection of constitutional values such as freedom of expression. However, this approach would also lead to a number of problems and eventually would confuse rather than clarify the situation.

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32 P. Areeda, supra note V-14 above, at 843.
33 See for instance Berkeley Photo v. Eastman Kodak Co., 603 F.2d 263 (7th Cir. 1979), cert. denied, 444 S Ct 1063 (1980) in which Berkeley complained that it wanted to have access to Kodak’s research result before it started marketing its innovations; or Northwest Wholesales Stationers, Inc. v. Pacific Stationery & Printing Co., 472 US 284 (1985) dealing with a paper retailer complaining that its competitors did not admit him to a wholesale buying consortium; or the famous Aspen Skiing Co. v. Aspen Highlands Skiing Co., 472 US 585, (1985) in which a ski resort operator complained that another operator did not engage in a joint marketing operation; or Olympia Equip. Leasing Co. v. Western Union Tel. Co., 979 F.2d 370 (7th Cir.), cert. denied, 107 S Ct. 1574 (1987) dealing with a teletype machine marketer complaining that its competitor would not sell machines for it; or Flip Side Prods., Inc. v. Jam Prods., Ltd., 842 F.2d 1024 (7th Cir.), cert. denied, 109 S Ct. 261 (1988) dealing with an impresario seeking admission in the local auditorium; or Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Suppl. 1528 (S.D. Fla 1989) concerning a potential oil seller without a storage facility seeking access to the incumbent’s facility; and finally the case of a body-building food
Firstly it may introduce a complex balancing process of potentially conflicting values or
rights of the same rank (for instance freedom of expression and freedom in private
economic initiative). Secondly in most cases the pursuit of a public interest (for
instance the provision of telecommunication services, or the provision of information
services) is achieved by means of commercial activities. The essential facility might be
at one or more level of a multi stage production process which eventually deals with a
service or product of public interest. For instance whilst broadcasting is to be
considered one of the economic activities in which the public interest is more clearly
expressed (because of its links with the fundamental freedom of expression), the
segmentation, diversification and commercialisation of this sector might undermine an
argument which tries to distinguish this sector from others on the basis of a public
interest test. Yet, in the communications sector more than in others, the economic
structure of the market, the convergence and the interrelation of different activities
created a “fertile” ground for exclusionary practices which the essential facility doctrine
aims at eliminating. Finally, limiting an essential facility on the basis of the public
value of the activity carried by the incumbent introduces a considerable risk of
uncertainty and potentially of discrimination. In this sense an economic approach
appears much more preferable. Nevertheless the doctrine cries out for a rigorous
approach to avoid its over-application. This will help preserve its exceptional character
and protect the fundamental role in balancing economical and social values.

Both Terminal Road and Associated Press, which are considered the foundations of the
essential facility concept in antitrust theory, dealt with concerted actions. To a certain
extent these cases are easier to deal with by means of judicial remedies. In fact, apart
from the problem of determining the cost (including that of bearing the risks) of the
original venturers at the time when the joint venture was created, in these cases access
can be ordered on the basis of the same terms already applied to the existing
participants. Furthermore, in some circumstances, the co-operation of various parties

supplements producer requesting a body-building magazine to accept its ads Twin Laboratories, Inc. v. Weider Health
& Fitness Corp., 720 F. Suppl. 31 (S.D.N.Y. 1989).
might in itself be evidence of essentiality. However, essential facilities are in most circumstances owned or managed by single entities in a monopoly situation and may involve both withdrawal and refusal to supply.

### 2.3 Essential facilities: monopoly or monopolisation

Under US law, essential facilities case law has been developed mostly on the basis of Section 2 of the Sherman Act. Section 2 condemns as an act of felony the action of anyone who shall "...monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or the commerce among several states or with foreign nations." Without engaging in a detailed analysis of US antitrust law, a major characteristic of that system is that it focuses primarily on the conduct of the monopolist. US antitrust laws condemn any element of impropriety in the achievement or maintenance of a monopoly and exclusionary conduct is evidence of this impropriety. For the purposes of Section 2 if the "monopoly was not improperly obtained or maintained, then exploiting the monopoly - to charge whatever price the market will bear - does not violate the statute."

In developing the doctrine of essential facilities US authorities shifted the focus onto the mere existence of a bottleneck facility. The essential facility doctrine can actually be regarded as an exception to the rule established in *US v. Colgate* whereby "in the absence of any purpose to create and maintain a monopoly" even a monopolist can "exercise his own independent discretion as to the parties with whom he will deal". This doctrine however overlaps, to a considerable extent, with other very similar strands

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34 See P. Areeda, *supra* note V-14 above, at 845.
35 Section 2 provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among several states, or with foreign nations, shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine ... ."
36 See the Supreme Court in *United States v. Grinnel Corp.*, 384 US 563, 570-71 (1966) which refers to "willfully acquire or maintain monopoly power as contrasted with monopoly achieved as a result of historical accident, business acumen, or other like"; P. Areeda, *supra* note V-14 above, at 846.
37 See P. Areeda, *supra* note V-14 above, at 847.
of authorities which focus their assessment on a monopolist’s “intent” and “monopoly leveraging”.

On the contrary Article 82 EC prohibits the objective abuse of a dominant position. On the basis of the essential character of the facility (howsoever defined) and of the consequent (or rather intrinsic) foreclosure of the market it could be argued that whoever holds that facility is prima facie in a dominant position for the purposes of Article 82. Whilst the existence of an essential facility will in most cases create a dominant position, this does not necessarily imply the abuse of that dominant position. However a system such as the EC one, which prohibits the abuse of a dominant position, is equally capable of covering the typical behaviour of the essential facility’s incumbent which results in bare exclusionary practices or more subtle discriminatory pricing policies without necessarily requiring a subjective element. If the equation between "essentiality" and dominance applies, the first step is to understand in which circumstances a facility is considered essential or strategic. The key factor under an Article 82 analysis remains the assessment of the abuse of the dominant position by discriminatory behaviour or refusal to grant access. An additional factor in this analysis consists of analysing the market in which the effects of a refusal to supply are felt and the relationship between the activities of this market and the one in which the stranglehold over the essential facility is held.

2.3.1 The intent and monopoly leveraging tests

In the US the “intent test” focuses on the advantages which the monopolist aims at gaining or maintaining by making use of exclusionary behaviour in one market. This principle which limits the scope of the Colgate rule mentioned above was refined by the Supreme Court in Aspen Skiing Co. v. Aspen Highlands Skiing Co.\textsuperscript{39} which is also commonly referred to as an essential facilities case. The facts are well known: Aspen Skiing owned three mountains in Aspen, Colorado whilst Aspen Highlands Skiing owned the fourth one. For a number of years the two companies had marketed a ski pass which allowed the use of all four mountains. Aspen Skiing decided to discontinue this co-operation and Highlands complained of illegal monopolist behaviour.
The plaintiff won a jury verdict which subsequently went to appeal and was eventually heard before the Supreme Court. The Court stated that the plaintiff must prove not only the exclusionary effects resulting from the monopolist’s conduct but also the objective intent of the defendant to monopolise. To do this the American courts would look at whether there is a lack of business justification (such as increase of efficiencies). In this case the Court of Appeals upheld the jury verdict in favour of Aspen Highlands on the basis that the multi-mountain pass that Aspen Skiing was refusing to market jointly with the operator of the neighbour mountain was an essential facility and that there was enough evidence to support the allegation of intentional creation and maintenance of a monopoly. Far from attempting to reconcile the essential facility argument with the proposition that Highlands’ mountain was as good as the defendant’s resort, the Supreme Court did not even address the essential facilities quarrel. The Court merely focused on the “exclusionary or anticompetitive purpose or effect” and confirmed both the jury verdict and the appeal Court decision to the effect that Aspen Skiing’s conduct was in breach of Section 2.

The monopoly leveraging test is derived from a Supreme Court ruling in a non essential facility case, United States v. Griffith, in which it was stated that “the use of monopoly power however lawfully acquired, to foreclose to gain a competitive advantage, or to destroy a competitor is unlawful.” The monopoly leveraging test permits the assessment of the lawfulness of the exclusive advantages gained by a monopolist on one market through its position in a second related market. As we have seen above, this aspect is typical of an essential facilities scenario where often the incumbent exploits its position in an upstream bottleneck market to obtain advantages or exclusionary effects in the downstream market. In Berkeley Photo v. Eastman Kodak Co. the Court affirmed that it is “improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete

41 See P. Areeda, supra note V-14 above, at his note No 38.
effectively in the second market." As a matter of law no general duty to share was found. However the exclusionary behaviour of a monopolist is unlawful if it is not founded on the absence of a "valid business policy". On the facts the Second Circuit Court held that the innovator was not obliged to disclose and share its developments to the competitor as the absolute justification of a valid business policy was successfully invoked.

Thus the common denominator of these two strands of authorities is that they both accept an absolute defence when a valid business justification exists. Often the justification will be simply found in the creation of efficiencies such as the creation of economies of scale. In other cases such as Berkely, the Court might find that disclosure would reduce returns from innovation and consequently is a disincentive to innovation. This has been regarded as sufficient to outweigh the attractiveness of a duty to share. Some cases can easily contain elements of both intent test and monopoly leverage. In the US case law one of these is Otter Tail Power which can also be regarded as a borderline essential facility case (assuming there is a dividing line). In fact, this case has been described as a proto essential facility case. Otter Tail, an integrated public utility, had refused to sell or transmit electric power to municipalities located in its service area which had sought to enter the market of electric supply for retail customers. The competing power system had no other source of supply. The US Government, upheld by the Supreme Court, held that this behaviour was illegal as a company cannot use its strategic dominance over a facility controlling access to a market for the purpose of maintaining its monopoly by excluding potential competitors.

It is interesting that the EC cases which are largely seen as essential facilities in Europe bear a remarkable resemblance with what in the US experience have been categorised as intent test or monopoly leverage cases. We have noticed that in the refusal to supply or withdrawal of supply cases such as Commercial Solvents or United Brands the ECJ

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43 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 US 1090 (1980).
focused on the intention of the monopolist. However, the ECJ also introduced some elements of a sort of "strict liability" on the incumbent to facilitate the claimant or the Commission in discharging the burden of proof.

*Commercial Solvents* is a clear example of a monopoly leverage test cases where the operator exploits its position on one market to obtain a monopolist-type of advantages in another. A number of other cases which followed *Commercial Solvents* are directly or indirectly linked within the communications sector. In *Telemarketing* one undertaking enjoyed a broadcasting monopoly. Its broadcasting activities were essential for the neighbouring telemarketing market. Telemarketing consists in the provision of a number of marketing services during a television broadcast. The viewers then call the number provided by the telemarketing company and are connected to an operator also provided by the telemarketer to make orders or obtain more information. In *Telemarketing*, after an initial period where the TV station provided its services, it then decided that it would have given advertising time only to those telemarketers who would use the lines and services provided by a company associated to the station. The Court of Justice found this behaviour in breach of Article 86 (now Article 82).

A similar "monopoly leverage" situation can also be found in other cases: for instance common and uniform standards or indeed intellectual property rights can often be used.

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47 In *United Brands*, (Case C-62/82, United Brands, [1978] ECR 207, para 192), the Court said that UBC could not be unaware of the fact that adopting that behaviour it would discourage other ripener/distributors from supporting the advertising of other brand names and that the deterrent effect of the sanction imposed upon one of them would make its position of strength on the relevant market much more effective.


49 Case C-53-87, Consorzio Italiano della Componentistica di Ricambio per autoveicoli and Maxicar v. Régie des Usines Renault, [1988] ECR 6039; Case C-238-87, Volvo AB v. Erik Veng (UK) Ltd., [1988] ECR 6211 in which the Court said at para 8 and 9: "It must also be emphasised that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such licence cannot in itself constitute an abuse of a dominant position. It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels might be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States; Case T-69/89, *Radio Telefis Éireann* v. Commission, [1991] ECR II 485; Case T-70/89, *The British Broadcasting Corp.* v. Commission, [1991] ECR II 535; Case T-76/89, *Independent Television Publications Ltd.* v. Commission, [1991] ECR II 575; on appeal Joined Cases C-241/91 P and C-242/P *RTE and ITP* v. Commission [1995] ECR I-743.
anticompetitively. In the *Telecommunication Terminals* case the Court - in analysing a directive which abolished the exclusive rights of the national telecommunications monopolists to import, sell, put into service and maintain telecommunications terminals - said that the Treaty requires conditions where competitors have equal chances. These conditions do not exist when one competitor has the power to lay down technical specifications for, and to approve products of, other competitors. In *RTT v. GB-Inno* the Court ruled that it is contrary to Article 82 that a dominant company would reserve for itself, without objective necessity or justification, an activity in a distinct though related market.

More recently in the controversial *Magill* case the ECJ, upholding the findings of the CFI, held that broadcasters abused their dominant position by relying on national copyright in their programme schedules to prevent the publication by third parties of TV guides which would have been in competition with the television guides published by each broadcaster and containing exclusively their own programmes. The Court stated that: "...the appellants - who were, by force of circumstances, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide - gave viewers wishing to obtain information on the choice of programmes for the week ahead had no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

The appellants' refusal to provide the basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which

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53 A case which is widely regarded as an essential facilities case is *Hugin* (Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd. v. Commission*, [1979] ECR 1829) which concerned the refusal to supply of spare parts for cash registers to a downstream competitor. The Commission considered that was aimed at protecting its own service and maintenance activities from competition. The Court accepted that Hugin was dominant in the relevant market however it annulled the decision of the Commission on the basis that the effect on trade between Member States had not been proved.
54 *RTE and ITP*, *supra note V-49 above.*
there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 [now Article 82] of the Treaty."\(^{55}\)

In his opinion in *Oscar Bronner* Advocate General Jacobs explained the *Magill* ruling in view of "the special circumstances of the case which swung the balance in favour of an obligation to license."\(^{56}\) He went on to say that "while in general the exercise of intellectual property rights will restrict competition for a limited period only, a dominant undertaking's monopoly over a product, service or facility may in certain cases lead to permanent exclusion of competition on a related market. In such cases competition can be achieved only by requiring a dominant undertaking to supply the product or service or allow access to the facility."\(^{57}\) In its judgment in *Oscar Bronner* the Court followed this restrictive interpretation of its previous ruling justifying it on the basis of the exceptional circumstances of the case.\(^{58}\)

The implications of the *Magill* ruling were also considered by the CFI in *Tiercé Ladbrooke*.\(^{59}\) The case concerned an appeal against a decision of the Commission to reject a complaint without proceeding to formal decision. The complaint regarded the rights to the films and commentaries of the French horse races. The ten French associations which organised the races licensed their performing rights of the races for marketing live through a company PMU. PMI, a subsidiary of PMU, was licensed to license outside France with the specific consent of the relevant association each time. PMI had licensed DSV on the condition that the films would not be transmitted outside the former Federal Republic of Germany and Austria. Various complaints arose out of this arrangement. In Belgium a Ladbroke subsidiary was refused the licence of the films of the French races by both PMI and DSV, the German licensee.

The Commission held that the market for transmission of films was ancillary to the betting market, therefore the geographic market for the former is limited to that of the

\(^{55}\) Ibidem, at paras 53 and 54.
\(^{56}\) Para 63.
\(^{57}\) Para 64.
\(^{58}\) Paras. 40-41.
\(^{59}\) *Tiercé Ladbrooke v. Commission*, supra note III-24 above; see comment V. Korah, supra note III-24 above; the appeal was withdrawn.
latter. The CFI found that the Commission had correctly identified the product market as retransmission of sound and pictures of horse races in general and the geographical market as the Belgian market. With regard to the question of abuse the Court noted that given that the undertakings in question had not granted any licence for the territory of Belgium, their refusal to grant a licence did not entail a discrimination between operators on the Belgian market. The Court distinguished the case from the circumstances of Magill because whereas in Magill the refusal to licence prevented the applicant from entering the market for comprehensive television guides, in Tiercé Ladbroke the applicant was not only present on, but had the largest share of, the main betting market on which the product in question (racing films) was offered to consumers while the owners of the rights were not on that market. Furthermore it was added that even if it were assumed that the presence in the related market was not decisive Article 82 would still not be applicable as “…the refusal to supply the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or a service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers …"60

2.3.2 Leveraging under EC law
EC case law supports an interpretation of Article 82 which extends to prohibiting an abusive conduct on the dominated market having effects on markets other than the dominated market. This function of Article 82 is of primary importance, both in terms of direct application of the provision and in its interrelation with the regulatory regime. In Chapter IV above we have seen how Article 82 applies to leveraged dominance. The notion of essential facilities has gone through phases of alternate fortune. This epithet, as Areeda calls it, is controversial and abuses of arguments based on it have been rightly constrained by the Oscar Bronner judgment. It is therefore necessary to analyse first how this notion has been explicitly used in the case of both the US and the EC courts and authorities.

60 Tiercé Ladbroke v. Commission, supra note III-24 above, para 131.
3. The essential facility doctrine in US and EC case law

3.1 US case law

The US case in which the notion of essential facility emerged in most clear terms is the Second Circuit decision in *Hetch v. Profootball*. The case concerned the use of a football stadium which was franchised to a professional football league team. A covenant prohibited leasing the stadium to any other professional football team. A potential franchisee whose team played in a rival football league challenged the terms of the stadium's lease. The claimant won a jury verdict which was appealed. On appeal one of the issues was whether the case could be decided on the basis of the essential facility doctrine and Section 2. The Second Circuit in condemning the practice as in breach of Section 2 stated that "where facilities cannot practically be duplicated by would be competitors, those in possession of them must allow them to be shared on fair terms. It is an illegal restraint of trade to foreclose a scarce facility." The Second Circuit specified that the facility does not need to be indispensable as it is sufficient that the duplication of the facility is economically infeasible.

With regard to the use of the doctrine by competition authorities, the US Federal Trade Commission ("FTC") has always been reluctant to use the expression "essential facility". Nevertheless it has effectively applied this principle in the *Reuben H. Donnelly* case. The case involved the publisher of the *Official Airline Guide*. The guide contained up-to-date schedules for US domestic passenger flights. The FTC found that the guide was the only complete listing; it was considered the primary source of flight schedule information for the flying public and the primary marketing tool for carriers. The guide was therefore considered an essential tool for both customers and for competitors which can enhance customer's choice. In fact an airline whose flights were not included in the guide would have found it very difficult (although arguably not impossible) to compete with airlines whose flights did appear in the publication. It is not clear whether the duplication of the guide was actually "economically infeasible". It

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61 570 F.2d 982 (1977).
62 95 F.T.C. 1 (1980).
has been argued that this case does not fit into the classic notion of essential facilities developed in US case law. Donnelly did not compete in the passenger airline market whilst most essential facilities cases “involve a refusal by an integrated firm with a monopoly in one market to deal with its competitors in a second market.”

Furthermore, Donnelly was accused of listing commuters’ connecting flights in less convenient locations. The FTC argued that without a substantial business justification, it was unlawful for a monopolist to treat some customers in a discriminatory manner if the result would bring about a lessening of competition in the customers’ market. Therefore it ordered Donnelly to list flights of commuters in a non-discriminatory manner. Interestingly, the Court of Appeals rejected the Commission’s decision and affirmed that a monopolist in Donnelly’s position was free to decide with whom to deal “as long as he has no purpose to restrain competition or to enhance or to expand his monopoly.”

The case law of US district courts shows various examples of the use of this doctrine. In Consolidated Gas Co. of Florida v. City Gas of Florida, City Gas, a large gas distributor in southern Florida, had permitted access to its pipeline to a smaller distributor, Consolidated Gas, at unreasonably high prices. This conduct impaired the possibility of Consolidated Gas to compete with its larger rival by serving some of its customers. The Court held that the unreasonable terms were “tantamount to a refusal to deal” and ruled City Gas’s conduct in breach of Section 2 of the Sherman Act. It has been remarked that since Aspen American jurisprudence required the “showing of anti-competitive harm under Section 2 that cannot be inferred simply from the monopolist’s refusal to deal.” The underlying proposition is that under US competition law a monopolist has no duty to create competition and such an affirmative duty should arise only if the refusal to deal actually reduces competition. In the absence of this reduction

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63 M. Azcuenaga, supra note V-27 above 882.
64 Ibidem.
65 Official Airline Guides Inc. v. FTC, 630 F.2d 920 (2nd Cir. 1980).
66 See in general G. J. Werden, supra note V-7 above, at 446-7.
68 Ibidem at 58,927.
69 P.J. Ahern, supra note V-44 above, at 163.
a refusal to deal on the part of a monopolist does not "trigger an affirmative duty to deal or need to justify the refusal."\textsuperscript{70}

In this respect the most important authority is \textit{Rural Telephone Service v. Feist Publications}.\textsuperscript{71} The case concerned the refusal of a monopolist Rural Telephone to allow a smaller rival to use its white pages listings in the rival's yellow pages directory. In this case the court reaffirmed that under Section 2 a complainant has to demonstrate that the monopolist's conduct harms competition generally and not just a competitor. According to the Court Feist Publications had to demonstrate that Rural Telephone's conduct "was intended to or did have some anticompetitive effect beyond its own loss of business."\textsuperscript{72} In this case the court considered that the plaintiff failed to discharge its burden of proof in several respects. It had not shown an inability to compete, and it was unable to identify anyone who had complained or refused to purchase because the yellow pages directory did not contain the rival's white pages listing. Finally the competitor had actually reached a market share of 20 per cent. from the start of its commercial venture. In the light of all these elements, the Court considered it unnecessary to examine the monopolist's business justifications and did not regard the plaintiff's case as requiring the imposition of an affirmative duty to deal.

Undoubtedly the communications sector, due to its complex and convergent nature, offers considerable scope of application for the essential facilities doctrine. In the US this emerged in \textit{MCI v. AT&T}.,\textsuperscript{73} MCI was seeking interconnection to AT&T's network. AT&T's pricing for private lines was discriminatory in the sense that the price per call on a private line was higher than that made through a public line. The difference did not find a justification in costs. However, the capacity of a private line could not be resold to others. In 1969 the FCC allowed MCI to develop a system connecting a number of cities. This infringed AT&T's monopoly over long-line communications. In 1974 new carriers were allowed to gain access to customers via AT&T's local lines. However, the

\textsuperscript{70} Ibidem.
\textsuperscript{71} 957 F.2d 765 (10t Cir.), cert. denied, 113 S. Ct. 490 (1992); see also the cases referred to by P Ahern, supra note V-44 above, at note 45.
\textsuperscript{72} Ibidem at 768.
\textsuperscript{73} \textit{MCI Communications Corp. v. AT&T}, 708 F.2d 1081, (7th Cir. 1982), cert. denied, 464 US 891 (1983).
pricing policy of the main operator did not suffer from competition as the FCC required it to adopt uniform pricing. The Court overruled the FCC and allowed the operation of Execunet, a service which allowed subscribers to make calls over both AT&T local lines and MCI long lines, at MCI prices. On appeal the Court of Appeals considered that the case law sets forth a number of elements necessary to establish liability under the essential facility doctrine and in particular: (i) control of the essential facility by a monopolist; (ii) a competitor's inability practically or reasonably to duplicate the essential facility; (iii) the denial of the use of the facility to a competitor; and (iv) the feasibility of providing the facility. In the MCI case it was considered that the requirements were met: the technology available at the time was regarded as giving natural monopoly to the Bell companies; it was considered unfeasible for MCI to duplicate Bell's facilities and, furthermore, it was not possible to obtain a regulatory authorisation. The conditions set out by the Court of Appeals are still considered an authoritative benchmark in essential facilities cases.

3.2 EC case law

The essential facility doctrine found its way into EC law mainly through the Commission's action and decisions. Even if it is an ad hoc development a common strand may be found in the decision pattern. It is certainly not a coincidence that the Commission has taken a more innovative stance in this area. In fact due to its role in the enforcement process, the Commission is best placed to engage in the economic and legal analysis involved in essential facilities cases. The Commission has always shown care in developing the doctrine in harmony with general competition principles expressed in Article 81 and 82 and it has spelt out that "conflicts should not arise with other Community rules because Community law forms a coherent regulatory framework."74

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Chapter V

Exclusionary behaviours have been condemned in a number of other cases. Some concerned supply of raw materials, others involved interrelating technology-driven markets and a substantial number the transport sector. In the case of communications, and particularly telecommunications, the issue of access to the facility is mainly to be determined in terms of interconnection rights and regulatory policy. The specific issue of local loop unbundling, which as we have seen in Chapter II, borrows a number of concepts from the essential facilities doctrine is now codified in a specific Regulation. In relation to broadcasting the issue of access is critical in particular with regard to conditional access. A number of merger control decisions and remedies examined in the next chapter deal with these issues. The competition rules are nevertheless of paramount importance in the establishment of a coherent regulatory policy which is required to take those rules into consideration and sometimes enforce them. Furthermore the regulatory action, which takes place increasingly at national level, is often supported by coordination with the Commission's action. In this sense case law principles developed by the Commission in relation to other economic sectors, might prove very important and can be considered a useful precedent for communications both at European and at national regulatory level.

The Commission has been particularly active in the transport sector. The precedents thus are very useful for an analysis of the application of the doctrine in the communications sector. In London European/Sabena Sabena which was dominant in Belgium in the market for computerised reservation systems (CRS) had refused to allow

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76 National Carbonising Decision; Case 109/75R, National Carbonising Co. Ltd. v. Commission, [1975] ECR 1193. National Coal Board (NCB) held a dominant position for both the raw material (coal) and the downstream product (coke). National Carbonising a coke producer, complained with the Commission that the price for the coal and, in parallel, the price charged by NCB for coke, were to low to enable a fair competition; see also Commission Decision 88/518/EEC of 18 July 1988, Napier Brown v. British Sugar, OJ 1988, L 284/41.

77 In the IBM case, IBM who manufactured large computer hardware with main memory and basic software, prevented some competitors to supply memory and software to IBM's customers. Furthermore IBM put in place a number of bundling practices by refusing to supply certain software to non IBM computer users and not disclosing details of the technical interfaces long after it had started taking orders for its own machines. This effectively impaired competition of IBM compatible hardware or software producers. The Commission announced its intention to open an investigation and issued a statement of objections. The case unsuccessfully fought on procedural grounds (Case 60/81, IBM Corp. v. Commission, [1981] ECR 2639 on the annulment of the Decision to initiate a procedure and the statement of objections), was subsequently settled (XIVth Report on Competition Policy, 1984, point 94). Nonetheless this provides a useful illustration of what the Commission's regarded as unlawful tying practices in a case involving interrelating technology driven markets.

78 The Commission has expressly recognised this in its Access notice, para 88.
a competitor, London European, to have access to its CRS. This was intended to indirectly induce London European to raise its fare on the London-Brussels route or to withdraw from the market. The Commission expressly quoting Commercial Solvents considered the practice unlawful and ruled that Sabena had abused of its dominant position by refusing to supply an essential service. Interlining is another aspect of airlines’ practices which is particularly relevant in the context of essential facilities. The analogies that can be drawn with access in communications are manifestly clear.

In British Midland/Aer Lingus the Commission found that the termination of the interlining agreement by Aer Lingus amounted to an abuse of dominant position. Aer Lingus was found dominant in the London-Dublin route. Once British Midland announced its intention to enter into that market to compete with Aer Lingus, the Irish airline decided to terminate their interlining agreement. This withdrawal substantially affected British Midland’s ability to compete during the initial period of its presence on that route-market. The Commission found that refusing to interline is not normal competition on the merits. Aer Lingus argued that it “would suffer from interlining with British Midland by losing several points of the market share to a new entrant.” The Commission expressly said that the argument that interlining would result in a loss of revenue would not in itself make the refusal legitimate. It is interesting to note that the implicit equation between the loss of market shares alleged by the airline and the loss of revenue envisaged by the Commission implies that the market was at full capacity of demand. This might be interpreted as meaning that a duty to supply would extend also to a clogged facility, where the release of a share of capacity to a competitor would cause not only a decrease of market share but also of revenue.

79 OJ 1988, L 317/47.
80 See decision para 33.
81 This is an IATA practice whereby airlines are authorised to sell each other services. As a result, “travel agents can offer passengers a single ticket providing for transportation by different carriers (e.g. leaving on the airline issuing the ticket and returning on another airline serving the same route or continuing to destinations not served by the issuing airline). In addition, airlines recognise each other’s authority to change a ticket so that passengers can change reservations or routings on airlines after the ticket has been issued,” see XXth Report on Competition Policy, 1990, point 73 and ff. The issuing airline collects the price for all segments from the passenger and then pays the fare due to the carrying airline less a percentage service charge as a compensation for expenses incurred in selling, handling, servicing and processing interline traffic.
Another set of cases which gave a substantial impetus to the development of the essential facilities doctrine in EC law concern access and use of harbour facilities. In B&I/Sealink83 a company Sealink was both a car ferry operator and the owner of Holyhead Harbour. B&I was the only competitor and it also used the harbour. Its berth was inconveniently located at the mouth of the harbour. In fact the mouth was so narrow that when a Sealink ship sailed by, B&I had to stop its loading and unloading operations to lift the ramp which connected the ship with the dock. Due to an alteration in Sealink’s schedule the disruption in the competitor’s operation had to occur more frequently.

On the basis of the existing ECJ case law the Commission affirmed that:

“A dominant undertaking which both owns and controls and itself uses an essential facility, i.e., a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 86, if the other conditions of that Article are met.”84

The Commission found that the owner of an essential facility could not impose a competitive disadvantage on the competitors which also use its facility by altering its own schedule to the detriment of a competitor’s service if the features of the facility are such that the alteration of one competitor’s service harms the other’s. Holyhead Harbour again came under the scrutiny of the Commission when a third competitor, Sea Container, sought access to the use of the facility and was delayed by the difficulties made by Sealink. The Commission reiterated the analysis already made in the B&I/Sealink case.85

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84 Ibidem, para 41.
Finally in the *Port of Rødby* decision\(^6\) the Commission, in an action brought under Article 86, condemned the refusal by the Danish government to allow Stena to build a private commercial port near the existing one or to let it use the *Port of Rødby*. The port was the only point of access for sea transport between eastern Denmark and Germany. The key issue in reaching the decision was that on the one hand there were no technical constraints which would impede access, on the other there was no evidence that the facility could not handle more traffic.

The considerable body of case law from the Commission and the European Courts, together with the experience of American cases, allows a mature reconstruction of the notion with a view to its application in the communications sector. This notion however has to be reconciled with self-restraint or the need to avoid, as put by AG Jacobs, leading "the Community and national authorities and courts into detailed regulation of the community markets, entailing the fixing of prices and the conditions for supply in larger sectors of the economy."\(^7\) He rightly considered that intervention on that scale would not only be unworkable but would also be anticompetitive in the longer term.\(^8\) In the context of a regulated sector such as communications this might also be unnecessary. However, in order to arrive at a synthesis of the application of the general principles of essential facilities in communications a more specific analysis is required which is the subject of the next section.

4. **The EC practice examined**

When an undertaking is refused access to a facility, the starting point of competition analysis must be to determine whether the market for the refused product or service is foreclosed by the incumbent. In that respect the CFI, quoting *Magil*\(^9\) and *Tiercé Labroke*\(^10\) affirmed that "a product or a service cannot be considered necessary or

\(^6\) OJ 1994, L 55/52.
\(^7\) Para 69.
\(^8\) See also the arguments of Areeda, *supra* note V-14 above, at 847-848.
\(^9\) Paras 54 and 55.
\(^10\) Para 131.
essential unless there is no real or potential substitute."\(^{91}\) In *Oscar Bronner* the Court also attached a substantial importance (although at the same level as other factors) to the fact that "there is no actual or potential substitute in existence for [the refused service]."\(^{92}\) Once it has been established that there are no other viable ways to have access to that market, one must then consider whether the denial of the product or the service provided by the dominant undertaking prevents the other undertaking from accessing its related (albeit separate) market. In that case a facility is *prima facie* essential. This does not mean that a refusal to supply that product or service entails a conduct in breach of Article 82 EC.\(^{93}\)

In its Access Notice the Commission envisaged three relevant scenarios with regard to essential facilities in telecommunications: (a) a refusal to grant access for the purpose of a service where another operator has been given access by the access provider to operate on that services market; (b) a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market; and (c) a withdrawal of supply of access from an existing customer.\(^{94}\) These situations will be taken as a model but analysed in the following order: firstly the case in which there is a withdrawal of supply from an existing customer;\(^{95}\) secondly the situation in which access to a facility is refused where another operator has been given access to that product or service; thirdly the scenario where there is refusal to grant access and no other operator has been given access by the incumbent to that product or service.

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92 Para 41.
93 However, as we have seen above, the notion of abuse under Article 82 is an objective one. An evaluation of a conduct of a dominant undertaking has to be done accordingly. The premise of this reasoning is simply based on Article 82 which does not prohibit the existence of a monopoly but places a limit on its abuse. However, the impact on the Article 82 assessment, the undertakings' intentions (which play an important impact in the US approach) are not clear. If abuse under Article 82 is an objective concept is knowledge of adverse effects on competition required to prove abuse, and if not, is it sufficient? For instance in United Brands an important factor in the Court's reasoning appears to be the purpose of the behaviour of the dominant firm which, in the case of UBC, was linked to the dominant company with an strict liability criterion ("UBC could not be unaware of the fact that acting this way would discourage [Olesen's competitors]")(United Brands, supra note II-87 above, para 192). Furthermore the Court regarded as decisive the fact that "the adoption of such a course of conduct [was] designed to have a serious adverse effect on competition on the relevant banana market by only allowing firms dependent upon the dominant undertaking to stay in the business." (Case C/628 United Brands, [1978] ECR 207, para 194) The ECJ ruling in Tetra Pak also attach some importance to the intention of the dominant undertaking in the context of predatory pricing. Undoubtedly the existence of a discriminatory element in the conduct of a dominant undertaking can provide a useful yardstick to evaluate its legality. However, I believe that this might and should be confined to an objective interpretation and does not require entering into the uncertain territory of an analysis of intentions.
94 Access Notice, para 84.
Withdrawal to supply
With regard to withdrawal to supply one should start by clarifying that the mere existence of a previous supply relationship does not automatically render the product or service first supplied (and then refused) an essential facility. However, withdrawal can indeed constitute an abusive behaviour and the authority in this area is still the ECJ's ruling in Commercial Solvents. Clearly the previous commercial relationship between the parties provides a useful term of reference to evaluate the conduct of the dominant undertaking. Therefore, the assessment of the legality of the conduct of the dominant undertaking, which entails an evaluation of its justifications, is considerably easier.

Discriminatory refusal
Along the same lines, the presence of other customers who are granted access to the market to which access is sought by the refused undertaking, is a factor which greatly influences the evaluation of the refusal to supply. If such a refusal, which entails a different treatment of certain customers, is not objectively justified it can be regarded as a discriminatory restriction of competition.

Non-discriminatory refusal
If an incumbent refuses to supply a service or a product to a customer with whom it has had no previous commercial dealings and this refusal is not discriminatory (in the sense that no other customer is granted access to the product or service in question) it might be argued that an abuse would be more difficult to prove. However, the potential restrictive effects on competition of this type of conduct could be considerable, particularly in cases in which the refusal concerns a new product which could lead to the development of a new market. The balancing process in this scenario is very delicate.

A situation which involves no discriminatory element requires proof of the exceptional gravity of the conduct in terms of restrictive effect on competition in general.

95 Ibidem.
Whilst US law is based on the subjective tests of intent, under EC law the notion of abuse has to be construed objectively. In this context, the position of competitors in the related (but separate) markets where the abusive practice of refusing a service or product produces its effects on competition in general (rather than merely on the interest of the refused undertaking) becomes an essential element of the equation. The fact that the dominant refusing undertaking and the refused undertaking do compete, although in a separate market, provides a sort of objective evidence of intent.96

Refusals which lead to the impairment of competition in a separate market can also be construed as per se discriminatory and hence abusive without need to prove discriminatory intent. In Oscar Bronner Advocate General Jacobs stated the type of intervention required by an essential facility, which entails an imposition of a duty to supply, can be justified in terms of competition policy only in cases where the dominant undertaking has a genuine stranglehold on the related market.97 The "related market" is actually the one where both the dominant position is held and the abuse takes place. In an essential facility case the effects of an abuse which takes place in one market are felt in another in which the facility is required as part of the production or supply process.

These conditions might be satisfied when duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or it is highly undesirable for reasons of public policy, and, it is not sufficient that the undertaking's control over a facility gives it a competitive advantage. Similarly the Commission in its Access Notice has set out a number of situations concerning telecommunications in which it considers that an essential facility would exist: (a) the refusal must lead to the proposed activities being made either impossible or seriously unavoidably uneconomic; (b) the existence of sufficient capacity; (c) the blocking of the emergence of a potential

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96 This introduces the question of how would the doctrine operate in cases in which access to facilities is sought directly by customers. It is difficult to imagine why a company would refuse to supply a customer who is offering to pay a market price. A possible conceivable circumstance of this kind would be that of a provision of a service which is uneconomical for the service provider. These aspects are normally dealt within the regulatory provision in general and particularly universal service obligations. Typically essential facilities cases aim at achieving a wider choice for customers through the imposition of a duty to share on the incumbent in favour of actual or potential competitors. However, as pointed out by Advocate General Jacobs in its Opinion, the benefit for competitors is clearly subsidiary to that of direct customers. Temple Lang (supra, at. 251) has interpreted the prohibition of refusal to supply to customer as less strict than that relating to competitors (actual or potential). However, if we assume that the overriding aim of the essential facilities doctrine is to ensure access to a choice of services or products it would appear inconsistent if the duty of the dominant company vis à vis direct customers (as opposed to competitor-customers) were to be interpreted less strictly.

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new service or product or the impediment in competition of an existing or potential service or product market; (d) the payment by the undertaking seeking access of a reasonable and non-discriminatory price and acceptance of non-discriminatory terms and conditions; and (e) the lack of objective justifications. This reasoning can potentially apply also to broadcasting.

The approach adopted in *Oscar Bronner* is a substantial contribution to addressing the question of whether a facility is to be considered "essential". An essential facility must be "vital to the rivals' competitive viability", critical (not simply desirable) and not capable of duplication. Furthermore the desirability of allowing an access to an essential facility must be assessed on public policy grounds. Advocate General Jacobs rightly looks at public policy in economic terms. He remarks that whilst competition could be increased in the short term by providing access to a facility developed by one undertaking, it would be reduced in the long term as there would be no incentive for a competitor to develop competing facilities. Finally he points out that the primary purpose of Article 82 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors. He therefore says that it may be "unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus on the latter's market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact upon consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power."99

The Court accepted the approach adopted in the Advocate General's Opinion. One particular point is worth noting. The Court emphasised that, in order to demonstrate that the creation of the new facility is not a realistic potential alternative and that access to the existing facility is indispensable, it is not enough to argue that it is not

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97 Para 65.  
98 Access Notice para 91.  
99 Para 58 of the Opinion.
economically viable by reason of a small dimension of the undertaking which seeks access. For such access to be regarded as indispensable it would be necessary at the very least to establish that it is not economically viable to create a second facility for an operator of the size of the dominant undertaking.\(^{100}\)

Finally the issue of opening up competition clashes with a number of other considerations of equal rank. The premise of an evaluation in this case has been clearly set out by Advocate General Jacobs in his opinion in the *Oscar Bronner* case.\(^{101}\) Firstly, the Advocate General points out that general principles in the laws of the Member States recognise the right to choose one's trading partners and to dispose freely of one's property. Those rights in some cases have constitutional status and therefore interference should be carefully balanced. Secondly, on a more economic level, he pointed out that in the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business.

With regard to the relationship between duty to give access and property rights, it should be noted that the ECJ has stated in the past that the right of property might be limited by EC legislation provided that the limitation responds to a Community objective and the objective cannot be attained by a less restrictive measure.\(^{102}\) In the communications sector at large and in the case of access to networks the situation is, to a certain extent, simplified by the de-materialised nature of the asset where access is sought. Once again we can take the American experience at the dawn of competition when telecommunication companies leased private lines, as a valuable example and point of reference. It has been remarked\(^{103}\) that the lines and the networks were open at the "ends, along, or through, which those who leased could send their own calls and data freely" once they had paid connection and annual rental charges. The asset was

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\(^{100}\) Paras 45 and 46.

\(^{101}\) Para 56-58.


\(^{103}\) C. D. Foster, *supra* note 1-31 above, at 168
therefore open in nature and issue of interconnection and right to access is better analysed in terms of fair return for its use rather than in terms of confiscation.

Finally the doctrine of essential facilities and any other form of exclusionary abuses is, of course, subject to the justifications that the dominant undertakings can utilise as defences.

5. Justifications for failure to provide essential facilities

Since United Brands the Court stated that:

"Although [...] the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse of it."\(^{104}\)

Striking the balance between pro-competitive strategies and anti-competitive exclusions can prove to be particularly difficult. The two types of abuse in which this contrast emerges more clearly relate to pricing and refusal to supply.

A typical feature in the cases concerning with refusals to deal under Article 82 is that "a dominant firm may legitimise its conduct through objective justifications."\(^{105}\) The case law of the European Courts leaves scope to justify refusal (or discontinuance) to supply. In the definition adopted in Commercial Solvents the Court appears concerned with not widening too much the duties imposed on the incumbent. Its evaluation seems to be focused on preventing the incumbent from disguising its anti-competitive purposes with legitimate business justifications. In BP-ABG\(^{106}\) the Court focused on the justifications

\(^{104}\) United Brands, supra note II-87 above, para 189 and subsequently Tetra Pak II, supra note II-91 above, para 147.

\(^{105}\) J.S. Venit and J.J. Kallaugher, supra note IV-145 above, at 329.

for BP to refuse supply by reducing its supply to ABG substantially to a much greater extent than in relation to all its other customers. In challenging an adverse decision of the Commission BP was successful in proving that at the time of the reduction in supply ABG had become an occasional customer. Furthermore the alleged abuse occurred in a period of petrol shortage due to the 1972 world crisis. The Court found that there was no intention of anti-competitive behaviour in the refusal to supply to the downstream competitor but merely to preserve, in an exceptional period of shortage, the level of deliveries which its traditional customers expected.

However, the case law in this subject cannot be easily rationalised and does not clarify with certainty the circumstances under which discrimination or refusals can be justified. It has been remarked that "the Commission has never said anything to suggest that a dominant company could not take advantage of genuine advantages of vertical integration either to give itself an advantage over its downstream competitor or to argue that it was not obliged to give the competitor access because the result would be less consumer welfare rather than more." 107 The most important yardstick to assess the extent of the incumbents' duties is the principle of proportionality between the interest to competition and the justifications of the incumbent. In the context of utilities and particularly in communications this assessment should also take into consideration the wider issues of public interest such as the right to information and freedom of expression which can be entrusted to the incumbent explicitly (in the case of state owned enterprises) or implicitly (in case of privatised or liberalised undertakings).

More generally the analysis under Article 82 cannot ignore the causes of the dominance of a company. As we will see in Chapter VII below in ERT, the Court dealt with a case of dominance created by a state measure in favour of a public undertaking. 108 However, if a company has been left with a dominant position by the previous legal monopoly, this advantage can be counterbalanced by requiring the enterprise to give access and not to discriminate, provided that it does so at a market value, in order not to undermine its financial position vis à vis the investors. This burden derives precisely from the

107 Temple Lang, supra note IV-145 above, at 302.
combined effect of both its market position and the role that is entrusted to that economic activity within the system. It would be a sort of reverse discrimination if state owned companies were subject to the set of duties set out in ERT whilst this would not apply to operators which perform the same function and are de facto entrusted with the same role.

Undoubtedly the assessment of justifications will primarily involve an economic evaluation of the need of the facility owner to recoup the costs of the investment and the time required to place a new product on the market. This emerged in the ITT Promedia case\(^\text{109}\) which concerned the right of a publisher of telephone directories to have access to the information of Belgacom (the incumbent telecommunications operator) who enjoyed exclusive rights to the information. The CFI construed the obligation to provide access to essential information narrowly and given the exclusive right enjoyed by Belgacom at the time of litigation, the Court confirmed the Commission's view that the incumbent could legally assert what it could reasonably consider to be its rights. The issue is how to determine an equitable remuneration for the information to be provided to third parties. Whilst incentives are less important when they relate to information (or more generally assets, including know-how) obtained in a regime of exclusive rights, the question of remuneration and incentives to innovation will be different once companies have been subject to competition for a number of years. Furthermore the pace of technological development in communications corrodes quickly a number of the advantages gained by companies in formerly nationalised industries.

With regard to refusal to supply, in the context of telecommunications, the Commission has declared\(^\text{110}\) that the overriding difficulty of providing access to the requesting company may be considered an objective justification. The seriousness of these difficulties will have to be evaluated on a case by case basis. This process will involve a balancing between the impediments and the damage done to competition and end users if access is denied.

\(^{108}\) Case C-260/89, Elleniki Radiofonia Tileorassii Anonimi Eairia (ERT AE) and Another v. Dimotiki Eairia pliroforissits and Sotiros Kounelas and Another, ("ERT") [1991] ECR 2925; see para 4.21 in Chapter VII.


\(^{110}\) Access Notice, para 91.
With regard to essential facilities, Areeda draws a distinction between legitimate business justifications at "micro level" and those at "macro level". In the former category he includes "the circumstances of the particular case". Amongst these fall all the cases where a duty to share or grant access would cause the disruption the monopolist's business. By "macro level" or "class justification" he refers to legitimate business purposes which "are not personal to any particular defendant, but are propositions of general policy." These do not refer to the technical or practical feasibility of granting access or sharing achievements but rather general concerns on what could be called downstream effects of this form of competition (such as disincentive to innovation which would in the long term affect consumers). The ruling of the Court in *Oscar Bronner* limits considerably the extent of application of the essential facility doctrine in EC law by setting a very high standard in favour of the owner of the facility at "macro level". This was clearly done in an attempt to limit an instrumental use of the doctrine. This limitation reduces considerably the need for micro level defences. However one could still consider whether cases where access would disrupt the monopolist's own business justify an exclusionary practice.\(^\text{111}\)

Finally one has to consider whether a "clogged" facility would be an absolute defence or this would simply have an impact on the practical evaluation. To what extent can this type of justifications be invoked and more importantly which business justifications are to be considered legitimate? It is worth noting that in the *Sealink* case\(^\text{112}\) the Commission entered into an assessment of the facility's capacity and considered that the capacity of the harbour would allow the presence of a competitor without inconvenience. Again, in terms of objective justification it seems reasonable to infer that the issue of capacity would play a key role in the assessment of the duty to share the facility. Furthermore in the *Port of Rødby* decision\(^\text{113}\) the key issue in reaching the decision was that on the one hand there were no technical constraints which would impede access, on the other there was no evidence that the facility could not handle


\(^{113}\) OJ 1994, L 55/52.
more traffic. Again the issue of spare capacity seemed decisive in the Commission's assessment. The Commission expressly stated that this duty applies even if the actions of the essential facility's owner "make, or are primarily intended to make its operations more efficient. Subject to any objective elements outside its control, such an undertaking is under a duty not to impose a competitive disadvantage upon its competitor in the use of the shared facility without objective justification". This seems to say that, under an Article 82 analysis, efficiency cannot be considered an "objective justification".

6. Conclusion

The essential facilities doctrine in EC competition law after Oscar Bronner appears to be in a regressive phase as the circumstances in which it can be invoked have been clarified. The restraint on an indiscriminate and excessive application of the doctrine is to be welcomed as a positive development. However it is precisely in a sector such as that of communications that the doctrine retains its role. A few conclusions can be drawn from the precedent in Oscar Bronner. The essential facilities doctrine which originated in the US, is to be assessed within the EC system of competition law in the context of the existing and rich case law on refusal to supply under Article 82. As it illustrated above, Article 82 allows an interpretation which covers situations of monopoly leveraging or abuses taking place in a dominated market which have effects in a market other than the dominated one. This of course is particularly important in the case of vertically integrated companies. Indeed the close interrelationship between different markets within the communications sector has produced integrated structures in which the risk of monopoly leveraging on the part of incumbents (particularly former legal monopolists) has to be monitored closely. However, the analysis may be different when dominance in one market is obtained not as a result of an historic legal monopoly but rather through innovation. In this situation, the balancing act there is between the continuing need for competition, even in new areas, and the risk of discouraging innovation and investment to avoid free riders.

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114 B&I Line plc v Sealink Harbours Ltd. and Sealink Stena Ltd., (1992) 5 CMLR 255, para 42.
It has been remarked that *Oscar Bronner* fails to provide guidance as to what duties should be imposed upon a non-integrated or single monopolist who has no rivals to exclude either from its own or from a related market.\(^{115}\) It is difficult to imagine why a supplier, even a monopolist, would refuse to provide a service to a potential customer willing to pay a market price. If the reasons concern pricing than the question would have to be assessed in the context of the principles developed in that area of competition law. If there is a bundling or tying problem then again one should look at the case law developed in that context. In any event competition law principles on pricing and cost allocation analysed in Chapter IV interrelate with the essential facilities doctrine to cover situations in which pricing issues disguise an actual refusal to supply.

An important principle arising from both the Advocate General’s Opinion and the Court’s judgment in *Oscar Bronner* concerns the importance of investment and, in particular, the issue of whether a duplication of the facility is economically viable. This is highly relevant in the context of communications where the initial investment costs (normally relating to infrastructures) are often a considerable barrier to entry into the relevant markets. Notably the Court postulated that the economic viability of the duplication of the facility alleged to be essential has to be assessed by reference to the ability and economic means of a hypothetical undertaking of the size (and market power) of the incumbent. This undoubtedly acts as a further constraint to the application of the doctrine. However it leaves open the question of the possible application of this principle to the case (which can easily be conceived) of a company which is dominant in the market where it refuses to supply and not dominant in the related market where the effects of the abuse are felt. Arguably according to the *Oscar Bronner* test in this scenario the refusal would have to be considered as abusive.

In economic terms the Court’s statements can be interpreted as meaning that the market where the essential facility arises must be such that only one firm is economically viable and, hence, it is not possible for two firms to operate simultaneously in the market unless one of them is at least unprofitable.\(^{116}\) This situation gives rise to a natural

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\(^{115}\) See the annotation of the *Oscar Bronner* case by L. Hancher, 36 CML Rev., 1289, 1305.

monopoly or perhaps more accurately inevitable monopoly.\textsuperscript{117} In communications, situations of this type arise notably in relation to local loops for telecommunications and platforms for broadcasting which entail conditional access or access control. In the Commission Communication on Unbundled Access to Local Loop the Commission stated that the incumbent’s copper pair is the key infrastructure for providing services in a number of separate relevant markets including access voice retail services, local call (origination) services (in cases where carrier selection and pre-selection is not available) and high bandwidth services to end users.\textsuperscript{118} In this context the use of the principles developed in \textit{Oscar Bronner} was expressly recalled by the Commission. The historic reconstruction of the origins of the doctrine (particularly in US case law) and its link with higher level rights such as public interest is suggestive but ultimately, it is submitted, unsatisfactory. The notion of essentiality has to be reconstructed in terms of economic analysis. Such an approach will intrinsically include a public interest analysis and act as a restraint to prevent an abuse of the doctrine.

Competition law has an important role to play in defining the incumbent’s obligations. In particular the principles in relation to Article 82 have a significant authority, due to the primacy of EC law, within the application of national regulatory provisions by national competition and regulatory authorities. However this role in shaping legal interpretation and the application of the relevant provisions is also ultimately reliant on regulation at either EC or national level. In \textit{Oscar Bronner} Advocate General Jacobs has not failed to stress that courts and authorities, both at Community and national level should not engage in detailed regulation entailing the fixing of prices and conditions of supply. In this sense the doctrine of essential facilities is the epitome of the cooperation between competition law and regulation and demonstrates the limits of the former in favour of the latter (or maybe the contrary). At the same time due to the primacy of EC law it is one of the areas in which regulation will be most influenced by the interpretation of Article 82, which conceptually lies at the basis of more specific regulation.

\textsuperscript{117} Natural monopoly can be viewed as the situation when over the relevant range of production, a lower level of cost should always be attainable if only one firm produces compared to the situation when production is divided between two or more firms.

\textsuperscript{118} COM (2000) 237 final, section 3.
Chapter VI

Concentrations, joint ventures and remedial powers

1. Introduction

This chapter intends to show how liberalisation in this sector is not only realised through measures of a general nature but has also been sustained by the continuous action of the Commission through its enforcement powers, particularly under the Regulation 4064/89\(^1\) (the “EC Merger Regulation” or “ECMR”) but also under Regulation 17/62/EEC\(^2\) (“Regulation 17”). The two forms of action (of a general nature on the one hand and with specific application to individual undertakings holding or acquiring position of market power on the other) are complementary and interact with one another. This chapter will examine how these provisions have been used by the Commission to implement, on a case by case basis, its overall liberalisation process. After examining the Commission’s practice the analysis will turn to question of the appropriateness of this approach which seeks to enforce a general policy in individual decisions through a process which has substantial elements of discretion which, de facto, receive very little judicial scrutiny.

In a sector such as communications which is going through a rapid evolution and convergence, structural abuses and (potential) distortion of competition due to creation of strengthening of dominant positions through concentrations (rather than through unilateral behaviours) are very common. Indeed in recent years there has been an authentic explosion of mergers or full function joint ventures. Large portions of the competitive analysis (such as market definition or assessment of market power) are substantially similar to the one analysed in the chapters above. However the distinguishing feature of the cases analysed under this chapter is the preventive nature


of the Commission’s action. This of course influences its assessment. Moreover this characteristic places the Commission in the delicate (and to a certain extent ambivalent) position of rule maker (due to its position in the legislative process), enforcer and de facto sole adjudicator of the market structure in general and ultimately, in relation to certain forms of communications, pluralism.

The convergent nature of the sector also facilitates the creation of co-operative joint ventures which fall short of the merger control provisions and are analysed under Article 81 EC. The focus of this study is market power which, in the majority of cases, gives rise to unilateral abusive actions. Its creation or strengthening can prevented through the application of merger control. Therefore merger control is of paramount importance within antitrust policy in communications. Furthermore the current phase of development of the market does not favour collusion between operators. However, the risk of forms of co-operation other than joint ventures cannot be ruled out. This chapter will look mainly the application of the merger control provisions but, to a certain extent, also at the use of Article 81 with regard to joint ventures in the communications sector.

The general aspects of the ECMR will be considered in paragraphs 2 and 2.1 and its application to the communications sector will be dealt with in paragraph 2.2. In paragraph 3 the interrelation between the Commission role as a general policy maker and enforcer is examined. Paragraph 4 deals with the application of Article 81 particularly to the so-called partial function joint ventures. Finally paragraph 5 analyses the enforcement powers and practice of the Commission in relation to remedies.

2. Merger Control

2.1 The EC Merger Regulation

Under EC Merger Regulation the Commission is entitled to prohibit concentrations that create or strengthen a dominant position in the common market.\(^3\) Under the EC Merger

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Regulation, the Commission applies a "dominance" test. This implies that the concentration will be prohibited if it creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market. Whilst the market power analysis is similar to the one carried out under Article 82, the major difference is that, as it appears from the seventh recital in its preamble, the Regulation's aim is to monitor "prospectively" market structures to see whether they create positions in which abuses are possible and economically rational rather than evaluating "retrospectively" the behaviour of undertakings.\(^4\) From a regulatory viewpoint the system of pre-merger notification set up by EC Merger Regulation enables the Commission to monitor and shape the evolution of the market structure which would create the conditions for possible abuses. The Commission's analysis applies to both horizontal and vertical effects of the merger.\(^5\) The ECJ confirmed in *Kali und Salz* that the ECMR provisions also apply in the case of collective or joint dominance.\(^6\)

The powers of the Commission in relation to merger control do not only concern concentrations\(^7\) but also extend to full function joint ventures. Article 3(2) of the amended EC Merger Regulation provides that: "*[t]he creation of a joint venture performing on a long lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).*" Joint ventures which meet this requirement bring about a lasting change in the structure of the undertakings concerned and are referred to as "full function" joint ventures. A similar concept already existed under the old regime within the distinction between co-operative and concentrative joint ventures and it was designed to identify the joint ventures which came under the scope of the Merger Regulation. The principles developed under the old regime and set out in the Notice on the distinction between


\(^5\) Vertical situations concern undertakings at different level of trade and industry (such as those between a producer and a distributor). Horizontal situations indicate the relationship between economic players at the same level of trade or industry (such as two service providers that compete with each other).

\(^6\) *France v. Commission*, supra note IV-39 above. See more generally Chap. IV above

\(^7\) This concept is clarified in the Commission Notice on the concept of concentration under Council Regulation (EEC) No. 4064/89, OJ 1998, C 66/5.
concentrative and co-operative joint ventures are now set out and further clarified in the new Notice on the concept of full function joint ventures which replaces the previous one.

In order to identify a full function joint venture the Commission examines the extent to which the joint venture is commercially independent from its parent companies. The joint venture must be able to perform the functions normally carried out by undertakings operating on the same market, exercising its own commercial policy. It must have a management dedicated to its day-to-day operation and access to sufficient resources, including finance, staff and assets (tangible and intangible) in order to conduct its business activities within the area provided for in the joint venture agreement on a lasting basis. A joint venture is not full function however if it only takes over one specific aspect within the parent companies’ business activities without access to the market, for example in the case of an R&D or production-only joint venture. Therefore if the joint venture merely carries out an auxiliary commercial activity of the parent companies, it will not fall within the Merger Regulation. The Commission considers that this is also the case where a joint venture is created to supply products and services exclusively to its parents, or is wholly dependent on its parents for supplies, beyond an

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8 OJ 1994, C385/01.
10 Most of the changes introduced by the new notice are of minor importance and concern drafting. However, the Commission has also introduced an important reference to "management dedicated to the joint venture's day-to-day operation" which is to be considered as a further element indicating the full function nature of the joint venture. Furthermore the old notice stated that "in respect of intellectual property rights it is sufficient that these rights are licensed to the joint venture for its duration." This approach was based on a previous decision of the Commission in which the full function nature of a joint venture was inferred from the rights granted by the parent entities (Case IV/M.236, Ericsson/Ascom, OJ 1992, C 201/16, para 11); the reference to this criterion has now been removed from the Notice on full function joint ventures. In relation to IP rights the notice now refers to Case IV/M.527, Thomson CSF/Deutsche Aerospace, OJ 1995, C 65/4, para 10 which, with regard to the assessment of the concentrative nature of the joint venture, states: "each of the joint ventures performs on a lasting basis all the functions of an autonomous economic entity. Except for provisions in the joint venture agreement in the event of deadlock the joint ventures are intended to operate on a lasting basis. They each perform functions comparable to those carried out by other undertakings operating on the same market. The parties will transfer to them all the assets necessary to carry on their business; these include the relevant intellectual property rights, which will be assigned or (if the parties have independent applications for the rights) either will be licensed to the joint ventures for their duration or assigned to them and then licensed back. Each joint venture will be responsible for the marketing of its own products. Each will independently fulfill its funding requirements. Each will recruit its own staff, although some of the personnel may be seconded by the parties."

11 In Elf Atochem/Rohm Haas, (Case IV/M.201, OJ 1992, C 201/18) the Commission concluded that the joint venture was an autonomous economic entity as it was provided with the physical and human resources necessary for the production and sale of the product, the parent companies granted it irrevocable intellectual property licences necessary for manufacturing and it was to have its own distribution network and research and development facilities. As a result, it could act as an independent supplier and buyer on the market.
initial set-up period.

In making its appraisal, the Commission is required to take into account the presence of the parent companies in markets upstream or downstream from that of the joint venture, especially where this results in the joint venture making substantial sales to or purchases from the parents. When a joint venture company purchases from its parent companies, the Commission will examine in particular to what extent the joint venture brings significant added value to the products or services concerned. However the full function nature of the joint venture will not normally be affected by the fact that it is reliant on its parents for sales or purchases for an initial start-up period.

The joint ventures subject to the Merger Regulation must be intended to operate on a lasting basis. The fact that the parents commit resources such as those described above to the joint venture is normally an indication of this. The focus is really upon whether or not the joint venture will bring a lasting change to the structure of the market. In the BA/TAT case, for example, the Commission considered that a joint venture in the air transport sector which had the potential to be terminated after just six and a half years was sufficiently long to bring about a lasting change in the structure of the undertakings concerned, given the characteristics of that particular sector. In Go Ahead/Via/Thameslink a period of seven years was approved. The fact that the joint venture agreement contains termination provisions, such as provisions on the failure of the joint venture, does not normally prevent it being considered as operating on a lasting basis. However, a joint venture of a finite duration established to carry out a specific project would not normally be considered to be "long lasting".

2.2 Concentrations in the communications sector

The Commission considers that the development of telecommunications and multimedia
markets depends on four factors: service competition, infrastructure competition, infrastructure upgrades as well as other types of innovation\textsuperscript{16}. Undoubtedly this statement of general policy has an impact on the merger control policy and on the assessment of individual cases. Clearly in the case of concentrations the evaluation of the Commission is confined to antitrust law\textsuperscript{17} but the general effect of market evolution which might derive from concentration in converging markets and the political dimension of the assessment of the level of concentration is likely to be problematic. One of the areas which required more stringent intervention was that of joint ownership of telecommunications networks and cable TV networks. The Commission is eager to avoid those structural situations which are likely to stifle competition.

The issue of common ownership of TV cable and telecommunications networks arose as a result of the liberalisation process brought about by Directive 95/51/EC\textsuperscript{18} which required Member States to “abolish all restrictions on the supply of transmission capacity by cable TV networks and allow the use of cable networks for the provision of telecommunications services, other than voice telephony”, and to “ensure that interconnection of cable TV networks with public telecommunications networks is authorised for such purpose, in particular interconnection with leased lines, and that the restrictions on the direct interconnection of cable TV networks by cable TV operators are abolished.” The concern of the Commission was that a joint ownership of the two types of networks will lead to abuses such as delaying the emergence of new advanced communications services and restrictions on the technical progress at the expense of users and contrary to Article 82.\textsuperscript{19}

The Commission decided to address this specific problem by adopting a general measure, a Directive which required each Member State to ensure that “no

\textsuperscript{15}Case IV/M.253, OJ 1997, C253/2.
\textsuperscript{16}Commission communication concerning the review under competition rules of the joint provision of telecommunications and cable TV networks by a single operator and the abolition of restrictions on the provision of cable TV capacity over telecommunications networks, OJ 1998, C 71/4, para 7.
\textsuperscript{17}J. Temple Lang, \textit{supra} note 11-17 above, at 430 in footnote 92.
\textsuperscript{18}OJ 1995, L 256/49.
telecommunications organisation operates its cable TV network using the same legal entity as it uses for its public telecommunications network when such organisation: (a) is controlled by that Member State or benefits from special rights; and (b) is dominant in a substantial part of the common market in the provision of telecommunications networks and (c) operates a cable TV network established under special or exclusive right in the same geographic area.\(^\text{20}\) A number of decisions described below show that a similar approach has been adopted in the individual structural analysis of mergers between operators that, whilst not meeting all the criteria set out by the Directive, pose a similar threat for competition in this convergent area. The Commission has prohibited this type of merger in one case\(^\text{21}\) and has obtained undertakings in this respect notably in the *Telia/Telenor* case analysed below.

Indeed another aspect that is of paramount importance in the Commission’s assessment is that of ensuring access to gateway facilities such as TV platforms or the local loop. In the Commission Decisions analysed below one can detect a clear pattern of implementation on a case by case level of the policy considerations and aims described in Chapter II above.

The types of mergers that are likely to arise in a sector that is technologically and strategically convergent are threefold: (a) horizontal mergers between competitors (actual or potential) with a strong market position; (b) vertical mergers particularly between content or new services providers and carriers; (c) mergers between companies with market power in currently separate but converging markets.\(^\text{22}\) The Commission recognises the potential pro-competitive value of these transactions and the instrumental role in developing the media and telecommunication sectors.\(^\text{23}\) However, this has not prevented it from taking negative decisions particularly when it considered that a transaction could potentially impair the developments of the market towards a more competitive structure. The chapter will mainly deal with those concentrations that the

\(\text{\footnotesize\textsuperscript{20}}\) Article 9 Directive 90/388/EEC as amended by Directive 1999/64/EC.


\(\text{\footnotesize\textsuperscript{22}}\) J. Temple Lang, *supra* note II-17 above, at 429.

\(\text{\footnotesize\textsuperscript{23}}\) Twenty-fifth Report on Competition Policy, 1995, at 174.
Commission has either blocked or cleared subject to detailed inquiry or substantial commitments. A number of mergers and joint ventures in the communications sector have raised doubts about their compatibility with the common market and have, as a consequence, been referred to a phase II in-depth investigation. The Commission's approach in those cases is analysed according to the subdivisions referred to above although a classification of a concentration in one of the categories is not always cut as many transactions involve both horizontal and vertical elements.

Of course the geographic definition is also important particularly in the TV and TV related markets which are still linked to the language spoken in the relevant regions. However the approach of the Commission in this respect does not appear always entirely consistent. Whilst in certain cases it takes a lenient approach based on the fact that the companies operate in different geographic markets, in other cases, such as the BSkyB/Kirch joint venture analysed below, despite the different geographic market in which the parties operated, the Commission had doubts as to the compatibility of the transaction with the common market. This was due to the increased financial and know-how strength that the JV would have had in Germany as a result of the participation of the leading British player.

2.2.1 Mergers between competitors with a strong market position

In the communications sector there has been an impressive growth of mergers over recent years. Some of them involved the leading players and these cases have indeed attracted the attention of the Commission which has opened in-depth investigations. Cases which raised points of interest are analysed below.

One major case of this type concerned the proposed (and subsequently abandoned) merger between BT and MCI (II) which were also party to a notified joint venture,

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24 In the case of Eureka (a joint venture between the German group Kirch and the leading Italian commercial TV broadcaster Mediaset) the transaction was approved precisely on the basis that despite the horizontal character of the concentration the parent companies operated in different geographic markets with no significant overlap between them (Case IV/M.1574, Kirch/Mediaset, OJ 1999, C 255/3; see Commission Press Release of 3rd August 1999, IP/99/611).


Concert. BT is the UK-based supplier of telecommunications services and equipment. MCI is a US diversified communications company. The Commission found that the concentration would create a dominant position in the markets for international voice telephony services on the US-UK route. This was due to the limited capacity of international transmission facilities coupled with the parties’ entitlements on existing transatlantic submarine cables between the UK and the US. Furthermore, as a result of the merger BT/MCI would have been able to carry transatlantic traffic over their own end-to-end facilities and the cost advantages produced by this could not easily be achieved by competitors. Another area of concern was that of audioconferencing in which it was found that, despite the relatively low investment required to set up the business, market entry on a sufficiently large scale might prove difficult as part of the revenue derived from this service (the one relating to the call minutes used by the participants to the audioconferencing) reverts to the telecommunications operator. This makes it more difficult for a new entrant to generate sufficient revenue to make entry attractive. The merger was approved following the commitments given by the parties. These consisted essentially in selling a UK audioconferencing business, in making transatlantic cable available and selling matched half circuits to other operators at their request.

A subsequent decision of paramount importance concerning the communications sector and in particular Internet was WorldCom/MCI. This was a US$37 billion merger of two US-based international telecoms companies, WorldCom and MCI Communications Corporation, and made the previous decision on the MCI-BT merger obsolete. The Commission expressed concerns on the potential combined market share of the two parties in the supply of Internet “backbone” services (the high capacity trunk lines that underlie the global network) and opened a phase II inquiry. While the merging parties disputed the allegation that they will dominate the backbone, their competitors claimed that the merger would have affected the balance of power between the group of companies whose networks currently act as the backbone of the Internet. Two of the most problematic aspects of the investigation have been the definition of the relevant

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27 Case IV/M.1069, WorldCom/MCI, OJ 1999, L116/1 (the “WorldCom/MCI Decision”).
product markets and ascertaining the correct method for the calculation of combined market shares.\textsuperscript{28} The merger was eventually cleared on the basis of considerable divestiture conditions which covered all MCI’s Internet business. Similar concerns in relation to top-level Internet connectivity led to the blocking to the subsequent merger between MCI WorldCom and Sprint.\textsuperscript{29}

The Telia/Telenor\textsuperscript{30} concentration concerned the largest telecommunications operator in Sweden and the largest Norwegian telecommunications operator both wholly state-owned and active with a full range of telecommunications and TV services in the Nordic area and internationally. The transaction was cleared subject to compliance with the undertakings submitted by the parties. The Commission’s concerns derived from not only the horizontal overlap but were also reinforced by the vertical effects of the combined activities.\textsuperscript{31} In fact the Commission considered that even the proposed divestment of the overlapping interests would not have been an adequate remedy in the presence of other factors (such as branding, technical/financial support, proximity of relevant supporting networks, bargaining position) which, particularly in the telephony area, conferred advantages to the merged entity.\textsuperscript{32}

The Commission had serious doubts as to the compatibility of the concentration with the common market as it would have led to the elimination of actual and potential competition between the parties. It would have increased their ability and incentive to eliminate actual and potential competition from third parties by raising the rival’s cost to competitors, increasing (or not decreasing) the price of interconnection or degrading the quality of interconnection. It would have also increased the parties’ ability to bundle products across a wider geographic area and their ability to leverage a secure captive market in order to prevent entry by operators in different geographic markets (i.e. Finland and Denmark).

\textsuperscript{28} See above Chapter III.
\textsuperscript{29} Commission Press Release of 28 June 2000, IP/00/668; the full decision is not yet available.
\textsuperscript{30} Case COMP/M. 1439, Telia/Telenor Commission Decision of 13 October 1999 (the “Telia/Telenor Decision”).
\textsuperscript{31} This is expressly stated in particular in para 376 of the Decision.
\textsuperscript{32} See paras 140 to 147.
In addition the Telia/Telenor transaction also had an impact on television services in the market for content buying and wholesale of right to content. In this respect the Commission also expressed concerns on the vertical effects created by the combined effects of the strong or dominant position across all relevant infrastructures for the carriage of telecommunications services, as well as in cable TV, Direct To Home and digital terrestrial television (DTT) and its strong position to develop Internet and interactive services. The Commission thought that following the concentration "not only the content suppliers would have an incentive to contract with Newco, but Newco itself will have a strong incentive to leverage its privileged position at the infrastructure level into downstream distribution levels." In order to address its concerns and clear the transaction the Commission was able to obtain undertakings that have a striking similarity with the issues of general policy pursued at regulatory level. It firstly obtained an undertaking for divestiture of cable TV networks in Sweden and Norway which was intended to remove both a horizontal overlap in relation to retail TV distribution systems and the vertical effects concerning bundling of satellite transponder services and retail TV distribution services. In addition (and to a certain extent as a complement to this) the Commission obtained undertakings to introduce local loop unbundling.

In the Vodafone Airtouch/Mannesman case the parties had a direct horizontal overlap in the markets for mobile telecommunications in the UK and Belgium. Furthermore the Commission considered that the merged entity would have had an increased ability and incentive to eliminate actual and/or potential competition in the market for the provision of seamless pan-European mobile communications. Interestingly in these cases the Commission had concerns based on the fact that the merger itself would create a new market giving the merger entity a leading position by bringing together activities in separate horizontal geographic markets. In fact the Commission considered that a structural integration of mobile networks across Europe into an integrated network

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33 Para 265.
34 Case COMP/M.1795, Vodafone Airtouch/Mannesmann Commission Decision of 12th April 2000 (the "Vodafone Airtouch/Mannesmann Decision").
would have afforded to the merged entity the ability to meet the new demand for advanced pan-European services, thereby creating a new geographic market.\textsuperscript{35} The Commission stated that this would "entrench the merged entity into a dominant position on the emerging pan-European market for internationally mobile customers for the foreseeable future because customers of other operators would generally prefer the merged entity to other mobile operators given its unrivalled possibility to provide advanced seamless services across Europe."\textsuperscript{36} In order to obtain clearance the parties had to submit a mixture of structural divestments in relation to the national mobile services market and behavioural undertakings to ensure third party non-discriminatory access to the merged entity's integrated network so as to provide advanced mobile services.

A variation on the horizontal mergers described in this paragraph is the concentration between companies separate but converging markets. The Commission activity in this area shows their willingness to adapt their competition assessment to a more flexible and wider approach to take into account the development of the market. This will be analysed in paragraph 2.2.3 below. The Commission has also closely scrutinised concentrations which create or have an impact on the vertical relationship between the parties.

\subsection*{2.2.2 Vertical mergers}
This second type of mergers involving vertical relationships, particularly between content or new services providers and carriers, can also raise a number of competitive issues and have often incurred hurdles with the Commission.\textsuperscript{37} It has been argued that these types of cases "necessitate assessments of the market power of both parties at both levels. If the content provider is dominant a competing carrier might be unable to obtain enough valuable content in the appropriate language to offer a satisfactory

\textsuperscript{35} See para 44 of the Decision.
\textsuperscript{36} Para 45 of the Decision
\textsuperscript{37} Case IV/M/32 Screanport-EBU Members, OJ 1991, L 63/32, Case IV/M.469, MSG Media Service, OJ 1994, L 364/1 (the "MSG Media Service Decision"), Nordic Satellite Distribution Decision (which can also be considered of the second type); Case IV/M.553, RTL/Veronica/Endemol OJ 1996, L 134/32 (the "RTL/Veronica/Endemol Decision") which was authorised after the withdrawal of Endemol the content provider by decision dated 17 July, 1996, OJ 1996, L 294/14; Case IV/M.993, Bertelsmann/Kirch/Premiere OJ 1999, L 53/1.
selection of channels and programmes. If the carrier is dominant, a competing provider might be unable to find satisfactory alternative broadcasters." This approach seems to suggest that a concentration between two undertakings that are separately dominant in two linked (but separate) markets would not be acceptable. In this type of case the links envisaged would be vertical and resemble the economic scenario described above with regard to the essential facilities doctrine: the dominant position is held in one market, but the effect is felt in a separate downstream or upstream market. As we have seen above in the case of Telia/Telenor often a merger combines both horizontal and vertical effects.

In terms of policy, the Commission has expressed in its Communication of 9 March 1999\textsuperscript{39} on the results of the public consultation on the Green Paper entitled "The convergence of the telecommunications, media and information technology sectors" the desirability of separating the provisions dealing with transmission and those dealing with content. Indeed mergers between content providers and transmitters might create an obstacle to the separation sought by the Commission. A concentration might have the effect of strengthening a dominant position because of the links between the two markets. Therefore the Commission has consistently tried to avoid the creation of situations in which undertakings create gateways or positions enabling them to leverage their economic power in one market with effects in another.

One of the first cases in this area was MSG Media Service, a joint venture to be set up by Bertelsmann, a leading German media Group with international publishing, book club, printing, sound recording, and commercial television activities, Taurus a holding company belonging to the Kirch Group (the leading German supplier of feature films and television programming, also active in commercial television) and Deutsche Telekom the German public telecommunications provider. The relevant markets were found to be the market for services for suppliers of pay-TV and other television services financed through payments by viewers, and the market for cable television networks.\textsuperscript{40}

\textsuperscript{38} J. Temple Lang, supra note II-17 above, at 430.
\textsuperscript{39} COM (1999) 108.
\textsuperscript{40} See above Chapter III for market definitions.
The Commission concluded that the proposed joint venture would have created a dominant position in all three markets. It did not accept the argument that the three companies would have not been able to enter these markets separately. Interestingly, DG IV (as it was then called) considered that if MSG dominated the market for services and infrastructure for pay-TV, Bertelsmann and Kirch would have been able to strengthen their position in the downstream market for pay-TV. Furthermore, it was considered that the proposed joint venture might have stifled the effects of liberalisation on the market for cable networks. In fact whilst the cable operator enjoyed a privileged position because of a restrictive administrative procedure required in Germany to serve home distribution without a link to Telekom, if this restrictive procedure was abandoned and the merger cleared, private network operators would still run the "risk that [they] could not obtain the programmes of the leading pay-TV suppliers Bertelsmann and Kirch, which are required for attractive programme packages, or could obtain them only on unfavourable conditions." The commitments offered were considered inadequate and, as a result, the concentration was declared incompatible with the common market.

Another negative decision in the communications sector (although involving both horizontal and vertical elements) concerned the proposed joint venture Holland Media Groep SA (HMG). HMG was a joint venture between two of the leading Dutch language commercial television stations RTL and Veronica, and Endemol the leading producer of Dutch language television programming. The parent companies of RTL were the Luxembourg broadcasting group CLT and the Dutch publishing group VNU. The three affected markets would have been: TV broadcasting, TV advertising and the market for independently produced Dutch language programmes. HMG would have brought together three channels with a considerably strong position on the Dutch market for TV broadcasting. The Commission also recognised that the position in the TV advertising market is largely dependent on their audience shares. Again the Commission focused

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41 MSG Media Service Decision, at paras 82-90.
42 Ibidem, at para 93.
43 The concentration was originally prohibited by the Commission in the RTL/Veronica/Endemol Decision.
on the links between the market and considered that as a result of its high audience shares, HMG would have become by far the strongest player on the Dutch TV advertising market. Finally with regard to the market for TV production in Holland Endemol was already in a dominant position and, as a result of the links with broadcasters, this position would be further strengthened. The Commission considered that the downstream effect of the vertical integration was due to the structural link with one of the future leading broadcasters, HMG. This would secure a large basis for the joint venture's product which is safe and cannot be attacked by competitors. This reasoning was upheld by the CFI to which the case was appealed.

An important point in cases which present a vertical element is the level of participation in a JV by its parents and the effects that this has. In RTL/Veronica/Endemol the Commission considered that, even in the absence of joint control, in view of the representation in the decision making process of the JV, a participation of 23 per cent. in a company which is active in a downstream market has to be seen as strategic, rather than financial. The Commission concluded that Endemol, through its structural link to HMG, would have been in a position to strengthen the policy of the company in programming and programme acquisition in a manner which would have strengthened its position in the market for independent production. The CFI in its judgment on appeal against the Commission decision did not rule on this issue as it had concluded that the JV was jointly controlled by Endemol. In a different case the CFI clarified that in assessing whether a concentration creates or strengthens a dominant position the Commission is not bound to apply the control test referred to in Article 3 of the ECMR and limits its assessment of the concentration to the entities which are controlled by (or exercise control over) the parties to the concentration on that basis. This subsequent

44 Twenty-fifth Report on Competition Policy, 1995, at 175.
45 Para 98.
46 The prohibition was appealed to the CFI in Case T-221/95, Endemol v. Commission, [1999] ECR-II 1299, paras 167-169; following the withdrawal of Endemol and modifications to the supply agreement between Endemol and HMG and the JV itself it was approved in see OJ 1996, L 294/14.
47 See para 100.
48 In a further move towards vertical integration Endemol has been subsequently purchased by Telefonica of Spain, see Commission Press release IP/00/755 Commission clears Telefonica buy of Endemol, 12 July 2000.
ruling can be taken to broaden the Commission's scope of action in relation to vertical situations also.

Nordic Satellite Distribution (NSD) was another case presenting considerable vertical elements. The merger involved a joint venture between subsidiaries of the Norwegian and Danish national telecommunications operators (respectively NT and TD) (the largest cable TV operators in their jurisdictions) and Kinnevik (a Swedish conglomerate with interests in TV programming, magazines and newspapers as well as in steel, paper, packaging and telecommunications).\(^\text{50}\) NSD was to provide satellite TV programmes to cable TV operators and households receiving TV on their own dish ("direct to home market"). The vertically integrated structure that would have been created as a result of the joint venture affected three markets: the market for provision of TV transponder capacity to the Nordic region; the market for operation of cable TV networks and the market for distribution of satellite pay-TV and other encrypted TV channels to direct to home households. Following its approach in MSG Media Service the Commission found that the vertically integrated nature of the operation meant that "the downstream market positions (cable TV operations and pay-TV) reinforce the upstream market positions (satellite transponders, provision of programmes) and vice versa. Overall the parties would achieve such strong positions that they would be able to foreclose the Nordic market for satellite TV."\(^\text{51}\) The Commission admitted that the particular caution with which it treated the affected market was also due to the fact that they were subject to the liberalisation process. The Commission wanted to ensure that no foreclosure effect was produced at a structural level in a newly liberalised market. Therefore it declared the concentration in its notified form incompatible with the common market.\(^\text{52}\) However, the Commission did not want to discourage transactions of this type and affirmed in its Competition Report: "joint ventures and particularly transnational joint ventures can be instrumental in developing the media and telecommunications sectors to their full potential. Furthermore it is the Commission's policy to take new developments into account. The parties were therefore invited to

\(^\text{50}\) See generally Twenty-fifth Report on Competition Policy, 1995, at 173.


\(^\text{52}\) Nordic Satellite Distribution Decision.
present a modified project compatible with the Common Market and the functioning of the EEA agreement.\textsuperscript{53}

After the MSG merger, Kirch and Bertelsmann attempted to link their activities as second time with two mergers. Once again the European Commission decided unanimously on 27 May, 1998\textsuperscript{54} to prohibit both the concentrations, which together would have set the framework for the future development of digital pay-TV in Germany. The Premiere joint venture involved the acquisition of joint control by CLT-UFA and Kirch of Premiere, the German pay-TV provider, and of BetaDigital, which provides technical services for broadcasting digital pay-TV programmes. CLT-UFA is a joint venture between Bertelsmann AG and Audiofina S.A. Kirch is the leading provider of cinema films and television entertainment programmes in Germany and is also active in the private broadcasting business. CLT-UFA, Kirch and Canal Plus were the shareholders of Premiere, but Canal Plus would have withdrawn, leaving Premiere jointly owned by CLT-UFA and Kirch, which would then use it as a programme and marketing platform for digital pay-TV. Kirch would also transfer its own pay-TV rights to Premiere. The aim of this merger was to develop Premiere into a joint digital pay-TV channel and marketing platform, using Kirch’s current digital television activities, its d-box technology and technical services from BetaDigital.

The Commission felt that through the merger, Premiere would achieve a dominant position on the market for pay-TV in Germany and the German speaking area, in particular as the assets of its only present competitor, the Kirch subsidiary DF-1, would be transferred to it following the merger. The pooling of their programme resources and Premiere’s existing subscription base would prevent the development of any additional broadcasting platform in the German pay-TV market. Premiere would have been in a position to determine the terms under which other broadcasters could enter the market. Furthermore, in the market for technical services for pay-TV, BetaDigital would attain a lasting dominant position in the satellite sector in Germany.


The *BetaResearch* merger involved the acquisition of joint control by CLT-UFA, BetaTechnick (belonging to the Kirch Group) and Deutsche Telekom of BetaResearch, currently a 100 per cent. Kirch subsidiary which holds exclusive licences for Beta access technology in Germany, Austria and the German-speaking areas of Switzerland. The merger was intended to give Deutsche Telekom access to the Beta technology. The BetaResearch merger would have had an effect particularly on the markets for technical services for pay-TV and cable networks in Germany. Deutsche Telekom was to provide the technical platform in the cable network for the provision and broadcasting of pay-TV programmes. The Commission concluded however that the merger would result in Deutsche Telekom permanently becoming the only supplier of technical services for pay-TV in the cable network. This would further strengthen Deutsche Telekom’s still dominant position on the market for cable networks.

Under the terms of their agreement, CLT-UFA, Kirch and Deutsche Telekom had all committed themselves to using Beta access technology and the d-box decoder, which has a self-contained proprietary encryption system. After the merger therefore, all current providers of digital pay-TV in the German speaking market and the future provider of technical services, Deutsche Telekom, would all be committed to this technology, and jointly control the exclusive licensee, BetaResearch. The Commission felt that the development of an alternative decoder structure was not very likely, so that any other service providers would have to use the parties’ Beta technology and would depend on obtaining a licence from BetaResearch. As a result, it could prevent market entry through its licensing policy. Further, CLT-UFA, Kirch and Deutsche Telekom, through BetaResearch, would control the future development of decoder technology.

In reaching its decision to prohibit the merger, the Commission noted that it would have welcomed an agreement which met its competition concerns, but stressed the need for the digital TV market to be kept open and allowed to evolve on a competitive basis. During negotiations the parties had agreed to allow third parties to become shareholders in BetaResearch and to make 25 per cent. of the films to which Kirch holds the pay-TV rights available to other broadcasters. Negotiations broke down however when the
parties refused to agree to allow independent cable operators to market their own pay-per-view packages either alongside or including those offered by Premiere.

A particular type of these mergers concerns the one resulting in vertical integration between television broadcasters and sports organisations. The most prominent case arose nationally when BSkyB Group plc, one of the largest European pay-TV broadcasters, attempted to acquire Manchester United, one of the most successful European football teams. The acquisition was blocked following a recommendation of the Monopolies and Mergers Commission ("MMC") (as it was then called).\(^{55}\) Whilst this study only concentrates on the European dimension of competition law, it is nevertheless interesting to note some of the arguments presented before the MMC particularly with regard to the bidding stage.

One issue concerned information advantages deriving from vertical integration. The proposition was that if a broadcaster owned a football club it would obtain information about the rights selling process that would not be available to competing bidders and that such information would help it in preparing its own bid. The MMC appeared to accept the argument that ownership would make this more likely and perhaps even inevitable.\(^{56}\)

Another argument was based on the so-called "toehold effect". This argument, based on auction theory,\(^{57}\) predicts that when a bidder in an auction has an ownership stake in an asset being sold, even only a relatively small one (a toehold), it would be more likely to win the bid than competitors without a toehold. It is argued that there are two reasons for this. First part of the value of any bid will return to the bidder with the ownership stake. Secondly, the small initial advantage may be amplified by the operation of the winner's curse which occurs when a bidder discovers that the value of the asset is lower than the price he or she paid. It is suggested that in an auction in which one bidder has


\(^{56}\) See para 2.104.

\(^{57}\) For details see Appendix 4.6 of the Report.
an ownership stake in the assets, all the other bidders will know that it can afford to pay a little more for the assets than they can. Therefore the theory submits that if a bidder without an ownership stake wins the auction, it may find that it has paid more for the asset than it is worth. According to this theory the existence of the winner's curse will make bidders without an ownership stake more cautious in their bidding, with the result that the bidder with an ownership stake is more likely to win the auction than any other bidder and the price paid for the assets is likely to be lower than it would have been in the absence of a bidder with an ownership stake. The pros and cons of this situation are discussed more thoroughly in the MMC Report.\textsuperscript{58} This study does not allow scope to examine the specific arguments put forward by the parties. Suffice it to say that the MMC accepted that it is reasonable to suppose that a vertical integration between the bidder and one of the clubs selling the rights will lead competing bidders who think they are at a disadvantage to bid more cautiously. However the MMC did not believe that the toehold effects would give BSkyB a major advantage but would expect it to gain some benefit from the overall rights selling process.

Of course a vertical integration of this kind would have a number of fall-back options for the broadcaster acquiring a sporting organisation or more generally a content provider. These will depend on the individual circumstances of the case. It is likely that the individual affect of one aspect rather than another would not be decisive. However taken collectively these factors might provide a decisive advantage to one broadcaster over another bringing about serious distortion of competition.

Similarly vertical aspects played a crucial role in the recent joint venture between Vodafone, Vivendi and Canal Plus for the creation of \textit{Vizzavi} an Internet Portal which would have developed, marketed and provided a branded multi-access Internet portal throughout Europe providing a seamless environment for web-based interactive services across a number of platforms, such as fixed and mobile telephony networks, PCs and palm tops, as well as television sets. The Commission considered that the transaction would have lead to competitive concerns in the developing national markets for TV-
based internet portals and the national and pan-European markets for mobile phone based internet portals. In order to obtain clearance the parties therefore provided undertakings to ensure that the default portal could be changed should the customer so wish. This was intended to remove the potential detrimental and discriminatory vertical effects of the transaction. Indeed the vertical relationship between content providers and platforms providers (either Internet or TV) has been one of the most pressing concerns of the Commission in the AOL/Time Warner and Warner/EMI mergers. The latter notification was withdrawn after concerns had been expressed by the Commission in relation to the possible creation of a collective dominant position in national European markets for recording music, a single dominant position in national markets for market publishing and single dominant position in the markets for on-line music and software based music.

The AOL/Time Warner merger was cleared under conditions. Time Warner ("TW") is one of the world's biggest media and entertainment companies with interests in television networks (e.g. CNN and TNT), magazines (e.g. Time, People) and book publishing, music, filmed entertainment and cable networks. AOL is the leading Internet access provider in the United States and the only provider with a pan-European presence. In Europe AOL operates mainly through two joint ventures: AOL Europe, a 50/50 venture with Bertelsmann, and AOL CompuServe France, a venture with both Bertelsmann and Vivendi subsidiaries Cegetel and Canal Plus. The merger created the first Internet vertically-integrated content provider, distributing TW branded content (music, news, films, etc.) through AOL's Internet distribution network. Because of the structural links and some existing contractual arrangements with Bertelsmann, AOL/TW would also have had preferred access to Bertelsmann content and, in particular, to its large music library. As a result the Commission considered that AOL/TW would have controlled the leading source of music publishing rights in Europe, where TW and Bertelsmann together held approximately one third of the

61 See Commission Press Release "Commission gives conditional approval to AOL/Time Warner merger" IP/00/1145 of 246
The Commission concern was that AOL would have faced no obstacle in dominating the emerging market for Internet music delivery on-line, which includes both digital downloads and streaming. According to the Commission "AOL/TW would have become the gatekeeper to this nascent market, dictating the conditions for the distribution of audio files over the Internet. AOL/TW could also have been tempted to format TW's and Bertelsmann's music in a way compatible only with AOL's music player Winamp, but not with competing music players. Winamp would have been able to play the music of competing record companies, which generally use non-proprietary formats. By contrast, competing players could not read TW and Bertelsmann audio files and consequently play their music. Because of the technical limitations of the other music players, AOL/TW would have been able to impose Winamp as the dominant player."^62

In order to address these competition concerns the parties offered a package of commitments, whose ultimate goal was to break the links between Bertelsmann and AOL. In particular, AOL and Bertelsmann put in place a mechanism by which Bertelsmann will progressively exit from AOL Europe and the French joint venture AOL CompuServe. In addition, the parties agreed to take interim measures to ensure that the relationship between AOL and Bertelsmann was kept at arm's length until Bertelsmann's exit was completed. In particular, AOL Time Warner was prevented from taking any action that would have resulted in Bertelsmann music being available online exclusively through AOL or being formatted in a proprietary format that is playable only on an AOL music player.

In the Vivendi/Canal Plus/Seagram case^63 one of the main concerns of the Commissions related to the effect of the transaction on the emerging pan-European market for portals

^62 See Press Release more detail of the Commission's assessment will only be available once the decision is published; see also Case COMP/M.2050, Vivendi/Canal Plus/Seagram, Commission Decision of 13 October 2000, OJ 2000, C 311/03 (Commission Press Release "Commission clears merger between Vivendi, Canal Plus and Seagram" IP/00/1162 of 13 October, 2000) in which the Commission requested undertakings to avoid preferential treatment and first window rights by Universal to Canal Plus and obtained that Vivendi disposed of its stake in BSkyB which created a very indirect link with Fox another major film studio owned by News Corp., the major shareholder of BSkyB.


and the emerging market for online delivery of music. The Commission expressed the view that the position of Vizzavi (a portal developed by Vodafone and Vivendi) in the market for portals would have been strengthened as a result of the additions in content resulting from the acquisition of Universal's music. Similar concerns related to the market for pay-TV insofar as the vertical link between a leading pay-TV operator (Canal Plus) and one of the major film studios (Universal) would, according to the Commission, strengthen the position of the merged entity on the first window premium films segment and foreclose the pay-TV market in which Canal Plus was active.

Undoubtedly in a converging and developing sector the vertical effects of a concentration are scrutinised very closely by the Commission. In particular the Commission's concern seems to be double-edged. On the one hand it wants to ensure that a strong position in the market for content coupled with the position of gatekeepers in the market for the converging communications platforms does not enable a concentrated entity to create or strengthen a dominant position in the market for distribution (by whatever means) particularly in those sectors in which a certain type of content (e.g. sport or films) acts as a driver for the development of the platform. Conversely, perhaps more appropriately in a more mature phase of the development of the market for platforms, the Commission will have to ensure that the combined effect of the position as "distributor" and content producer does not reduce the competition in the market for content.

2.2.3 Mergers between companies with market power in currently separate but converging markets

This third type of merger which concerns undertakings active in markets that are currently separate but in the process of converging, has a considerable scope for expansion. This scenario involves a horizontal relationship between the undertakings operating in two separate markets which can compete as a result of technological convergence (for instance telecommunications networks and cable TV networks). The

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64 ("Vivendi/Canal Plus/Seagram Decision").

See paras 60-67 of the Vivendi/Canal Plus/Seagram Decision.

issues in this type of horizontal mergers between companies that can potentially compete with each other in a converged environment, can be crucial for the impact that this type of transaction can have on the future evolution of the market. In fact a major concern is that a merged entity could be placed in a situation of potential conflict of interest and might end up developing one activity rather than the other when both are necessary for a balanced development of the sector as a whole. As a result, this might potentially cause a reduction of competition in the market place. This type of situation is very delicate. The balancing act by the Commission consists of evaluating the possible development of the market to avoid creation of market power without suffocating innovation through an excessively interventionist approach. The strength of the Commission in this respect consists of its preventing powers. However the inevitable risks of this system lie in the large elements of de facto discretion entrusted to the Commission, whose decisions are rarely challenged.

A number of the cases described above, in particular Nordic Satellite Distribution and Telia/Telenor, present the features of horizontal mergers between companies with market power in currently separate but converging markets. Another case presented some features which are both horizontal and vertical in nature and were indeed amplified by the convergent character of the activities in question: BSkyB/Kirch. The case concerned the acquisition of joint control by BSkyB, the UK pay-TV broadcaster of KirchPayTV operating in Germany and Austria. Whilst the two companies operated in markets which were geographically distinct, the Commission felt that the mere injection of financial resources and know-how would have strengthened KirchPayTV’s position so as to raise doubts as to its compatibility with the common market. One of the issues considered by the Commission was KirchPayTV’s ability to enter, as a result of BSkyB input, the market for digital interactive television services which presented some elements of convergence with the market for pay-TV. In the Commission’s analysis in fact the demand from content providers for access to an operator’s digital interactive television platform is likely to be determined by the popularity of the platform with final customers whilst the attractiveness of platforms with final customers

66 BSkyB/KirchPayTv Decision.
is determined by the range of services they can find on it. In this context it is likely that pay-TV is an important driver for interactive services. Conversely the Commission considered that customers might choose a pay-TV (such as KirchPayTV) as it is likely that will be the only one, in the foreseeable future, able to offer both pay-TV and interactive services without the cost or inconvenience of having two set-top boxes. Some vertical elements came into consideration in this. KirchPayTV control BetaResearch which developed the technology used in d-box, the set-top box which gave access to both pay-TV and interactive TV services.\(^{67}\)

In analysing the situation the Commission appeared to be concerned with possible discriminatory or exclusionary practices implemented through BetaResearch. The Commission acknowledged that in theory the entry into a new market by a firm dominant on a closely related one does not automatically lead to the creation of a dominant position. However, it considered that, due to the monopoly position of KirchPayTV in the pay-TV market and the links between platforms (such as pay-TV) and interactive services which are often combined in their offering to customers (and therefore constitute a driver for the offering of new services), there was a risk of foreclosure and of raising the barriers to entry into the new market for interactive services. Finally the transaction was cleared subject to commitments by the parties to give access to Kirch’s technical platform by interested third parties (including access to Kirch’s d-box system, development of interoperability of competing technical platforms, access to KirchPayV’s services by other technology platforms) and use of Kirch’s technology by competing platforms (including the production of multiple system boxes). Unlike the BetaResearch mergers described above which resulted in an outright prohibition, this decision effectively enabled the Commission to impose non-discrimination obligations which would favour third parties access to the market and could be strictly monitored by the Commission.

\(^{67}\) Paras 78 and 79.
2.3 Co-operative effects between parents

To the extent that the creation of the full function joint venture may have as its direct consequence the co-ordination of the competitive behaviour of the parent undertakings, this is assessed within the same procedure as the concentration but in accordance with the criteria of Article 81(1) and (3) with a view to establishing whether or not the operation is compatible with the common market. Most importantly, both assessments are done within the Merger Regulation’s procedures and time limits.

The practical consequence of this is that most full function joint ventures now receive within a month of notification a clearance which also covers the co-operative effects under Article 81(3). However, such full function joint ventures have to be notified to the Commission within a week of signing the relevant agreement, whereas previously no time limit applied in relation to Article 81 notifications under Regulation 17. A potential problem both for notifying companies and the Commission may arise in cases where the Commission would clear the structural parts of the transaction but is not able to grant an exemption under Article 81(3) for the co-ordination between the parents. A variation of this problem has arisen in the early days of the introduction of the new system in the WIND case. In that case the Commission cleared the creation of a full function joint venture between Deutsche Telekom, France Télécom and the Italian electricity group ENEL for the provision of a full range of telecommunications services in Italy but specified that the clearance was without prejudice to the separate investigation under Regulation 17 into the overall co-operation between France Télécom and Deutsche Telekom.

Full function joint ventures will be treated under the Merger Regulation only if they meet the turnover thresholds under Article 1(2) and (3). Whilst the Commission has overtly recognised that full function joint ventures which do not reach a Community dimension may require notification to Member States, it does not rule out the possibility of retaining jurisdiction on co-operative full function or partial function joint ventures

under Regulation 17.\(^{69}\)

In practice, the co-ordination of the competitive behaviour of the parents will be examined by the responsible sectoral units of DG Competition in liaison with the Merger Task Force. In making its appraisal, the Commission is required to take into account in particular: (a) whether two or more parent companies retain to a significant extent activities in the same market as the joint venture, in a market which is downstream or upstream from that of the joint venture or in a neighbouring market which is closely related to that of the joint venture; (b) whether the co-ordination which is a direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Co-ordination is likely where the parents and the joint venture specialise in specific segments of an overall product market, or where the parents are active in an upstream or downstream market and the joint venture is their main customer or supplier as the case may be, or where the parents have significant activity in a neighbouring market which is of significant economic importance compared to that of the joint venture. In addition, where a network of co-operative links already exists between the parent companies in the joint venture’s market, the joint venture may be seen as constituting a further link strengthening the existing co-ordination of competitive behaviour.

In assessing possible co-ordination of competitive behaviours between the parents, the Commission considers both the interaction between markets and the foreseeable

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\(^{69}\) Commission Press Release of 3 March 1998, IP/98/203. To this limited extent therefore, the distinction between concentrative and co-operative joint ventures retains its value in allocating competencies and establishing the procedural framework of notifications. However, this situation can also potentially cause a jurisdictional overlap between the Commission’s powers under Regulation 17 and those Member States which automatically or by legislative amendment adopt the EC approach vis à vis full function joint ventures and combine it with lower turnover thresholds. The Commission points towards the Notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Article 81 and 82 of the EC Treaty (OJ 1997, C313/3) in order to resolve potential conflicts and reiterates its policy “by which the focus treatment of such cases should be with the Member States.” However it is disputable whether the notice would apply in cases in which the concurring jurisdictions derive from Regulation 17 on the Community level and from the merger control provisions under the national level. Presumably the same principles would apply and the Commission would be in favour of a decentralised application of competition law at national level. Nevertheless, this aspect might need some further clarification in the light of the grey areas of the relationship between the Commission and national authorities. See Case C-266/93, Bundeskartellamt v. Volkswagen and VAG Leasing, [1995] ECR I-3477, Opinion of AG Tesauro para 51 on the power of a national authority to prohibit exempted agreements.

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developments in the emergence of wider geographic markets. This can be of paramount importance in communications. It could be argued that the criteria set out in Article 2(4) for the Commission's appraisal of co-operative effects are in tune with the more general approach expressed in the recent case law of the ECJ which stimulates flexibility and interaction in the competitive analyses. In assessing the dominance of an undertaking in *Tetra Pak* the ECJ upheld the CFI interpretation according to which, given the extremely close links between the dominated and non-dominated market and in the light of the extremely high market share on the dominated market, certain practices can be caught under Article 82 without its being necessary to establish the existence of a dominant position on those markets taken in isolation. The ECJ was careful to stress that this type of dominance may only occur in exceptional circumstances. Nevertheless it confirmed that, when these circumstances are met, a company may be in a situation comparable to that of holding a dominant position on the markets in question as a whole. Indeed it is possible to envisage an extension of that ruling to merger cases with regard to both the strengthening of dominant positions and the co-operative effects of the transactions. More importantly, as we have seen in Chapter IV, this doctrine appears to be applicable to a convergent sector. However the Commission recently appeared to be careful in ascertaining that there is a causal link between the possible co-ordination and the creation of a joint venture.

In the *BSkyB/KirchPayTV* case referred to above it was noted that a possible co-ordination between the parties in relation to a possible joint bid for pan-European sports rights and mutual preferential sale of territorial rights may exist separately from the concentration. The Commission stated that a causal link between the creation of the JV and a co-ordination of the competitive behaviour of the parents must be established and this was lacking in the circumstances. However the Commission has spelt out in other

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70. In Case IV/M.293, Philips/Thomson/SAGEM, OJ 1993, C22 the proposed joint venture was to be active in the development, design, manufacture and sale of active matrix liquid crystal displays. The Commission decided that there would be a co-ordination of competition because Thomson and Philips would remain important players in the display system field with access to research. Furthermore, the Commission considered that there would be a degree of interdependence between new and existing display technologies, that therefore two of the parent companies and the joint venture would be active in the same market and/or in closely related markets and that it was reasonably foreseeable that their competitive behaviour would be co-ordinated.

71. See, supra note II-89 above.

72. See para 91 of the Decision.
circumstances that co-ordination does not have to be the object of the operation but it might be an effect of it.\textsuperscript{73} In assessing the likelihood of co-ordination under Article 2(4) the assessment of the relative size of the “Article 2(4) market” (the market where co-ordination between parents is possible) and the joint venture’s market is an important tool of analysis in the Commission’s view.\textsuperscript{74} The Commission has found that the risk of co-ordination tends to be smaller if the joint venture’s market is “significantly” smaller than the Article 2(4) market. However, this factor is not considered by the Commission to be sufficient to show automatically an absence of co-ordination between parents. The Commission will also examine the nature of the markets themselves and the nature of any existing links between the parents. This is the approach which was adopted in BT/\textit{AT&T}\textsuperscript{75} one of the main joint venture cases concerning the communications sector which involved an Article 2(4) analysis within an in-depth investigation.

That case involved a joint venture between BT and AT&T which intended to provide global telecommunications services to multinational companies and international carrier services to third party telecommunications operators. The Commission’s investigations hinged on four areas where the joint venture could lead to the creation or strengthening of a dominant position: the provision of global telecommunications services to multinational companies, international carrier services, telecommunications services on the UK-US route, and specific international voice telephony services in the United Kingdom. The Commission had three areas of concern as to possible co-ordination in the United Kingdom. These related to ACC and Telewest, subsidiaries of the parties, and the distribution of AT&T/Unisource services in the United Kingdom. In order to address the Commission’s concerns AT&T offered undertakings which involved the divestment of ACC UK, the structural separation of AT&T and Telewest, and the appointment of a third party distributor to distribute AT&T/Unisource services in the United Kingdom, as this company would be wound up. The Commission cleared the joint venture subject to compliance with these undertakings.

\textsuperscript{73} Case COMP/JV.5, \emph{Cegetel/Canal +/AOL/Bertelsmann}, Commission Decision of 4 August 1998, para 3.
Another case concerning the application of Article 2(4) in the communications sector is indicative of the Commission's approach. In *Canal+/CDPQ/BankAmerica* the Article 2(4) (or spill-over) effects concerned the market for the wholesaling of TV rights in Spain which was upstream from the one in which the JV operated (i.e. although the notified transaction concerned the downstream market in France). In Spain Canal Plus had strong positions on the pay-TV market and on the upstream market for content. The Commission did not find that the transaction would create or strengthen the dominant position of Canal Plus but found that the notified transaction would give Canal Plus a strong incentive to favour Cableeuropa (controlled by the other two parent companies, CDPD and BankAmerica) in the sale of Spanish pay-TV rights. Remedies were offered that there would be no risk of discrimination against competitors on the Spanish market. The Commission in doing so left the transaction structurally unchanged but set a benchmark for Canal Plus' behaviour on the Spanish market.

Finally it is worth recalling here that ancillary restrictions accepted by the parties to a concentration that are directly related and considered necessary for the implementation of the transaction will be assessed together with the concentration itself in accordance with the principles set out in the Commission Notice on ancillary restrictions.

3. **Co-operation under Article 81**

The type of co-operation that is relevant under Article 81 results from both partial function joint ventures or by other forms of collusion normally deriving from a wide array of contractual arrangements but also from concerted practices. Article 81(1) prohibits all agreements between undertakings, decisions by association of undertakings and concerted practices which may affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market. It is a well-established principle that this Treaty provision applies to

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76 See also Case No IV/IV 1, *Telia/Telecom/Schibsted*, OJ 1999, 220/23; the case concerned the creation of a joint venture, Scandinavia OnLine, for the provision of Internet access, gateway services, Internet advertising and web-site production. The case was cleared in phase one as no creation or strengthening of dominant position or spill-over effect were found.

77 Case No IV/M.1327, OJ 1999, 223/51.

78 Commission Notice regarding restrictions ancillary to concentration, OJ 1990, C203/05; the notice is currently be

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both horizontal and vertical restraints. An agreement falling within the prohibition may be exempted under Article 81(3) if the benefits to which it gives right outweigh any restrictions on competition.

The focus of this study is the competition law assessment of market power and its relationship with liberalisation and pluralism in the communications sector. Therefore it will not deal specifically with the possible application of Article 81 to form collusion or horizontal or vertical restrictive contractual arrangements or licensing of IP rights that might have a substantial impact on competition in a sector in which technology plays a key role. These aspects will be merely referred to incidentally and to the extent that they are treated by the Commission as instruments of general policy. However the current approach based mainly on individual notification and exemptions with regard to forms of co-operation falling within Article 81 enables the Commission to exert a considerable preventive control in this area. In particular co-operative joint ventures are normally caught by Article 81 and require notification and individual

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revised. An initial draft of the revised notice was circulated in 1999.

Whilst price fixing arrangements (principally horizontal but also vertical) are one of the main focuses of the Commission's competition policy, such agreements (which are often accompanied by mechanisms such as production quotas, the pooling of output or profits, and market sharing) are unusual in the current market conditions of the communications sector. The scope for expansion of the markets and the pace of technological development do not constitute the economic conditions leading to these forms of competitive distortions. Similarly, the Commission might, in certain markets, seek to establish the existence of a concerted practice where competitors repeatedly make announcements of future price increases directly to customers at or around the same time in the knowledge that customers or intermediaries, for example agents, will act as a conduit for the communication of such information from one competitor to another. Collusive behaviour may therefore consist in the mere exchange of price information or on the timing or levels of price increases which may prompt individual producers to respond by adapting their market behaviour. Often this exchange of information has been found to take place through the conduit of a trade association. However, this could happen through other systems. In the context of communication one should be careful with the operation of the so called B2B (Business to Business) Internet exchanges which may act as conduits for information exchanges. In relation to telecommunications services one should note that pricing is for the most part regulated. Whilst it is possible to argue that regulation in itself could be conducive to certain forms of collusion it would be paradoxical if anticompetitive effect would be created as a result of it. Often suppliers communicate price increases to customers some time in advance of the increase become effective; suppliers are frequently obliged to do so under contractual arrangements with individual customers. Such communications of future price increases are generally not capable of restricting competition between suppliers. However, in certain circumstances, price announcements may be used by suppliers in order to signal their pricing policies to each other. Where a system of price announcements constitutes an indirect contact between competing suppliers and leads to parallel pricing, leading to a restriction in competition the system may be regarded as a concerted practice between suppliers.

In some cases the licensing aspects can be essential in order to maintain or promote competitive conditions in the market place. This is particularly true in an area which is still unregulated such as the Internet. In fact the Commission has looked at the licensing arrangements between Network Solutions Inc. (the company operating as monopolistic registry generic Top Level Domains) and test bed registrars accredited by ICANN (the non-profit Internet Corporation for Assigned Names and Numbers). The liberalisation of the Internet would involve the creation of a System called Shared Registration System ("SRS") and allowing the existence of competing registry. NSI was to develop a protocol and associated software supporting a system of multiple registrars to provide services for the registry of the existing generic TLDs. The licensing agreements are aimed at enabling the test bed registrars to register second level domain names within the Top Level Domain Names managed by NSI therefore enabling these companies to access the NSI Shared Registry System. The Commission identified a number of clauses in the standard NSI-Registrar licensing agreements that may raise anticompetitive concerns; see Commission Press Release of 29 July, 1999, IP/99/0956.
exemption under Article 81(3). A number of individual decisions taken under Article 81 and examined below are therefore very important in analysing the Commission's approach in the use of its preventive powers. However two developments have changed and will further change the impact of the Commission in this respect.

Firstly the introduction of the concept of full function joint ventures (with the possibility of assessing the co-operative aspects of those joint ventures within the framework of an ECMR notification) has had the result of shifting the structuring of an increasing number of joint ventures to the ECMR regime, which offers considerable procedural advantages. As a result it is arguable that a number of cases which were historically structured as co-operative joint venture, and notified under Regulation 17 would now be structured as full function joint ventures and notified under the ECMR and the co-operative effects would be analysed under Article 2(4) of the ECMR as outlined above.

Secondly the adoption of the White Paper on modernisation of the rules implementing Articles 85 and 86 (now 81 and 82) of the EC Treaty of 28 April 1998, followed by the adoption of the proposed Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, which proposed the replacement of the current exclusive power of the Commission to grant individual exemption under Article 81(3) with the decentralised application entrusted to national courts and competition authorities, will have an impact on the Commission's action in this respect. Arguably due to the economic importance of this industry and its impact on the development of the EU the Commission will retain a central role even if the rules on notifications and exemptions are changed.

The liberalisation policy pursued by the Commission can influence greatly the economic assessment of individual cases under Article 81 in another respect which relates to the legal analysis under Article 81. It is arguable that general policy
particularly in relation to liberalisation may interact with the *Delimitis* doctrine. In that case the ECJ applied a two-stage test to evaluate whether an agreement is anti-competitive. The first consists of establishing whether the market in which the agreement operates is one which is difficult for potential new entrants to access. If the market poses barriers to entry or growth, one applies the second test which involves considering whether the agreement in question contributes significantly to those barriers. The analysis of the Commission with regard to an agreement which relates to this sector is likely to tie in and be consistent with its general policy of liberalisation and perhaps give rise to a strict interpretation in implementation of a policy aimed at preserving any form of reduction of competition. This approach is of paramount importance in both the assessment of individual vertical agreements and in the case of wider co-operation occurring in joint venture agreements.

3.1 *Joint ventures under Article 81*

Co-operative joint ventures can occur frequently in communications and often have pro-competitive effects. They might lead to the development of new and improved products or services, promote technical progress or enhance efficiency and reduce costs. In its Notice on the assessment of co-operative joint ventures pursuant to Article 81, the Commission set out some of the principles that it takes into consideration in granting an individual exemption under Article 81(3). In the light of the proposed reform on the decentralised application of Article 81(3) originally set out in the 1998 White Paper on modernisation and further developed in the proposed Regulation these principles will also have to be considered by national competition authorities and national courts. The Commission, in assessing a joint venture, must examine: (a) whether it contributes to improving the production or distribution of goods or to promoting technical or economic progress; (b) whether consumers are allowed a fair share of the resulting benefit; (c) whether the parents of the joint venture are subject to restrictions which are not indispensable for the attainment of these objectives; and (d) whether the cooperation in the joint venture affords the undertakings concerned the possibility of

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eliminating competition in respect of a substantial part of the products or services in question.\textsuperscript{84} The Commission considers that an exemption from the general provision can only be issued if the answer to the first two questions is in the affirmative and the answer to the second two questions is in the negative.\textsuperscript{85}

The Commission, in evaluating an exemption, will also consider advantages to third parties and especially consumers, particularly the development of new or improved products or services, opening up of new markets leading to the sales expansion of the undertaking in new territories or the enlargements of its supply range. These pro-competitive factors will be evaluated positively by the Commission. On the other hand one of the greatest risks for competition brought about by joint ventures, particularly in the communication sector, is the risk of spill-over effects (i.e. co-operation outside the joint venture), foreclosure effects (i.e. excluding third parties from co-operating with the joint venture partners) or networks effects (i.e. the anticompetitive effects associated with the creation of a number of commonly controlled joint ventures).\textsuperscript{86}

A number of the most important cases in the communications sector which have been examined by the Commission under Article 81 relate to broadcasting rights.\textsuperscript{87} Particular concerns over the cartel-like situation of collective purchasing have recently been scrutinised at both EC and national level.\textsuperscript{88} A number of these cases have been evaluated by the Commission in the context of the strategic joint ventures set up to operate in this area.

\textsuperscript{83} OJ 1993, C 43/02 ("JV Notice").
\textsuperscript{84} It can be argued that this consideration is similar to one of the two-stage test of wide market analysis applied by the Court in Delimitis with regard to exclusive purchasing.
\textsuperscript{85} JV Notice, para 53.
\textsuperscript{88} \textit{Ibidem}, at 24 and 25.
3.1.1 Broadcasting rights

The risk of foreclosure effects led to a negative decision in the Screensport/EBU case. The case arose out of a series of complaints by Screensport alleging, *inter alia*, that the formation of the Eurosport JV satellite television sports channel between the Eurosport Consortium (an association of broadcasting organisations which were also members of the European Broadcasting Union (EBU), Sky Television ("Sky") and News International) infringed Article 85 (now Article 81).

Virtually all EBU members take part in the Eurovision System, an institutionalised exchange system whereby the members jointly purchase rights for TV programmes including sports. This system provides that, when a Eurovision member covers a sporting event taking place on its own territory which and is of potential interest to other Eurovision members, it offers the signal free of charge to all the other Eurovision members on the understanding that in return it will receive corresponding offers from all other members regarding events taking place in their countries. The agreements extended the Eurovision system to Eurosport of which Sky was a member. The Commission took the view that since the Eurosport Consortium Members and Sky were potential competitors in the market for trans-national television sport channels, the joint ventures agreement eliminated all potential competition between the JV parents. The Commission also concluded that the joint venture gave rise to foreclosure effects in the markets for the broadcast of sports programming, the acquisition of sport programming rights, and the marketing of cable distribution rights. The request for exemption under Article 85(3) (now 81(3)) was also refused on the basis that any possible features of setting up a trans-national television sports channel were outweighed by the limitation of market entry opportunities. It considered that, in the absence of the joint ventures, consumers would have had a choice between the claimant (Screensport) and one of the parents (Sky); and the agreements between competitors could not be regarded as indispensable to the establishment of a dedicated sports channel with transnational dimension.

89 Case IV/32.524, OJ 1992, L 63/32.
Chapter VI

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The Football Association case\textsuperscript{91} concerned the agreements between BSkyB, the BBC and the English Football Association to broadcast live English football matches exclusively. The agreements involved both national matches organised by the Football Association and international matches which involved the English national team. The Commission considered that the exclusivity granted to BBC and BSkyB fell within the scope of Article 85(1) and, in order to allow access to popular football matches such agreements should be limited to one season. The exemption was justified on the basis that BSkyB had been operational for only three years and required a longer term to facilitate its entry into the new market for direct-to-home satellite broadcasting.\textsuperscript{92} The Commission also obtained the removal of an exclusivity clause for broadcasting from abroad and an undertaking not to discriminate against third parties who intended to show matches from abroad.

The EBU/Eurovision case\textsuperscript{93} involved an arrangement for joint purchase of television rights of sporting events, for the exchange of sport programmes, and for licensing to non-members. Membership was open to broadcasters providing a service of national character, producing a substantial proportion of their own programmes, and providing programming for minority interests which covered all or most of the population of their State. In practice these requirements restricted membership to public broadcasting companies whose duties were set by law and which involve non-profitable goals.\textsuperscript{94} Commercial broadcasters operating a "cream-skimming policy" by concentrating on mass appeal events in order to generate high advertising ratings, were not allowed to join EBU.

The Commission cleared the EBU arrangements under Article 85(3) (now 81(3)) for a number of reasons: in particular the system benefited small members by reducing transaction costs and facilitating broadcasts by different stations as well as exchange of

\textsuperscript{90} Twenty-first Report on Competition Policy, 1991, at para 78.
\textsuperscript{91} Cases IV/33.145 and IV/33.245 see Article 19(3) Notice in OJ 1993, C 94/06.
\textsuperscript{93} Case IV/32.150 EBU/Eurovision OJ 1993, L 179/23.
\textsuperscript{94} J. Temple Lang, supra note II-17 above, at 407.
programmes. The Commission did not consider that the system prevented competition between the parties for the right to broadcast important sport events. The decision was appealed before the CFI.\(^\text{95}\) The CFI considered essential that membership requirements be objective and sufficiently so that they could be applied without discrimination and quashed the appeal. The Court considered that the Commission had failed to evaluate whether these criteria were respected and whether the restrictions were indispensable.\(^\text{96}\)

Commercially, exclusivity in the right to televise events (particularly sports events) can be very important. It has been argued that whether this sort of arrangement infringes Article 81 depends on a number of factors such as "the duration of the agreement, the number and the importance of the events in relative and absolute terms, how many viewers want to watch the events and whether any other events or any other sports are substitutable, whether any other broadcaster has any right to televise any part of the event (given e.g. by legislation), how important the events are in the eyes of advertisers, whether the same broadcaster has acquired exclusive rights to broadcast many other important sport events (that might be very large in the case of, say, the Olympic Games) and whether it is likely that more than one camera team would otherwise film the events."\(^\text{97}\)

It has been argued that exclusivity in these circumstances "is natural and that in itself it does not infringe Article 85(1) [now Article 81(1)] unless it was for too long a period, it had other excessive effects, or resulted from the cumulative effects of series of exclusive contracts."\(^\text{98}\) It is submitted that in this area there is a considerable scope of application for the twofold Delimitis test.\(^\text{99}\) Undoubtedly the scale of operation of broadcasting events and the increasing financial dimension in those deals will most circumstances result in an increased barrier to enter the market. On the other hand the position of competitive advantage deriving from one arrangement is continuously

\(^{95}\) Métroplée Télévision SA and Others v. Commission, supra note III-119 above.

\(^{96}\) See in particular, para 102.

\(^{97}\) J. Temple Lang, supra note II-17 above, at 410.

\(^{98}\) J. Temple Lang, supra note II-17 above, at 410.

\(^{99}\) Delimitis, supra note VI-82 above.
challenged by the fact that the market for TV rights is a bid market in which the
situation can change radically at each round of negotiation when new entrants can enter
the market and challenge existing competitive positions. Hence the paramount
importance of avoiding lengthy agreements.

The Commission has already used individual exemptions to facilitate the establishment
of new broadcasters. Furthermore the foreclosure effects that, in certain
circumstances, may arise as a result of exclusivity clauses can be diluted by conditions
allowing sublicensing. While the Commission seems to be of the view that the existence
of a sublicensing policy would not in itself, "alter the need for an individual exemption
in circumstances where exclusivity is caught under Article 85(1) [now Article 81(1)]," sublicenses can prove crucial in ensuring that the conditions of Article 81(3) (in particular in relation to the absence of exclusionary effects) are met. Of course the value of sublicenses and their ability to fulfil the requirements of Article 81(3) will depend on their terms. The imposition of a general duty to sublicense is likely to cause a certain degree of legal uncertainty. The issues are similar to the one analysed in the context of essential facilities. This can be seen as an argument in favour of an ex ante determination of the sublicensing duties by regulatory authorities at national level.

Article 81 notification and the Commission's preventive analysis in this context has also
proved crucial in telecommunications cases, particularly at the early stages of liberalisation.

3.1.2 Telecommunications and interactive services
Two important cases involving three major telecommunications providers (Deutsche Telekom, France Télécom and Sprint Corporation) are paradigmatic of the
Commission's approach in the application of its general policy to a specific case in the
context of Article 81. Atlas was a joint venture between Deutsche Telekom ("DT") and
France Télécom ("FT") aimed at providing telecommunications services to large users
in Europe one of the first areas which benefitted from competition. Atlas in turn which

took part with Sprint Corporation in Phoenix (subsequently renamed Global One) for the supply of the same services world-wide as well as traveller services and telecommunications services to other telecommunications organisations. Both agreements were exempted on the same day under conditions described below in paragraph 5.\(^{102}\)

The Atlas and Global One cases provide an excellent example of how the Commission pursued its liberalisation process by means of the general measures described in Chapter II and through individual decisions. Firstly, the level of liberalisation of the market was taken into consideration in deciding the appropriate commitments and the length of the parties' obligations.\(^{103}\) The Commission subsequently took the view that a modification of its decision and a relaxation of the obligations originally imposed on the parties\(^{104}\) was justified in the light of the changes in the competition conditions in the market place.\(^{105}\) These market conditions included a more mature level of liberalisation in Europe, the wider liberalisation which arose as a result of the WTO Global Agreement on Trade in Basic Telecommunications Services (signed on 15 February 1997 and came into force on 5th February 1998), as well as other individual exempting decisions (most notably the clearance decision for the BT/AT&T joint venture),\(^{106}\) or simply the presence of competitors which were not subject to the same limitations.

One of the most important joint ventures in interactive services concerns the BiB joint venture (subsequently renamed Open) between BT, BSkyB, Midland Bank plc (now HSBC) and Matsushita (a subsidiary of Matsushita Electric Co, Ltd) (MEI) a designer, developer and manufacturer of electronic and electrical products and associated

\(^{101}\) See European Commission, supra note VI-87 above, at 24.

\(^{102}\) See para 74 of the Global One Decision and Article 1 of the Atlas Decision.

\(^{103}\) The amendments would include (1) a deletion of a limitation contained in paragraph 7 of the Decision which excluded from the scope of the exemption broadband transmission capacity and public basic telecommunications services (such as voice telephony services) as defined by the 7th indent of Article 1 of Directive 90/388; and (2) a deletion of the limitation concerning bundling.


software and information technology.\textsuperscript{107} The purpose of the joint venture was to set up the infrastructure necessary for the provision of digital interactive TV services (i.e. Internet or Internet-like, online services to be delivered via television screens)\textsuperscript{108} to consumers in the UK and to provide such services to consumers using that infrastructure. This excluded forms of non-interactive entertainment such as video on demand and pay TV channels. The BiB infrastructure could be broken down into broadcast and online system, systems to ensure that only authorised viewers have access (i.e. conditional access for broadcast services and access control for on-line), set-top box (containing the application programming interface, API), an electronic programme guide, a system allowing financial transaction on platform (the so called TMS, transaction management system)), and a service creation system for the interactive applications of the content providers (i.e. the companies who retail their goods and services on the BiB platform). The joint venture was negotiated at length with the Commission which took a favourable view only after a number of conditions were agreed. These included legal separation; removal of subscription ties between BiB and the services of BSkyB (one of its parents); removal of EPG and API exclusivity; availability of a clean feed to distributors of BSkyB channels; divestiture of cable by BT; veto rights; undertakings to develop simulcrypt arrangements with conditional access providers; subsidy recovery; and information provision by the parent company.

The Commission's precedents in relation to partial function joint ventures are somehow losing the centrality they had in the immediate wake of the liberalisation process in the mid-nineties. This is mainly due to the shift in importance towards the ECMR regime and the procedural uncertainties of Article 81 notifications described above. In any event, the overall Commission approach in relation to concentrations and joint ventures (both full and partial function) has of course a unifying thread that, despite differences of an historical nature (and which relate to the different stages of development of the liberalisation process), call for a unitary critical analysis.

\textsuperscript{107} Case IV/36.539, \textit{British Interactive Broadcasting/Open}, OJ 1999, L 312/1; see A. Font Galarza, "The British Interactive Broadcasting Decision and the application of competition rules to the new digital interactive television services", Competition Policy Newsletter (1999), 7.

\textsuperscript{108} This could include retailing, information services, game playing, internet access and adding interactivity to broadcast entertainment services.
4. Between general policy and individual decisions: a critical appraisal

The Commission's action in *Atlas* and *Global One* seems to be inspired by the general liberalisation process pursued by it and, at the same time, appears to be aimed at being supportive of it in an individual case. In the mid-nineties in preparation to the full liberalisation of telecommunications, the Commission had to deal with the industrial consequences of its liberalisation process which had sparked the first forms of repositioning of the gigantic and somehow stifle structures of the national monopolists. The agreements that the Commission was called upon to evaluate related to co-operative joint ventures which were effectively the first signs of the international mobility of the national monopolists. In response to this the Commission had to assess the need to incentivise vivacity amongst players against the substantial risk of avoiding that monopolists' starting to oppose or slow down the impact of liberalisation in the first areas subject to competitive forces. The analysis of the commitments obtained highlight the particular concern that the Commission had to implement, on an individual basis, the liberalisation policy pursued at general level by including provision on avoidance of discrimination, cross-subsidisation, bundling and accounting separation. The preventive powers entrusted to the Commission afford it a privileged position to impose and monitor measures that it sought to pursue at a general level with more difficulty and political resistance.

It is interesting to note that the initial joint ventures in the sector, the most important of which were brought into existence before the full liberalisation measures were adopted, tend to have two characteristics: firstly they tend to have a co-operative rather than concentrative nature due to the very limited vivacity of the operators; secondly they tend to have a more horizontal nature as the potential for convergence was less apparent then. Whilst liberalisation remained on the Commission's agenda, the more developed stage of the regulatory framework brought other items into the limelight in the late nineties. These included in particular the relationship between regulation and competition law and most significantly the importance of the use of *de facto* market power to deny access to what appeared to be essential gateways to develop new
convergent services. In this respect the Commission has started to make a new even more integrated use of its preventive powers under, in particular under the ECMR, to combine its general policy with individual decisions.

In a number of cases the parties have successfully invoked regulatory provisions to limit the scope of undertakings imposed on the parties. This happened for instance in *BiB/Open* when it was remarked that UK measures implementing Directive 95/47/EC were taken into account in evaluating the obligations to be imposed on the parties, in particular, on bundling and conditional access.\(^\text{109}\) In many cases the existence of regulation mitigates competition concerns. However the Commission's practice in this sense is not entirely consistent. In the *BT/MCI (I)*\(^\text{110}\) the Commission concluded that the existing regulatory constraints pre-empted the need to impose additional obligations on cross-subsidisation and non-discrimination.\(^\text{111}\) On the contrary in *Atlas* the Commission adopted a "belt and braces approach" imposing obligations aimed at ensuring "the Parties' firm commitment to comply with the applicable legal framework."\(^\text{112}\) In *Unisource* the Commission did consider the existing regulatory framework and the level of liberalisation was expressly taken into account.\(^\text{113}\) However the Commission decided to impose conditions on clearance which would have had the advantage of providing more legal certainty and specify in more detail the terms of the obligations imposed on the parties. On the other hand in *Kirch/Bertlesmann* the decision made no reference to the TV standards Directive which at least in principle regulates the provision of conditional access.

Is the approach of the Commission contradictory? Should more co-ordination between the legislative framework and the enforcement action be sought? An analysis of the Commission' approach needs to be made in an historical perspective. The "belt and braces approach" adopted in *Atlas* and *Global One* reflects the early stages of the

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109 See *BiB/Open* Decision paras 46-48 and 134.
110 Case IV/34.857, *BT/MCI (I)*, OJ 1994, L 223/36 (the "*BT/MCI (I)* Decision"), para 57.
111 *Ibidem*, para 57.
112 Para 30 of the *Atlas* Decision.
113 Case IV/35.830 *Unisource*, OJ 1997, L 318/1 (the "*Unisource Decision"), paras 68-74.
liberalisation when, having reached a political momentum, the Commission's actions at a general level required support through enforcement on a case by case basis particularly in relation to arrangements between national monopolists. At that stage the Commission showed particular care in reconciling its individual decisions with its general policy of liberalisation. When large players such as former national monopolists are involved the Commission has gone even further and has utilised individual exemption to speed up, steer or preserve the liberalisation process which was mainly pursued at legislative level. The Atlas and Global One cases are good examples of this policy and of this creative proactive combination of roles, and epitomise the interrelatedness of the Commission's use its powers as legislator and enforcer. In a more advance stage of the establishment of a regulatory process one could argue that the Commission should more comfortably rely on the regulatory background in assessing the effects on competition.

However this approach also has to be looked at against the background of general policy of increasing reliance on competition law as opposed to regulation as expressed in the 1999 Communications Review. As outlined in Chapter IV the advantage that regulation has over the application of general principles of competition law (particularly in areas such as pricing) is access to and creation of better information and consequently a preferable position from which to assess and address the possible distortion of competition. However, the level of information received and the strong position of the Commission in the context of the preventive approval required under the ECMR enables it to supplement the action of regulator with specific commitments which can be very effectively monitored by the Commission. In this respect it is interesting to note the approach taken by the Commission in the Telia/Telenor Decision. In considering the effects of application of interconnection prices pursuant to the Interconnection Directive (Directive 97/33/EC as amended by Directive 98/61/EC) the Commission stated that the fact that interconnection is cost oriented would not remove the parties' ability to eliminate actual and potential competition from third parties. Furthermore even if interconnection prices are calculated in accordance with Community law, the parties could still degrade the technical quality of the interconnection offered to third parties. Finally the Commission considered that in an increasingly competitive
environment telecom companies struggle to reduce cost base by replacing old high cost equipment with cheaper more efficient equipment. In this context the Commission stated that "historic costs should be higher that current operating or incremental costs and would thus enable incumbents to earn higher interconnection margins."\(^{114}\) Whilst this last statement seems in contradiction with the Commission's regulatory policy on pricing it proves that in the case of mergers, in which the economic analysis is less subject to political influences than decisions of a general nature, the Commission's Merger Task Force ("MTF") is likely to adopt and is in a position to impose more stringent tests even for behavioural actions.

From this approach one can infer that the function of sector-specific regulation of a general nature and the application of competition law to individual cases are complementary rather than overlapping. In fact as expressly stated by the Commission, even on the assumption that regulatory systems are effective, they cannot be expected to prevent the creation and/or strengthening of a dominant position that the combined entity will enjoy as a result of a merger.\(^ {115}\) As a result of this the tests adopted under in the context of competition law enforcement in general (and in particular merger control) are bound to be more stringent that those adopted by the regulators as its effects do not only relate to prices but to competition in general. It has been argued that regulation is often behavioural, taking as its starting point the existence of market power.\(^ {116}\) The Commission undoubtedly seems to perceive its action under the merger control provision as preventing the creation/strengthening of such dominant positions (in the same way as it does in a sector that is not regulated). However, the extent of its powers in adopting remedies, which as we will see below often have a behavioural nature, undoubtedly affects areas that concern the undertakings' behaviour and, in the communications sector, are often subject to regulation. In certain cases this leads to the adoption of contradictory or rather different and more stringent tests.

\(^{114}\) Para 136 of the Telia/Telenor Decision.

\(^{115}\) Bidem., para 137.

\(^{116}\) K. Coates and L. McCallum, "Communications (Telecoms, Media, and Internet), in Faull and Nikpay (eds.), The EC law of Competition, (Oxford University Press, 1999), 753, at 766.
5. Remedial powers

The remedial powers of the Commission under both the Merger Regulation and Regulation 17 constitute an important instrument to shape competitive conditions in the market place. In a number of cases the Commission has adopted an interventionist stance with regard to transactions or arrangements which it was notified either under the Merger Regulation or under Regulation 17. The principal Commission decisions in the communications sector in which commitments have been imposed by the Commission or accepted by the parties as a condition of clearance of transactions notified under the Merger Regulation or under Regulation 17 will be analysed insofar as they relate to joint ventures. In so doing the extent to which these commitments have been used as an instrument for liberalisation or a supplement to the general liberalisation process pursued at EU level will be examined. Further, the nature of the remedies imposed by the Commission (i.e. structural or behavioural) and their relationship with sector-specific regulation will be considered.

The distortion of competition in merger cases derives by definition from a structural situation whilst in cases to be assessed under Article 81 it normally derives from anti-competitive behaviour or arrangements. The cases analysed above show that this distinction is not always clear cut. More importantly, even in cases in which the distortion of competition is structural rather than behavioural the appropriate remedy (or in any event the remedy sought by the Commission) might be behavioural rather than structural. This tension has emerged particularly in Gencor. The case, which was appealed before the CFI, provides useful guidelines for the distinction of the Commission's powers which can be (and have been) applied in the communications sector.

117 Gencor Ltd v. Commission, supra note IV-39 above.
5.1 The powers to impose structural or behavioural undertakings: a teleological approach

In *Gencor* the applicants contested the refusal of the Commission to impose behavioural remedies in the framework of the structural analysis to be carried out under the Merger Control Regulation. This issue has considerable practical implications given that the Commission now has the power under the EC Merger Regulation to impose conditions and obligations even in a phase I decision under Article 6.1(b). More generally the decision on this point is interesting for both its outcome and the reconstruction of the role of the Commission in monitoring structural distortions. The applicants sought to negotiate behavioural remedies which were rejected by the Commission on the basis that the commitment offered was behavioural in nature (and could not therefore be accepted under the EC Merger Regulation), and the commitment did not in any event address the competition problems identified during the administrative procedure. The Commission considered that "the purpose of the regulation is to prevent situations from arising in which there is scope for anti-competitive conduct which does not involve concentration; consequently, only commitments which help to eliminate the possibility of abuse can be considered. The Commission notes in that regard that Article 2 of Regulation No. 4064/89 specifically prevents the Commission from authorising a concentration which creates or strengthens a dominant position. In those circumstances, a promise not to abuse that dominant position is inadequate and does not meet the requirements of the regulation."^120^

However, Götz Drautz, the head of the Commission's Merger Task Force, acknowledging the changing role of commitments within merger control proceedings^121^ noted that: "the distinction between [behavioral and structural] remedies is not a clear bright line and, in fact, it appears that the line has been "moving" over time. At one time, the notion of what was an acceptable remedy was almost solely limited to

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118 See new Article 6(2).
119 See Report for the Hearing, para 191.
120 See Report for the Hearing, para 201.
divestiture, or partial divestiture, of physical assets. However, as authorities have analyzed how the marketplace really works, it has become more apparent that there are a variety of options for correcting [or] modifying competition concerns that need not be limited to the sale of certain businesses, plants or equipment."  

It can be argued that following this case the distinction between the structural or behavioural nature of the commitment is certainly less important if not immaterial. This approach was advocated (albeit indirectly) by the Commission and has been upheld and expressed explicitly by the Court. In the Commission's words "a commitment can be regarded as structural when it solves a structural problem, for example one of access to the market". The CFI, for its part, stated more clearly that "the commitments offered by the undertakings concerned must enable the Commission to conclude that the concentration at issue would not create or strengthen a dominant position [...]. [T]he categorisation of a proposed commitment as behavioural or structural is therefore immaterial". The Gencor judgment makes clear that the characterisation of a commitment as structural rather than behavioural has to be interpreted "teleologically".

Whether a commitment is capable of achieving the aim of correcting a structural distortion is to be evaluated on a case by case basis. The aim in turn is to be interpreted in an objective way as that of the remedy not that of the parties. Therefore, a behavioural remedy that, in the parties' intention, is aimed at resolving the abusive effect brought about by a duopolistic market structure (such as an undertaking not to abuse a dominant position) is not acceptable, as, pursuant to the EC Merger Regulation, that market structure is not compatible with the common market in the first place.

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122 Ibidem, at 224.
123 Ibidem.
125 Para 819.
127 Paras 318 and 319.
128 In this case the Court seems to have squared the circle by upholding the Commission's decision to refuse the behavioural commitments in question and approving the Commission's practice of accepting behavioural undertakings. The Court has ingeniously done so by taking the issue out of the arena of the behavioural/structural debate and placing it at the higher level of teleological evaluation of the remedy. Therefore, in order to assess the compatibility of a remedy with the EC Merger Regulation, the Court has rightly considered immaterial the nature of a commitment and focused on its aim and effect on the market structure.
Outside the communications sector the Commission has taken a number of decisions concerning the disposal of shares or the disposal of assets under the ECMR. However, it has also accepted behavioural commitments in a number of cases. They range from the termination of exclusivity clauses, to undertakings to grant access to an essential facility or again commitments to avoid cross-subsidisation. In other cases, the Commission has adopted so-called "mixed commitments" which involve both structural and behavioural undertakings. In relation to communications, where the Commission's action often interacts with sector-specific regulation, the nature of the undertakings given assumes a particular relevance.

5.2 Remedial powers in communications

In assessing the commitments offered in decisions in the communications sector one can detect a distinct tendency to use behavioural remedies to address also structural issues.

Often the remedy offered has been structural in nature. In RTL/Veronica/Endemol the Commission had initially prohibited the concentration as it would have led to the creation of a dominant position on the Dutch market for TV advertising, and to the
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strengthening of Endemol's existing dominant position on the market for independent TV production. Since then, there had been various developments on the Dutch TV market, including the withdrawal of Endemol from HMG, and the participation of Endemol in a new sports channel; HMG had also agreed to transform its existing RTL 5 general interest TV channel into a news channel, with the intention of it becoming over time a pay-TV channel. It further agreed not to change the essential character of the news channel or to deviate substantially from the business plan submitted by it to the Commission in that connection for a five-year period.

The Commission considered that Endemol's withdrawal from HMG effectively removed any structural links between the largest Dutch TV producer and the leading TV broadcaster in the Netherlands, and would also result in HMG no longer having preferential access to Endemol's productions. The transformation of RTL 5 into a news channel was considered sufficient to restore effective competition in the Dutch TV advertising market, as it would decrease HMG's current market share to some 50 per cent. (close to the position of the RTL 4 and RTL 5 channels before the creation of HMG). It would also mean that HMG operated only two general interest channels with co-ordinated programme schedules, thus allowing competitors more room for manoeuvre, and that HMG could not use RTL 5 to counteract the programming of competing channels. The Commission therefore declared the concentration compatible with the common market.

The case for clear cut structural remedies is even more clear in cases in which there is a direct horizontal overlap. In British Telecom/MCI (II)\(^\text{136}\) (the proposed but subsequently abandoned merger between BT and MCI) the Commission found that the merger would create or reinforce a dominant position in the markets for international voice telephony services on the UK-US route. This was due to the current capacity shortage on existing international transmission facilities between the UK and the US, as well as the parties' significant entitlements, especially in the UK, to the capacity of these international facilities. The commitments offered by the parties in order to receive approval related

\(\text{136}\) Case IV/M.856, BT/MCI (II), OJ 1997, L336/1.

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mainly to the submarine transatlantic cables owned by BT/MCI and their European audioconferencing activities. BT agreed to sell off all of the new cable capacity arising from the takeover of MCI. This capacity would be sold to international infrastructure operators at a non-discriminatory price to be determined on a cost basis in agreement with Oftel, the UK national telecommunications regulator. MCI agreed to sell off the UK audioconferencing business controlled by its subsidiary, Darome, in order to reduce the 90 per cent. share of the UK market which the merged group would otherwise have held in this sector.

Equally in the WorldCom/MCI case the overlap in the Internet between the parties required a divestment of all or substantially all overlapping activities. Furthermore the Commission wanted to ensure that, given the level of concentration in the market, the business to be disposed of was preserved as far as possible as a single unit (and hence a possible potential force) and was divested to an acquirer who was capable of replacing the departing player in the market. Therefore the proposal submitted for divestiture involved the selection of an identified buyer prior to the Commission taking a final decision on the notification, a test on the market for reaction and further discussion with the parties. As a result of this process it was concluded that the best remedy would have been the divestment of the Internet business of MCI.

In certain cases the structural remedies in overlapping activities are not considered sufficient to address the competitive concerns. This happened in Telia/Telenor where, as mentioned above, the sale of the overlapping activities proposed by the parties was not considered an adequate remedy to remove the concerns about advantages in terms of branding, technical/financial support, relative proximity of relevant supporting networks and increased bargaining power in neighbouring markets that the merger would have brought about. The final package of undertakings submitted by the parties and accepted by the Commission included divestment by both parties of some of their activities in domestic and international voice telephony, Internet and data communications services, divestment of their cable TV business, network services and

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137 WorldCom/MCI Decision.
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PABXs (i.e. switches capable of handling a number of telephone lines simultaneously). Most importantly the parties accepted allowing competitors access to their respective local access networks. This last commitment was of paramount importance for the Commission who has been able to impose an access obligation on two former national monopolists outside the framework of the measures of general policy which were subsequently adopted (see Chapter II).

Conversely pure behavioural commitments are not likely to be considered acceptable (at least in the context of merger control investigation). In *MSG Media Service*¹³⁹ (the proposed establishment of MSG Media Service, a joint venture between Bertelsmann AG, Deutsche Telekom and Taurus Beteiligungs GmbH, a holding company of the Kirch group) the Commission found that the creation of MSG would create or strengthen a dominant position on the markets for administrative and technical services, pay-TV and cable networks in Germany. The Commission found that MSG was likely to hold a long-term monopoly in the German conditional access and subscriber management services market, although it was only just beginning to develop, as the mere setting up of MSG was likely to seal the market off to new competitors. The Commission rejected the claim that none of the proposed parent companies would alone take the risk of the required high level of investment, and saw it as contradicting the parents’ claim that other companies would be prepared to invest to establish a rival to MSG.

In an attempt to dispel the Commission’s concerns, the parties proposed various undertakings. A number of them concerned MSG. MSG undertook to: choose a decoder base with a common interface, provided that a common appropriate interface could be developed, and the risk of piracy minimised; promote the free sale of decoders and not impose any prohibition on the use of decoders for receiving programmes not handled by MSG; not disclose to its parents information on other pay-TV suppliers’ programmes or subscriber data; choose a neutral and non-discriminatory style of presentation for its electronic programming guides (EPG) and navigation software, and,

¹³⁸ See paras 140-147 of the *Telia/Telenor* Decision.
as far as technically possible, provide information on programmes not handled by MSG; establish an advisory body, in which MSG customers would be represented, to oversee the non-discriminatory display within EPG, and whose proposals would be taken account of by MSG in its decisions; charge reasonable prices and operate a transparent price policy, in particular with regard to equivalent prices for equivalent services; and open up its networks for further digital transmission of programmes in order to have sufficient reserves of technically usable capacity and avoid any shortage of channels.

These undertakings were rejected by the Commission as being insufficient to deal with its concerns of market dominance, and largely amounting to pledges of conduct. Whilst the introduction of a common interface and a transparent pricing policy for administrative and technical services were considered positive factors for the future competitive structure of the digital TV market, the MSG shareholding structure (with all parents being major players in the German media market), and the perceived difficulty of enforcement of the undertakings due to the conditions and reservations to which they were partly subject, all contributed to their unsatisfactory nature. In addition, the Commission viewed the majority of the undertakings as essentially comprising no more than a commitment that MSG would not abuse its dominant position on the administrative and technical services market, a legal obligation to which a dominant entity was in any event subject.

The Commission viewed the undertaking relating to the common interface as amounting to a mere non-binding declaration of intent, which, due to the conditions attached to it, could enable MSG to choose a proprietary system, on the basis, for instance, that there was a lack of acceptance by potential customers. It was relevant that the most important of these potential customers was the pay-TV channel, Premiere (known to be a strong supporter of proprietary systems). In any event, MSG’s dominant position, through its shareholding structure, in the technical and administrative services market would be unaffected, irrespective of any guarantee of the introduction of a common interface with unlimited access.
Enforcement of MSG’s undertaking not to apply discriminatory conditions to its customers was considered problematic, due to the possibility of hidden discrimination. The proposed advisory board could not check this as it would have no power to issue decisions binding on MSG. The undertaking not to pass information to MSG’s parents was insufficient to prevent the parents obtaining such information in non-verifiable ways. DBT’s undertaking was no more than a general declaration of intent and provided no guarantee that further digitalisation would not be tailored to meet the needs of Bertelsmann and Kirch. As a result, the Commission prohibited the joint venture.

In the BiB case Article 19(3) Notice the Commission explained why its preference was towards structural conditions even in a Regulation 17 case. It said that its preference is for structural conditions which do not require regulatory intervention, such as the legal separation of box and services operation, the exercise of veto rights in relation to marketing and similar financial contributions and the ending of exclusivity in relation to certain aspects of the joint venture (i.e. the EPG). These requirements were reflected in Condition 1 of the final Decision. BT was also asked to divest certain broadband cable services (Condition 4). However these structural conditions were also integrated by the ongoing behavioural conditions such as availability of clean feed for distributors (Condition 3), development of conditional access and symulcrypt (Condition 6), subsidy recovery for marketing contributions (Condition 7) which were regarded as necessary in relation to the provision of information about the technical specification of the box (Condition 9). In fact the most common form of remedies actually entails a mixture of structural and behavioural undertakings.

This has been apparent in the Commission’s approach since the landmark Atlas and Global One cases. These cases were at the time notified under Regulation 17 although it is possible that after the amendments of the ECMR would now fall within the scope of the ECMR regime provisions or structured by the parties as full function JVs due to

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140 See paragraph 5.1. In the BiB Article 19(3) Notice the Commission also clarified the distinction between a condition and obligation under Regulation 17. The essential difference appears to be “jurisdictional” in that a failure to comply with a condition means any exemption is inapplicable without further action by the Commission, whereas a breach of an obligation can lead to a formal Commission decision withdrawing the exemption. National authorities (including both regulatory authorities and national courts) can therefore themselves determine whether the conditions have been fulfilled. A national authority could no longer permit continued operations under its regulatory regime if the conditions were not
the procedural advantages offered by the ECMR regime. The *Atlas* decision included a structural remedy involving the disposal of France Télécom's German subsidiary Info AG. However, both the *Atlas* and the related *Global One* decisions contain conditions relating to non-discrimination, avoidance of cross-subsidisation, bundling and accounting separation which are both structural and behavioural. With regard to non-discrimination the Decision noted that Atlas and other service providers were dependent on access to the public switched telecommunications network, the integrated services digital network and other essential facilities which until effective liberalisation were operated by FT and DT in their national markets. The Commission envisaging the risk of a possible more favourable treatment in favour of Atlas imposed non-discrimination conditions on terms and conditions for the services provided to Atlas, the scope of services available, and disclosure of technical and commercial information. Further conditions concerned undertaking to guarantee third party access to the shareholders' networks. Cross-subsidisation was prevented by requiring that the entities formed pursuant to the Atlas and Global One venture be established as separate legal entities and obtain their own debt financing on their own credit. However, DT and FT were allowed to (i) make any capital contributions or commercially normal loans to the entities that were required to enable them to conduct their respective business; (ii) pledge their venture interests in such entities, in connection with non-recourse financing for such entities; and (ii) guarantee any indebtedness of the entities provided that FT and DT were only allowed to make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness. The entities created pursuant to the joint ventures were allowed to allocate directly or indirectly any part of their operating expenses, costs, depreciation or any other expenses of their business to any part of FT or DT's business units. Whilst the entities were of course allowed to bill the parent companies for products and services provided to them the prices should have been equivalent to the ones charged to third parties and on the basis of full cost

141 See also *Unisource* Decision which concerned the markets for non-reserved corporate telecommunications services, traveller services, carrier services and contains provisions on non-discrimination, misuse of confidential information, and prevention of tying.

142 See para 28 of the *Atlas* Decision.
reimbursement and on an arm's length basis.\textsuperscript{143}

The bundling conditions provided that DT and FT sold their services under contract separate from the contract for the sale of the joint venture services concluded as distributors of the joint venture in their respective national markets. It was requested that each separate contract set out the terms and conditions of each individual service sold and in particular attain any quantity discounts or other discounts to a particular service.\textsuperscript{144}

This approach is also apparent in more recent ECMR cases. Apart from the Telia/Telenor case referred to above, the commitments offered in Vodafone Airtouch/Mannesman concerned both the divestment of one business (the UK mobile operator Orange) and undertakings aimed at enabling third party non-discriminatory access to the merged entity's integrated network so as to provide advanced mobile services to their customers. Furthermore the parties agreed that the provision of roaming tariff and/or wholesale services will be made on a non-discriminatory basis between operators of the merged entity's group and other mobile operators. The non-discrimination principle was to apply to both pricing and quality of the service.\textsuperscript{145} In accepting these commitments the Commission was careful to stress, using the terminology adopted in (and quoting) the Gencor case, that the undertakings will have a structural effect on the market in that they will make it possible to preserve a competitive structure of supply. Whilst this is true it appears to be clear that the Commission is effectively carving out spaces for on-going monitoring, if not regulation, of the market through its merger control function. This is of course even more apparent in cases in which the issues relate to the co-operation assessment under Article 2(4) of the ECMR analysed above,\textsuperscript{146} even though in these cases "behavioural regulation" is inherent in the types of issues addressed. In BSkyB/Kirch the Commission succeeded in

\begin{footnotesize}
\begin{enumerate}
  \item See para 29.3 of the Atlas Decision and Article 2.(d)(3) of the Global One Decision.
  \item See para 29.5 of the Atlas Decision and Article 2.(e) of the Global One Decision.
  \item See para 50 of the Decision.
  \item See notably the BT/AT&T case but also the Canal+/BankAmerica case. See also the Vizzavi Decision on Internet Portal in which the parties, Canal Plus and Vodafone, gave undertakings to ensure that parties would have guarantee the customer ability to change the default portal and access third party portals (Commission Press Release IP/00/821).
\end{enumerate}
\end{footnotesize}
imposing as conditions for clearance for a joint venture involving companies operating in different geographic markets (i.e. Germany and the UK) the obligation to give access to Kirch’s technical platform by interested third parties (including access to Kirch’s d-box system, development of interoperability of competing technical platforms, and access to KirchPayV’s services by other technology platforms) and use of Kirch’s technology by competing platforms (including the production of multiple system boxes).

Undoubtedly the Commission has been very successful in imposing remedies that complement its actions on a general level. More recently we have witnessed an even further strengthening of the Commission's actions. The activism of the Commission in this area may give rise to criticism. It is difficult to judge to what extent it has been caused by the different approach of a new Commissioner or by a more long-term response to an excessive level of concentration in the industry.

6. Conclusion

This chapter shows how the Commission’s use of its preventive powers in the context of concentrations and joint ventures has played a role of paramount importance in shaping this industry in Europe. In my submission the cases analysed above demonstrate that the Commission has made an instrumental (although legitimate) use of its powers and of its position as gatekeeper of the structural alterations of the market. It has done so with the enforcement, through individual decisions, of its liberalisation policy pursued using measures of a general nature. The Commission has operated in a rapidly changing industrial environment and its position in relation to merger control cases has afforded it the flexibility of analysis which is sometimes lacking in measures of a general nature. At EU level measures of a general nature which find their roots in the need for harmonisation of the conditions of competition within the internal market might struggle to keep up with the pace of economic development and do not entirely perform the function of regulation of competition as such. This gap is filled by the application of competition law. Within competition law, control of structural changes enables a prompt reaction to phases of acceleration of the industry when changes occur
through structural rather than organic growth.

In the context of current Commission policy in communications based on an increased reliance on competition law rather than regulation, the Commission's preventive powers and ability to impose remedies will acquire an even more prominent role. A harmonic relationship with the existing forms of regulation both at EC and national level is one of the major challenges faced by the Commission. Some decisions described above show a certain level of tension between measures of general policy and more stringent tests applied on an individual basis. Not all these decisions can be justified on the basis of the preventive nature of the assessment in the case of merger control or co-operative joint venture notifications. It is true that in the context of mergers the Commission will also consider whether a certain market position might in itself induce abuse and not limit its analysis to behavioural issues. It is therefore true that structural situations call for a stricter and preventive approach as in those cases the Commission will have to take into account the potential effects on competition. However, the stricter tests adopted by the Commission in certain merger control cases in this sector betray a desire on the part of the Commission to impose, at individual level, policy decisions which may not be politically acceptable if adopted at a general level. Whilst this may be questionable in principle, these decisions may nevertheless be justifiable so long as they are based on sound economic grounds.

The risk is the re-introduction of regulation through the back door. Furthermore, in doing so the Commission is *de facto* subject to little judicial scrutiny. Whilst the lack of judicial scrutiny might in the short term strengthen the Commission's position, in the long term it would inevitably rely on political support. Therefore the avoidance of excessive activism or rather the maintenance of a strict economic approach is another major challenge for the Commission in order to maintain political support for its action and high standards of institutional credibility in its enforcement policy. Certain negative decisions or the use of its powers to impose commitments on the merging or co-operating parties originate from the high level of concentration in certain areas and are dictated by the desire not allow, after the start of the liberalisation process, the creation of centres of economic power in private hands. Some of the remedies imposed are also
a consequence of the importance of vertical integration in this dynamic and converging area. However, again, Commission decisions would have to be based on economic considerations.

The outside boundary of merger control, its very test, is economic in nature and does not concern pluralism as such. One might question whether there is pluralism in communications beyond the economic plurality of sources of competition. Competition law must mean affordability for customers, technological development and, to a certain extent, plurality of competitive forces. However, ensuring competition is no guarantee of political pluralism. At European level merger control should not enter the domain of political public interest. The next Chapter will examine the impact of EU law on forging a notion of public interest which is pervading the national systems through competition law.
Chapter VII

Communications as a public service and public interest in communications

1. Introduction: the role of public interest

Communications as a public service and public interest in communications: this sentence describes and summarises, in a few words, the evolution of the role of the public dimension of communications within EC law. EC competition law and its application to this sector has been the driving force of this evolution which spreads its effects down to the very roots of the notion of public interest at national level. Public interest is at the same time the very aim of a competition policy and its external limit. In the latter sense, public interest is often used as a benchmark to identify the limits of the application of antitrust rules to communications. This chapter will therefore focus on and draw conclusions regarding the application of competition law to telecommunications and television broadcasting.

Under the competition law regime of the EU public interest has a dual role. On the one hand, in its wider interpretation as the expression of consumers' interests, it is certainly one of the main criteria for assessment of competition analysis.1 On the other hand, considering public interest more strictly as the expression of values with less of an economic nature (if any at all, such as social cohesion, education, pluralism, etc.), its relation to competition policy (which must be based mainly on economic reasoning) becomes inevitably more conflictual. In a phase in which competition policy has expanded its role and weight considerably within the policies of the Union and acquired

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1 Under EC competition law, the relationship between competition law and public interest is even more complex than at national level. The EC Treaty provisions on competition are not based explicitly on the notion of public interest. This may be due to the fact that the values protected by the EC rules lacked the national dimension and proximity to the "polis" (political community of citizens) which is required in an analysis of the public interest. Instead they are based on legal-economic tests (such as abusing or strengthening a dominant position) or are aimed at contributing to the creation of conditions of undistorted competition for undertakings operating throughout the territory of the Union.
an essential role in micro-economic regulation, public interest still constitutes the boundary of its reach, particularly if it is the expression of values of equal rank. Furthermore, the present analysis, applied to a sector which is pivotal in the economic development of the Union and which is seen as strategic for the future of the “new” European economy, assumes the status of a paradigm of the new repartition of powers and competencies within the Union, which has the potential to constitute a model which can be followed in other areas.

The relationship between public interest or general interest and competition policy has an additional element of potential friction within the European legal order which is almost “jurisdictional” in character. Public interest arguments are subject to being used by Member States as instruments to protect their sovereignty against the intrusion of the European legislature and European policy makers (hence, the jurisdictional character). This tension is not intrinsic in the notion of public interest: on the face of it, public interest could theoretically be as well protected at national as EU level. The problem lies in identifying the value to be protected and the relationship between national interest and Community public interest in the light of the principle of subsidiarity. The Commission itself, in its Report on Services of General Interest, remarked that "it is for the Member States to make the fundamental choices concerning their society, whereas the job of the Community is merely to ensure that the means they employ are compatible with their European commitments."^2

The tension seems to be due to the very development of the EU legal system, which, over the last few decades, has witnessed an ever-increasing development of the role of Brussels in the government of national economies. Undoubtedly, competition policy is one of the areas in which the influence of the Community in national affairs is the strongest and Article 86(2) is one of the defences against this process. Another major source of jurisdiction in competition law derives from the Commission's powers under the Merger Regulation. The ability to monitor and control the creation and strengthening of dominant positions through structural changes is critical in the current economic conditions in which growth by acquisition and joint venture is very common.
The exclusive powers of the Commission in this role (through the one-stop provision of Article 21 of the EC Merger Regulation) bear the risk of further eroding national jurisdiction in an area that is considered to be highly sensitive. Against this background, Article 21(3) of the ECMR provides for further carving up of legitimate interests by stating that:

"Notwithstanding paragraphs 1 and 2, Member States may take the appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph. [...]"

The relationship between the "invasion" of EC provisions and that of national defences based on public interest is also apparent in other areas of EU law, notably in relation to free movement. In that case, public policy reasoning is often invoked to protect the national regulatory function. However, in relation to EC competition law which, unlike the Treaty provisions on free movement, provides an endo-integrated set of rules and values, the clash between the European regime and a possible national defence based on public interest becomes more blatant.

The issue of public services and public interest is somewhat confused. The definition itself is not entirely clear and the Commission's attempt to clarify the meaning of service of general interest, service of general economic interest, public service and universal

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2 Services of General Interest: a Key Element in the European Model of Society, COM (96) 443, para 17.
service are slightly simplistic and ultimately unsatisfactory. In my submission, a full understanding of the issues at stake needs a wider historic perspective. As often required in the analysis of Community law (particularly when national interests are at stake) the analysis also needs a comparative dimension.

2. **Historical and comparative perspectives**

The intervention of the State in the economy, principally through various forms of regulation, derives from the need to address general interests or meet public needs. In this sense public intervention is generally a remedy to market failures (regardless of how large they are perceived to be). This applies both to States with strong administrative law traditions (such as Continental European countries) and to common law countries.

The rise in importance of protecting the public interest through antitrust policies has brought about a reduction in the scope of the State’s active presence in the economy, even in sectors in which there is already a strong public interest, such as public utilities. Communications have a central role within those sectors, the importance of which is growing continuously in the "knowledge-based" economy.

Historically, the notion of public service has been largely developed by French scholars and in the case law of French courts. It is to the French legal tradition that one must look to find the roots of the notion of public service, or rather, as one should more

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6 In Annex II to the Communication from the Commission on Services of General Interest in Europe of 20 September 2000 (DOC/00/25) these terms were defined as follows: Services of general interest: this term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations. Services of general economic interest: this is the term used in Article 86 of the Treaty and refers to market services which Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications. Public service: this is an ambiguous term since it may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. It is with a view to promoting or facilitating the performance of the general interest role that specific public service obligations may be imposed by the public authorities on the body rendering the service, for instance in the matter of inland, air or rail transport and energy. These obligations can be applied at national or regional level. There is often confusion between the term "public service", which relates to the vocation to render a service to the public in terms of what service is to be provided, and the term "public sector" (including the civil service), which relates to the legal status of those providing the service in terms of who owns the services. Universal service: universal service, in particular the definition of specific universal service obligations is a key accompaniment to market liberalisation of service sectors such as telecommunications in the European Union. The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets. Universal service, within an environment of open and competitive telecommunications markets, is defined as the minimum set of services of specified quality to which all users and consumers have access, in light of specific national conditions, at an affordable price.

correctly say given the peculiarity of the concept in that jurisdiction, "service public". A detailed analysis of the development of this concept under French law is beyond the scope of the present study. However, it should be remarked that the theorisation of French scholars and the contribution of the French administrative courts brought about a notion founded on three basic principles: continuity, equality (égalité), and adaptability to needs. Various criteria have been adopted to define or describe the notion of public service: these are based on a "critère organique" (i.e. public service is constituted by the activities of the public administration), a formal criterion (which identifies the distinction between public and private law typical of civil law systems) and a functional criterion (i.e. public service meets the needs of general interest).

In common law countries the legal concept of public service is not known or not recognised in the same terms. Even the term "public" in the English language is often taken to indicate the collective ensemble of private interests, whereby an interest that is general is seen as being shared by a multitude of private interests. In this context, the notion of public utilities (or rather one could say the utilitas privatorum) acquires a position equivalent to that of the French service public. Against this background the issue of whether a public utility is run by a private- or a state-owned undertaking does not carry the same importance and does not imply the same consequences on the organisation of the State.

In the common law tradition it has emerged more clearly that the very concept of public utility is evolutionary and relative (i.e. needs vary over time and methods for the pursuit

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9 See N. Rangone, I Servizi Pubblici, (Bologna 1999), pp. 294 and 295. The author refers to P. Jourdan, "La formation du concept de service public", 103 Revue du Droit Public (1997), 90; and L. Duguit, Les transformations du droit public, (Paris, 1913), at. 39 and 222 and ff. The latter author, one of the theorist of the école de Bordeaux, considers that the social function, which constitutes the "pouvoir de domination", is the basis of public service; contra M. Hariou, Précis de droit administratif et de droit public, (Paris, Sirey, 1933); Hariou, who belonged to the School of Toulouse, criticised the approach of the School of Bordeaux and defined public service as the institution which provides the service to the public rather than being merely an expression of traditional royal power, see p. 13 and 14. See also L. Duguit, Law in the Modern State, (London, 1921).
10 See paragraph 2.5, Chapter 8 in L. Rolland, Précis de droit administratif, (Paris, Dalloz, 1996), at 408 and ff. It is interesting to compare this with the definition of Universal Service given by the Commission: "Universal Service is defined in terms of principles: equality, universality, continuity and adaptability; and sound practices [...]" in Services of General Interest: a Key Element in the European Model of Society, COM (96) 443, para 28.
11 In Germany the idea of public service was based on the very idea of sovereignty see J. Schwartze, "Le service public l'expérience allemande", Actualité juridique Droit Administratif (June 1997), at 150, and does not reach the level of sophistication of the French theorisation.
of those needs may also change). Most importantly, it is recognised that public utilities
do not necessarily have to be run under a monopolistic regime. On the contrary,
antitrust rules were created precisely to off-set the private powers of those operators
running activities with a bearing on public interest and to ensure that the service is
provided with affordability, continuity, equality and non-discrimination. These are aims
that are intrinsically in line with some of the principles which still inform competition
policies. The features of a public service, so defined, are strikingly similar to the ones
that emerge in the Community context.

The verb "emerge" was deliberately employed because, at EC level, there is no
definition of public service. The EC Treaty contains three references to the notion.
Article 73 (ex Article 77) in relation to aid to transport; most importantly Article 86(2)
(ex Article 90(2)) and, more recently, Article 16 (ex Article 7d). The question is
whether or to what extent Articles 16 and 86(2) can be legitimately invoked by a
Member State to limit the application of competition rules. The answer to this question
lingers between the legal and political spheres. It may be argued that despite the fact that
Article 16 is expressed to be without prejudice to the existing Treaty provision on public
services, its provision marks a reversion to the political sphere. The impact of the
provision on the existing regime is at the very least not clear. In legal (as opposed to
political) terms its interpretation may vary from considering it as not changing the
"underlying philosophy of the acquis concerning public services and the competition
rules" to treating it as enhancing national powers. The latter argument would find
some support, in particular with regard to public broadcasting funding, in the

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13 Article 16 provides that "without prejudice to Article 73, 86 and 88, and given the place occupied by services of
general economic interest in the shared values of the Union as well as their role in promoting social and territorial
cohesion, the Community and the Member States, each within their respective powers and within the scope of
application of this Treaty, shall take care that such services operate on the basis of principles and conditions which
enable them to fulfil their mission."
14 L. Flynn, "Competition Policy and Public Services in EC Law after the Maastricht and Amsterdam Treaties", in
O'Keeffe and Twomey (Eds.), Legal Issues of the Amsterdam Treaty, (Oxford, 1999), 199.
15 See M. Ross, supra note VII-5 above, at 28 et seq.
16 M. Ross, supra note VII-5 above, at 29 referring to L. Hancher, "Community, State and Market", in Craig and de Burca
(Eds.), The Evolution of EU Law, (Oxford, 1999), at 730-731.
17 With regard to the political dimension of public service see G. Amato "Citizenship and Public Services: Some General
Reflections", in Freedland and Sciarra (Eds.), Public Services and Citizenship in European Law, (Oxford, 1998), 145,
at 154 and ff.
introduction to the Amsterdam Treaty of the ninth Protocol, which provides that, considering the direct link between the democratic, social and cultural needs of each society and the need to preserve media pluralism, the provisions of the Treaty “shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit shall be taken into account.”

On face value, giving Article 16 the rank of a principle might have the effect of tilting the balance of its judicial interpretation in favour of considerations of a less economic nature. However, the carve-out in relation to the Treaty provision in competition renders the position unclear to say the least. It is indisputable that Article 16 marks a new emphasis on "shared values of the Union" and "promoting social and territorial cohesion", but given the importance of the established principle of undistorted competition and the preservation of the internal market, the actual impact of the provisions is likely to be constrained. It has been rightly pointed out that one should be mindful of Article 295 (the Treaty provision that is meant to preserve national systems of property ownership) in relation to which "what appeared to be a cast-iron acknowledgement by the EC Treaty of a no-go area in relation to national regulation proved to be irresistible to the Court of Justice in its dedicated preservation of the integrity of the internal market against distortions presented by national rules and the public sector."18

A new perspective will be added and a new stone will be laid in the construction of a European notion of public service (or services of general economic interest) if Article 36 of the Draft Charter of Fundamental Rights of the European Union is adopted. Article 36 in its current drafting provides that "the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote
the social and territorial cohesion of the Union". This provision brings about a clear link at EU level between the notions of European citizenship and services of general economic interest and reinforces their position as the Union's core values. The emphasis of the provision is again on access to the services and it is therefore citizen-oriented as a value. Under an economic analysis of the provision, the focus is the customer, a perspective which is in accordance with EC competition law. The reference to "national law and practices in accordance with the Treaty" can therefore be read in positive terms as a basis for the application of competition law in all those cases in which it is possible. In any event, at least under a restrictive interpretation, the provision should be read as a requirement for a non-disproportional application of national law.

In relation to communications, the ability to resolve the issues which arise in relation to services of general economic interest through Treaty provisions on competition depends on whether economic solutions (which are the basis of competition law) can be applied satisfactorily to values of a non-economic nature. Can competition policy guarantee the social or territorial cohesion which the increased importance of telecommunications brings about? Is competition in broadcasting a synonym of pluralism?

3. Public service in EC law

Article 86(2) provides that:

"Undertakings entrusted with the operation of services of general economic interest or having a character of a revenue producing monopoly shall be subject to the rules contained in this Treaty in so far as the application of such rules does not obstruct the performance in law or in fact, of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interest of the Community"

18 M. Ross, supra note VII-5 above, at 33.
A few points can be noted about this provision. Firstly the Treaty drafters did not use the expression "public service" but rather referred to "services of general economic interest". The Commission Document on Services of General Interest in Europe (published more than 40 years later) states clearly that "European policy is concerned with general interest, with what services are provided and on what terms, not with the status of the body providing them." Article 86(2) refers to undertakings entrusted with the operation of general economic services. It is submitted that the vagueness of the verb used in passive form and the lack of specification of who the "entrusting body" is or what the "entrusting measure" may be, is not coincidental. It enables a flexible interpretation of the exception regardless of the status of the undertaking providing the service. At the very least this excludes the possibility of defining public service in Community law with the "organique" criterion (i.e. based on the public or private status of the provider). The Commission's view, as recently expressed in the BBC News 24 Decision analysed below, is that one should not only take a merely formalistic view of the act which entrusts an undertaking with such a mission. It is necessary to evaluate the whole body of legislative and administrative provisions relating to the definition of the public service remit and to the entrustment of that service to an undertaking. Initially, the Court, possibly influenced by the French legal tradition, has tended to link the entrustment to State measures.

The lack of a clear criterion for the definition of services of general economic interest and the relationship with national courts or legislation, which derives not only from the Article 234 mechanism but also from the fact that Article 86(2) requires the function to be entrusted to undertakings (and this points towards national legislation), has an

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20 In Bodson, supra note IV-133 above, the AG appears to infer that external services for funerals are of general interest as French legislation entrusts them exclusively to the communes (para 82). However with regard to services provided under a concession the AG recognises that Article 86(2) applies to private undertakings which are subject to obligations and burdens which indicate their public nature (para 83 and 84).


22 Most clearly in Zachner v. Bayerische Vereinsbank, supra note IV-30 above, where it was stated that "it is not sufficient to make them undertakings within the meaning of Article 90(2) of the Treaty unless it can be established that in performing such transfers the banks are operating a service of a general economic interest with which they have been entrusted by a measure adopted by a public authority (emphasis added)", para 7; also in Case 127/73, BRT v. SABAM and NV Fonoir, [1974] ECR 313, para 23 the Court stated that in order for Article 86(2) to apply, the undertaking must have "...been entrusted by Member States (emphasis added) with the operation of a service of general economic
influence on the classification of services as general economic interests under EC law. This, particularly at the early stages of liberalisation, led the Court to be more hesitant and to rely on the interpretation by national courts of their applicable legislation to interpret Article 86(2). Interestingly, both these cases relate to broadcasting.

In time, when a wider consensus emerged around the notion of liberalisation, one can trace in the Court's case law a more independent or endo-integrated approach. This became blatantly clear in a landmark case concerning liberalisation which, once again (to confirm the pivotal role of communications both in economic liberalisation and in its legal implications), concerned the communications sector and more specifically telecommunications. In *Italy v. Commission* (the case brought by Italy for the annulment of a Commission decision declaring certain provisions adopted by the UK Post Office and British Telecommunications, and designed to curtail the activities of message forwarding agencies, to be contrary to Article 82 of the Treaty), the Court stated that the purpose of Article 86(2) is to "safeguard the tasks which a Member State sees fit to entrust to a specific body". However, when dealing with locus standi, the Court stated that "It must be further observed that the application of Article 90 (2) of the Treaty is not left to the discretion of the Member State, which has entrusted an undertaking with the operation of a service of general economic interest". It is submitted that this statement also has repercussions on the substantive analysis which points towards a more independent approach to the idea of services of general economic interest. The very notion shifts from the national to the Community domain.

The ECJ also gradually moved towards a more factual approach in its analysis of services of general economic interest, which enabled it to preserve the flexible character of the provision entrenched in the drafting of Article 86. So, in *Corbeau*, with regard to

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24 See BRT v. *SABAM* and NV *Fonoir*, supra note VII-22 above, para 22 which stated "it is the duty of the national court to investigate whether an undertaking which invokes the provisions of Article 99(2) [now Article 86(2)] for the purposes of claiming derogation from the rules of the Treaty has in fact been entrusted by Member States with the operation of a service of general economic interest". In this case the Court concluded anyway that an undertaking to which the State has not assigned any task and which manages private interests, cannot invoke Article 86(2).
26 *Ibidem*, para 29.
postal services, it stated that "it cannot be disputed that the Régie des Postes is entrusted with a service of general economic interest consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member States concerned, at uniform tariffs and on similar quality conditions, irrespective of the degree of economic profitability of each individual operation".28

Similarly, in Almelo, the Court noted that "as regards the question whether an undertaking such as IJM has been entrusted with the operation of services of general interest, it should be borne in mind that it has been given the task, through the grant of a non-exclusive concession governed by public law of ensuring the supply of electricity in part of the national territory. Such an undertaking must ensure that throughout the territory in respect of which the concession is granted, all customers, whether local distributors or end users receive uninterrupted supply of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers."29

The issue of whether a service is of general interest does not of course conclude the analysis under Article 86 which then has to deal with the substantive aspects of the provision.

4. The substantive analysis under Article 86

Article 86 is a particularly complex provision in its interpretation and application. Firstly, Article 86(1) is a norme de renvoi (i.e. a provision that does not itself contain any additional obligations of substance other than those which are set out in a Treaty provision30) which renders Member States equally subject to Treaty rules, including those on competition: "in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor

27 Ibidem, para 30.
29 Almelo, supra note IV-34 above, paras 48 and 49.
30 Study on the scope of the legal instrument under EC Competition Law available to the European Commission to implement the result of the ongoing review of certain situation in the telecommunications and cable TV sectors, Report to the European Commission, June 1997, (the "1997 Report") at 27.
maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89." Therefore its substantive content, whilst being contained in the EC Treaty (and therefore capable of being considered endo-integrated EC law), lies elsewhere (in particular, with regard to competition law, in Articles 81 to 89 EC).

However, the second paragraph of Article 86 contains an exception to the rules referred to in so far as they "obstruct the performance, in law or in fact, of the particular task assigned to them". This is a notion, based on the concept of proportionality, which inevitably (and expressly) relies on factual analysis to be carried out, as the case may be, by the Commission and CFI or, most importantly, at national level (and is to this extent etero-integrated). The Court stated in Almelo that "it is for the national court to consider whether an exclusive purchasing clause prohibiting local distributors from importing electricity is necessary in order to enable the regional distributor to perform its task of general interest."31

What the Commission has been very eager to clarify in order to reassure Member States about their national competencies, is that Article 86 does not apply to non-economic activities (such as compulsory education and social security) or to matters of vital national interest, which are the prerogative of the State (such as security, justice, diplomacy or the registry of births, deaths or marriages).32 In my opinion, in a number of cases, reliance on the non-economic nature of the activity may be an unclear or rather unsatisfactory criterion. However, this difficulty does not seem to arise in relation to

31 Almelo, supra note IV-34 above, para 50.
32 See Services of General Interest: a Key Element in the European Model of Society, COM (96) 443, para 18 and K. Van Miert, supra note I-2 above, at 2. See more recently the Communication from the Commission on Services of General Interest in Europe of 20th September 2000 (DOC/00/25). The ECJ has considered that services of a non-economic nature escape the Treaty provisions on competition. Into this category fall matters which are intrinsically prerogatives of the State, such as controlling and supervising air space and collecting charges for the use of its air navigation system (Case C-364/92, SAT Fluggesellschaft GmbH v. Eurocontrol [1994] ECR I-43) or a private body carrying out an anti-pollution service in a sea port (Case C-343/95, Diego Call, [1997] ECR I 1547) as they entail the exercise of powers which are typically those of a public authority. Also, activities conducted by organisations performing largely social functions, which are not profit oriented and which are not meant to engage in industrial or commercial activities, will normally escape the application of competition rules (see Case C-109/92, Wirth, [1993] ECR I - 6447). Also, national education and compulsory basic social services may be excluded because, in the former case, the State is not seeking to engage in gainful activity but is fulfilling its duty towards its own population in the social, cultural and educational fields (see Case 263/86, Humbel, [1988] ECR 5365). With regard to the latter, the ECJ stated that imposed social security schemes, which are based on the principle of solidarity, are non-profit making and where the benefits paid are proportional to the amount of the compulsory contributions, fulfil an exclusively social function and do not exercise an economic activity (Cases C-159/91 and C-160/91, Poucet, [1993] ECR I 637).
communications, which are undoubtedly an economic activity. The question is whether the attainment of other interests justifies the exemption provided for in Article 86(2). In particular, the Article 86(2) exemption has been applied in the field of broadcasting to the exclusion of the state aid provisions.33

4.1 Recent Commission Decision dealing with Articles 81, 82 and 86 in communications

Throughout recent years, the Commission has adopted numerous decisions in relation to Article 86 and Articles 81 and 82 in the communications sector. Particularly in the telecommunications sector, the Commission's decisions back up its legislative role and its aim towards the achievement of full liberalisation. The decisions in question have been taken where in individual circumstances practices have been adopted by Member States which infringe competition law. In 1995, the Italian government was condemned for imposing on the second GSM mobile operator an initial payment for the grant of a licence which had not been imposed on the first operator (which at the time was a public undertaking within the meaning of Article 86(1)). Article 86(2) is touched upon but dismissed in this decision. The Italian government did not attempt to rely on this provision to justify the discriminatory charging of the initial payment on the second operator. The Commission clarified nevertheless that the payment could not be justified by the performance in law or in fact of a service of general economic interest.34 The Commission also clarified that its Decision was not based on an infringement of Article 6 (now Article 12) of the Treaty but made in order to remedy the extension of dominant position within the meaning of Article 82 on the part of the incumbent.35

In a series of decisions concerning the granting of additional implementation periods to certain Member States for the implementations of Commission Directives 90/388/EEC, 96/2/EC and 96/19/EC as regards full competition in the telecommunications markets,


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the Commission expanded on the concept of the Article 90(2) (now 86(2)) exception in the context of the liberalisation regime. The interrelation between this provision and the telecoms liberalisation directives had been legislatively regulated in the sense that under Article 1 of Directive 90/388 Member States were entitled to request of the Commission the right to maintain, during the additional time period, the exclusive rights granted to undertakings to which they entrust the provision of a public telecommunications network and telecommunications services, as well as restrictions on competition, in so far as these measures were necessary to ensure the performance of the particular tasks assigned to the undertakings benefiting from the exclusive rights. Albeit indirectly, these decisions are interesting in their interpretation of what may give rise to an Article 86(2) exemption.

In the *Telecomm Eireann* Decision the Commission recognised that Telecom Eireann was entrusted with a service of general economic interest as, pursuant to Section 14 of the Irish Postal and Telecommunications Services Act 1983, it was required *inter alia*: (a) to provide a national telecommunications service within the State and between the State and elsewhere; (b) to meet the industrial, commercial, social and household needs of the State for comprehensive and efficient telecommunications services and, so far as the company considers reasonably practicable, to satisfy all reasonable demands for such services throughout the State; (c) to provide such consultancy, advisory, training and contract services inside and outside the State as the company thinks fit. Whilst this provision allows Telecom Eireann to refuse to provide telecommunications services where it is not reasonably practical, the Irish Government claimed that the provisions are interpreted narrowly and in the light of Section 15 of the Act which imposed an obligation on the company to provide services at minimal charges. Telecom Eireann also performed a number of other functions and was charged with a number of universal services obligations which, it claimed, in the short term, would continue to be performed and carried out only by it. In two decisions the Commission accepted the compatibility of funding public service broadcasting with competition law under Article

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86(2).\textsuperscript{38} In both cases the Commission considered that the broadcasters were entrusted with those tasks by an official act of the authorities and the funding system would not distort the development of trade to an extent contrary to the common interest.

The Commission Decision in *BBC News 24* is very interesting in many respects. Firstly, the Commission, despite acknowledging that Article 86, as a derogatory provision, has to be interpreted restrictively,\textsuperscript{39} also recognised that its assessment has to take into account the ninth Protocol of the Amsterdam Treaty on the system of public service broadcasting which underlines Member States' competence to define the public service broadcasting remit. In *BBC News 24*, this competence was not contested as a matter of principle, but insofar as it extended its public service status to the provision of a special interest channel dedicated to news. Part of the question revolved around deciding whether the service in question was a "public service" or an "ancillary service" as defined in the Royal Charter for the continuance of the British Broadcasting Corporation ("The Charter"). Wisely, the Commission wisely was not prepared to be drawn into a decision on whether the services of BBC News 24 fell into one category rather than another, as provided by the Charter, but limited its assessment to whether they were services of general economic interest under Article 86(2) in the light of the Broadcasting Protocol as well. On this basis the Commission concluded that the provision of news can be considered a public service mission in broadcasting and in particular that "a 24-hour service would help to meet the democratic and social need of a society, as referred to in the Protocol, by allowing coverage of a wider range of events and a more in-depth analysis of the events."\textsuperscript{40} It appears clear from this statement that the subject matter of the dedicated channel is essential in the Commission's assessment. Even if the Commission denies an intrusion in Member State competence to decide what fulfils a public service function within broadcasting a value judgement on the merits implies an indirect shift of competence at EC level.

\textsuperscript{37} See paras 11 to 16 of the Decision.
\textsuperscript{38} *Kinderkanal Decision* and *BBC News 24* Decision.
\textsuperscript{39} Para 39 of the *BBC News 24* Decision.
\textsuperscript{40} Para 49 of the *BBC News 24* Decision.
Furthermore, the Commission also indirectly set out important principles. In paragraph 53 of its Decision it stated that: "the Commission cannot detect any abuse of the Member State's competence to define such public service remit, taking into account also the specific features of the service cannot be found in services provided by private operators. None of the available existing channels, in fact, is provided free of charge and with no advertising". This suggests that when these conditions are not met and when, in particular, a channel which is allegedly performing a public service function actually competes with private initiatives, the final determination may be different and Article 86(2) may not be available. The Commission set out certain principles that, if applied in other circumstances, would lead to the opposite result. In other words, the BBC gain could be many other public broadcasters' loss.

This approach, of course, also has an impact on another condition for the application of Article 86(2), according to which the application of competition rules (in the case in question, those on State aid) must not obstruct the performance of the particular tasks assigned to the undertaking. This entails a proportionality assessment. In reaching the conclusion that the operation of the interest channel under the public service regime did breach this proportionality test the Commission considered the fact that the channel did not contain advertising and that consumers (and cable operators) were not charged for it crucial. Of course, one could ask the question as to whether they should finance the channel with means available to the private sector, but this would take us back to the initial issue concerning the scope of the public service remit, which the Commission had already resolved. The Commission's Decision loses rigour somewhat when it seeks, arguably half-heartedly, to quantify the proportionality, not of the type of funding, but of the level of funding. It is not clear what the cost allocation methodology adopted by the Commission, which is referred to and dismissed very briefly in three paragraphs, is. In fact, the Decision refers to the news-gathering costs of the BBC (tout court) on the one hand but costs incurred by BBC News 24 on the other. Arguably, in order to avoid cross-subsidisation, the proportionality test must be based on a strict marginal cost methodology whereby the undertaking must be compensated for the costs incurred by

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41 This emerges clearly from the Commission decision which, in relation to the fulfilment of this condition, referred to the question of whether the amounts transferred exceeded the necessary level (para 38).
the provisions of their service only, without misallocation of common costs shared with
the main news information service of the public broadcaster. This entails quite a
complex calculation of costs and the Decision does not show if a rigorous analysis has
been carried out in this respect.

Finally, the Commission approach in relation to the evaluation of whether the services
of general economic interest distort competition "to an extent that would be contrary to
the public interest" highlights the discretionary (and ultimately political) character of the
provision. The Commission stated that "the formulation of Article 86(2) indicates that a
certain effect on trade and its development can be tolerated because of the general-
interest nature of the service provided." The Commission implies that Article 86(2) is
to be interpreted as allowing "a certain amount of damage to competitors" and that
"some distorting effect has to be taken into account and tolerated, whilst it must neither
be made impossible for competitors to continue to do business nor must potential
competitors be precluded from entering the market." This seems to introduce a sort of
de minimis rule which cannot be read other than as an attempt to preserve flexibility and
discretion in a delicate area of EC law in which the driving forces seem to be dictated
more by the interests of competitors than the immediate welfare of customers.

The Commission's legal assessment in this series of decisions is based on the
application of the principle of proportionality. The application of this principle to a
sector such as that of communications shows, at once, the flexibility and the limits of
the concept. This fundamental and quintessentially legal concept entails a balancing of
values which are intrinsically political or at least linked with the policy-making
function. The Commission seems to be best placed to carry out that analysis which is
intrinsically factual and political at the same time. Of course, the final outcome of such
a decision is determined by the extent of the liberalisation process desired or the pace at
which one requires it to be implemented. This analysis highlights the flexibility and the

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42 Paras 84 to 86 of the BBC News 24 Decision.
43 Para 87 of the BBC News 24 Decision.
44 Para 93 of the BBC News 24 Decision.
Waelbroeck, Judicial Protection in the European Communities (5th ed.), (Kluwer, 1992), p. 77-80; J. Schwarze,
European Administrative Law, (Sweet & Maxwell, 1992).
fragility of Article 86(2) and its "political" character. As such it will always be applied somewhat more “clumsily” by the ECJ which, due to its constitutional function, is not equipped for detailed factual scrutiny and, within the EC constitutional balance, is more removed from immediate policy decisions. The Court has nevertheless made a big contribution to the development of the concept of general interest, particularly with regard to communications and broadcasting.

4.2 The ECJ's contribution

We have referred above to the "historic development" of the Court's approach. The Court's contribution to the relationship between public services and competition law in general rests of course upon the crucial interpretation of Article 86(1) and (2). Article 86 contains two different facets: one which could be defined as "active" and another "defensive". The first stems mainly from the provision of Article 86(1) and has an "active" character in the sense that it is Article 86 itself which actively imposes on Member States a respect for Treaty provisions in general and competition law in particular. The second is based on Article 86(2) and is defensive in the sense that it provides an exception and “off limits” for antitrust rules in relation to public interest.

In relation to Article 86(1), the Court, through consistent case law, has used this provision to rescind the “incestuous” link between the activities of the State as a regulator and as a dominant market player, which brought about a clear conflict of interest, or rather, in antitrust terms, the automatic abuse of a dominant position. The Court has also given a substantial contribution to the application of competition law to public services. From this perspective, it has defined the limits of Article 86(2) and mapped the boundaries of the defensive use of the public mission exemption.

4.2.1 Active application of Article 86

Two major ECJ cases have dealt with the relationship between Article 86 and 82 in broadcasting: the famous Sacchi case and Elliniki Radiofonia Tileorassi Anonimi

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46 See supra note VII-23 above.
Etaria ("ERT"), concerning the Greek TV transmission monopoly.\textsuperscript{47} In Sacchi, one of the first cases in this area (when Europe was still governed by a network of State-owned monopolists), the Court held that the mere creation of a dominant position or even a monopoly by granting exclusive rights to an undertaking in itself infringes Article 86.\textsuperscript{48} In ERT, when the liberalisation era had already started, the Court went much further. The case concerned a Greek radio and television undertaking which enjoyed exclusive rights granted by the Greek state for carrying out its activities. Dimotiki Etairia Pliroforissis ("DEP") and the Mayor of Thessaloniki had set up a television station which began to broadcast television programmes. ERT sought an injunction to prevent the television station from carrying out any kind of broadcasting, alleging the exclusivity of its rights granted by the Greek state.

In its preliminary ruling, the Court said that a television monopoly could be established for economic reasons concerned with the public interest. However, when this operation is likely to create an infringement of Article 82, the monopoly is still subject to an obligation not to discriminate in favour of its own programmes. This means that even when a monopoly is acceptable for public interest reasons on the basis of an Article 86(2) reasoning, it is still subject to an obligation to give non-discriminatory access to suppliers of competing products or services (in this case programmes competing with the monopolist's programme-producing activities).

In this case, the Court examined the accountability of state action on antitrust grounds. With regard to the competition aspects of the case, the Court stated that "while Articles 85 and 86 [now Articles 81 and 82] are directed exclusively to undertakings, the Treaty nonetheless requires Member States not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness". The Court then went on to say that Article 86(1) "prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit television broadcasts, where those rights are liable to create a situation in which that

\textsuperscript{47} ERT, supra note V-108 above; see annotation by P.J Slot, 28 CML Rev. (1991), 964-988.
undertaking is led to infringe Article 86 [now Article 82] of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes."\(^{49}\)

In a number of other rulings, the Court has also established that a Member State will infringe Article 86 in combination with Article 82 if it places, through the granting of exclusive rights, an undertaking subject to Article 86 in such a position that the undertaking, merely by exercising the exclusive rights granted to it, cannot avoid the abuse of its dominant position.\(^{50}\) Furthermore, the Court has declared the illegality of State measures that grant rights creating situations whereby an undertaking is induced to abuse its position.\(^{51}\)

It is not clear how it can be determined whether or not there is "automatic abuse" and in particular whether the abuse must be actual or may be merely potential.\(^{52}\) It is arguable that the test stated in ERT does not require the abuse to have been actually committed. However, the Court clarified\(^{53}\) that the combined effect of Article 82 and 86 can only occur if the automatic abuse is a "direct consequence" of the national law concerned.

Along similar lines, the Court has developed a parallel doctrine based on the extension of a dominant position by means of a State measure. It can be argued that evaluating the potential infringement of Article 82 from the effect of the conduct (the extension of the dominant position) rather than from the abuse of that position is an even more interventionist approach. Despite an analysis under Article 82, rather than the Merger Regulation, the Court in fact goes beyond the manifestation of the distortion (the abuse) to focus on the situation that, in most cases (but not always), creates an abuse (the strengthened dominance).

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\(^{49}\) Respectively paras 35 and 37.


\(^{52}\) See AG Tesauro in Corbeau, supra note VII-28 above, para 11.

\(^{53}\) Société Civile Agricole du Centre d'Insémination de la Crespelle, supra note VII-50 above, para 20 in which the combined application was not triggered.
The most significant case in this respect is *GB-Inno-BM*. The case concerned the Belgian legislation which entrusted a public undertaking, responsible in a monopolistic regime for the establishment and operation of the public telephone network and sale of telephone equipment, with the power to approve telephone equipment not sold directly by the undertaking and which had to interconnect with the network. The Court considered whether Article 86 requires Member States not to put an undertaking in a position whereby that undertaking would infringe Article 82 by carrying out the activity which is entrusted to it. The Court concluded that in those circumstances the State measure is to be considered an infringement of Article 86 in conjunction with Article 82 even if there is no indication that an abuse has actually taken place. The Court therefore rejected the argument that the mere possibility of the discriminatory application of the national provision could not itself amount to an abuse within Article 82 by saying that:

"...it is the extension of the monopoly in the establishment and operation of the telephone network to the market in the telephone equipment, without any objective justification which is prohibited as such by Article 86 [now 82], or by Article 90(1) [now 86(1)] in conjunction with Article 86 [now 82], where that extension results from a measure adopted by a State. [...] A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking an obvious advantage over its competitors."

The Court leaves open the possibility of an objective justification, which partially counter balances its strict approach. However, the statement of the Court is very far reaching: it extends its jurisdiction on the notion of what constitutes entrustment or
rather what entrustment by the State is lawful under competition law. It stressed that Article 82 is applicable to individual undertakings whilst the combined effect of Article 86 and Article 82 is applicable to Member States. In doing so, it touches on one of the pillars of Member States' control of public services. EC law intrudes in the sphere of national competencies by tilting the balance in favour of the protection of undistorted competition.

In Centre d'Insemination de la Crespelle, Advocate General Gulman held that the risk of an abuse was not sufficient to justify the combined application of Article 82 and 86. The Court ruled that the application of the Article must be a direct consequence of the State measure concerned. From this it could be inferred that there must be a strict interpretation whereby the doctrine will apply only in those cases where the State measure does not leave to the dominant undertaking any margin of discretion to avoid dominance but the simple implementation of its conduct will necessarily lead to an abuse of its position. This might explain why the Court in GB-Inno-BM has adopted the doctrine of the extension of dominant position. The fact that an undertaking is entrusted with regulatory powers does not per se imply an abuse of such powers.

Under EC law, competition rules apply to all undertakings. The fact that an entity might be non-profit making or providing a service that is in the public interest may now warrant its exclusion from the application of the general rules. This approach was maintained by the Commission in relation to the European Broadcasting Union Decision which, however, was quashed by the CFI. In this respect it is worth noting that the Court held in Eurocontrol (a case concerning a body with the responsibility for co-ordinating air-traffic control within Europe) that whilst "the concept of undertakings encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed", that entity was not an undertaking falling within the scope of application of the Treaty rules of competition.

56 At para 43 of the Opinion.
57 See the 1997 Report, at 28.
58 Commission Decision 93/403/EEC [1993] OJ L179/23, para 45. However, the Decision was annulled in Métropole Télévision, supra note III-119 above, paras 114-124, the appeal initially lodged with the ECJ was subsequently withdrawn.
59 SAT Fluggesellschaft GmbH v. Eurocontrol, supra note VII-32 above; see also cases referred to in note 32 above.
To appreciate fully the impact of the Court's case law on Article 86 one has to look not only to what we defined as the "active" application of Article 86(1) but also to the demarcation of the defensive use made by Member States of the public mission exemption under the second paragraph. In this respect we will try to determine what impact the provision can have on the justifications which are accepted by the Court in an Article 82 assessment.

4.2.2 The defensive application of Article 86: the second paragraph exception

Article 86(2) contains a proportionality test which inevitably presupposes a more factual (and in some cases economic) analysis of the justifications for the exemption. In the context of communications the notion of proportionality contained in Article 86(2) encompasses an evaluation of various considerations which sometimes require reconciliation: the idea of universality (and the obligations which go with it), the financial viability of an undertaking which provides services of general economic interest and the avoidance of privileged market positions of the incumbents. In economic terms the issue is whether, in the name of the application of general competition rules, undertakings should be allowed to operate a so-called policy of "creaming off", whereby they are allowed to operate on a competitive basis in certain activities which are profitable, leaving on the incumbent monopolists the duty to provide unprofitable services.

In *Italy v. Commission* the Court, whilst rejecting the argument on its merits, endorsed an approach which bases an assessment of the rights given to a monopolist on the impact on its overall financial viability. The Court stated that:

"[...] whilst the speed of message transmission made possible by technological advances undoubtedly leads to some decrease in revenue for BT, the presence in the United Kingdom of private forwarding agencies attracts to the British public network, as the applicant itself observes, a certain volume of international messages and the revenue which goes with it. The Italian Republic has totally failed to demonstrate that the results of the activities of those agencies in the
United Kingdom, were, taken as a whole, unfavourable to BT, or that the Commission's censure of the schemes at issue put the performance of the particular tasks entrusted to BT in jeopardy from the economic point of view.\textsuperscript{60}

The Court reaffirmed its position in a subsequent case, Corbeau\textsuperscript{61}, a preliminary reference from the Tribunal Correctionnel de Liège concerning proceedings taken against Mr. Corbeau for providing a door-to-door express courier service in the Liège area in breach of Belgian rules which gave the Belgian Postal service exclusive monopolist rights over the collection, transportation and distribution of post within Belgium. The Court stated that the provision of a universal postal service at a fixed tariff was a legitimate objective capable of justifying the restriction on competition. The Court held that Article 86(2) permits Member States to grant exclusive rights to undertakings charged with tasks which concern the public interest where such restrictions are necessary to ensure the performance of such tasks. It recognised that universal supply can only be ensured if the holder of exclusive rights has the benefit of "economically acceptable conditions."\textsuperscript{62} It therefore introduces a notion of proportionality, based on the financial equilibrium of the undertaking entrusted with the provision of an economic service, which aims to avoid cherry picking by other competitors who would choose to serve only densely populated and urban areas, leaving those in remote, rural or sparsely inhabited areas without provision. This ruling seems to endorse the legitimacy, in appropriate circumstances, of cross-subsidisation practices on the part of the legal monopolists. However, the Court concluded that excluding competition in relation to specific supplementary services, separable from services of general economic interest which respond to the demands of economic operators, would not be justified unless competition for such services threatens the economic equilibrium of the service of general economic interest.\textsuperscript{63}

\textsuperscript{60} Italy v. Commission, supra note II-43 above, para 33.
\textsuperscript{62} Ibidem para 16.
\textsuperscript{63} See also Case C-174/97P, FFSA v. Commission, [1998] ECR I-1303 and more generally on the issue of cross-subsidisation, see L. Hancher and J. Buendia Sierra, supra note IV-67 above.
Again in Almelo the Court confirmed this economic (or, more strictly, "financial") approach to the justifiability of a breach by the undertaking entrusted with a service of public interest by stating that it is "necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear, and the legislation, particularly concerning the environment."^64

In carrying out this economic analysis, one has to bear in mind an important distinction highlighted by the Court of First Instance in Métropole Télévision. The Court stated that the Commission would not be justified in taking into account, for the purposes of exemption pursuant to Article 81(3), the burdens and obligations arising on members of the EBU as the result of a public mission, unless it examined other aspects of the case, such as the possible existence of a system of financial compensation for those burdens or obligations, without prejudice to the provisions on State aid. The Court concluded that the Commission had misinterpreted Article 81(3) and in doing so it appears to draw a line between the application of competition provisions to an undertaking charged with a public mission and the use of the public mission as a justification for the application of Article 81(3). The implications of this judgment may be far reaching, particularly in light of the proposed reform for de-centralisation in the application of Articles 81 and 82. Unfortunately, its appeal to the ECJ has been withdrawn.

These cases appear to introduce (or endorse), at judicial level and in relation to the application of competition law, the notion of universality which plays an important role on the regulatory aspects of this sector.65 As will be shown below, the notion of universality has both a geographical and a social dimension. Both the judicial and regulatory interpretations of the notion, in both its dimensions, ultimately try to address the protection of values of a non-economic nature. The question is, to what extent is competition law able to guarantee the protection of these values?

^64 Almelo, supra note IV-34 above, para 49.
65 See Chapter II above.
5. Social and territorial cohesion: competition and universality

Social and territorial cohesion are possibly the most difficult values to reconcile with an antitrust analysis that must be based primarily on micro-economic analysis. Nevertheless, the development of certain sectors may have a tremendous impact on social and territorial cohesion. In our society, communications are the primary means of diffusion of knowledge, which in turn is the driving factor, if not the very foundation upon which our economy and society is increasingly based.66 The ability to manage, process, create and divulge information and knowledge more readily and speedily has the disadvantage that the scope for social and territorial exclusion is also magnified. Market forces are not always ready to fill those gaps where a commercial strategy would make it uneconomical. The operation of competitive free market forces should be pushed to the limits so that a healthy and competitive environment can keep to the very minimum those geographic areas or sectors of society which cannot benefit from these developments.

In fact, the notion of universality which the Court interpreted in Corbeau, mainly in geographical terms, is gradually adopting an increasing social dimension. The geographic emphasis on the notion of universality reflects a vision of society which is gradually disappearing. We are slowly witnessing a shift from the physical dimension of the economy, which is mainly based on property, towards the dematerialisation of wealth and development based on access.67 Given the importance of knowledge and information, the means of access to these cornerstones of the modern economic process may constitute a divide in our society. It is in this sense that whilst geographical barriers are increasingly irrelevant, the notion of universality tends to acquire a social dimension and signifies the wider phenomenon of migration from geographic confines to the social and economic realm of access.68

66 See C. Leadbeater, Living on Thin Air - the New Economy, (Viking, 1999).
The ultimate aim of any competition policy is measured chiefly on its effects on prices. This has indirect social consequences in that it enhances the affordability of products or services that become indispensable for development. Competition policy is not designed to address exceptional circumstances (for instance, the provision of fixed-line telephone services in extremely remote and uneconomical areas or the provision of communications as economical services for educational institutions). However, this goes beyond the scope of the rules and role of competition policy within a wider economic policy. These objectives have to be reached through other remedies of a regulatory nature (such as Universal Service Obligations) or by means of financial assistance to be granted by Member States. In the latter case, EC competition rules may come back into play through State aid provisions.

The very notion of universal service is one of the pillars and guiding principles of the regulation of communications and provides a social dimension to general antitrust analysis. Undoubtedly, this social aspect derives from the role that communications at large have in the so-called Information Society. The dual importance of universal service (both economic and social) emerges from the evolution of the meaning of that term.

5.1 The notion of “universal service”: a historical perspective

The expression “universal service” was created in the US at the beginning of the century. Apart from technological development, the competitive environment in the States at that time was remarkably different from the current situation in Europe.

At the beginning of the century, the expiration of Bell’s basic telephone licence in the US allowed independent companies to enter the market and develop a network which was alternative to that of the main operator. The independent companies originally aimed at establishing exchanges in areas where Bell was not present. This created a dual service whereby the competitors deliberately refused to interconnect to each
other. From the legal perspective, interconnection was prevented by the prevailing interpretation of the common carrier law.

Due to externalities the value of a telecommunication system, especially a closed-ended one, depends on the number of its subscribers. The independent companies started to form state associations to enhance co-ordination and effectively created long distance companies that were regional in scope. This placed a strong competitive pressure on Bell which, by keeping the systems separate, would lose the benefits of the externalities. Bell was forced to liberalise its closed-ended system and develop connecting arrangements with independent exchanges in areas previously unserved. The company therefore developed a policy of sub-licensing independent exchanges.

It has been convincingly argued that this system of competition produced, in that historical context, pressure to create a geographical universal service for rural areas. This process demonstrates that in the early stages of the US experience, access competition was the factor which mostly contributed to create what, with modern terminology, we could call a geographical universal service. On the one hand, the competitive pressure of the independent companies forced Bell into rural and once-neglected areas. On the other, it is arguable that, in the absence of this system, independent companies would have in fact concentrated in urban centres to undercut Bell’s prices and cream off its services. This situation of access competition undoubtedly speeded up the process of technological development. More importantly, it promoted the enlargement of its territorial scope to locations which would have been unremunerative for both Bell and the independent companies on a stand-alone basis but contributed to increase the overall value of the competing networks. However, the enormous disadvantage of this situation was that it created a fragmented and uneconomical system. Bell invoked universal service as an antidote to the fragmentation created by access competition. Theodore Vail, the President of AT&T,

69 The independent companies believed that interconnection with Bells would have jeopardised their exclusive control to interconnections over the areas where they were operating.


71 Ibid.

72 See M. Mueller, supra note VII-70 above, at 362.
used this concept as one of the three pillars which described the functioning of the Bell system.

In 1909 he declared that “the Bell system was founded on the broad lines of ‘One System,’ ‘One Policy,’ ‘Universal service’”. He recognised even then that this notion was not novel: in fact the Bell system was modelled on the Telegraph system which already existed in the States. Theodore Vail was referring to “a nationally interconnected centrally co-ordinated monopoly.” Mr Vail’s construction of the universal service was based on the assumption that monopoly rather than traffic interchange among competing networks was the best way to achieve universality.

In fact, users found it increasingly intolerable to have two (or more) non-interconnectable systems. Universal service rapidly gained political and industrial support. However, both dual and universal service had powerful backing. In fact, the reasons for the creation of the telephone monopoly are to be found in demand-side economies of scope rather than supply-side economies of scale.

The adoption of the Willis-Graham Act in 1921 signalled the end of the competitive era. The Act suspended the 1913 Kingsbury Commitment which had established, without success, the grounds for long distance interconnection while preserving a dual system at the local level. The Act was intended to eliminate the fragmentation of the system by exempting telephone companies from the Sherman Act and opening the way to monopoly.

At that time universal service therefore did not have any commitment to social ubiquity and household penetration (which subsequently became the predominant characteristics of this concept) but rather to exploiting the potentiality of the system and enhancing its externalities.

\[\text{Ibidem, at 357.}\]
\[\text{See convincing reasoning of M. Mueller, supra note VII-70 above, at 365.}\]
\[\text{See statements of Senator Graham in 67th Congress, 1st Session, Congressional Record, 1 June 1921, p. 1966.}\]
The 1934 Communications Act, which established the FCC, has been retrospectively interpreted as the Act which incorporated the new value of subsidised universal telephone penetration. It has been clearly explained and persuasively argued that the purpose of the legislature in 1934 was not that of amending the existing law, by introducing new policies or new goals, but rather that of consolidating the existing regulatory functions into a single agency. The expression "universal service" does not even appear in the Act.

The original meaning behind the term is therefore totally focused on the competitive structure of the market and, as opposed to the current interpretation, does not include any notion of ubiquity or social penetration of the service.

5.2 The modern notion of universal service

It is only in the seventies that this concept was re-defined in the US. The cross-subsidised practices were threatened by competition. In particular, creaming off permitted the attack on overpriced services by interconnecting with the subsidised network. At that time there was an authentic rationalisation of the term which was originally merely intended to support the monopolistic structure previously established by AT&T.

This interpretation has been introduced to the EU directly in its re-interpreted form and its social and geographical dimensions. Universal service is defined in EU legislation as a defined minimum set of services of specified quality which are available to all users, independent of their geographical location, and, in the light of specific national conditions, at an affordable price. However, universal service is recognised as being a dynamic and evolving concept whose scope may change in response to users' needs, social and economic priorities and improvements in technology.
The Commission utilised this concept in the wider context of services of general interest and defined them in terms of principles (i.e. quality, universality, continuity and adaptability) and in terms of sound practices (openness in management, price setting and funding, and scrutiny by bodies independent of those operating the services). With regard to the telecommunications sector, the Commission recognises that the role of universal service is not that of determining the development, roll-out and take-up of new services or technologies. These objectives can be obtained with the operation of market forces. In the Commission's policy, the idea of universal service is aimed at ensuring that the benefits of new services and technologies are spread throughout the European Union. Whilst this objective has mainly been achieved through the imposition of the regulatory measures described above, the pursuit of effective competition is also recognised as "key driver of improvements in service quality, penetration and prices."

In fact, it is the very application of competition law concepts to the notion of universal service which shifts the focus from universal geographical access to universal access tout court through affordability. Certainly, the regulatory regime constitutes a useful yardstick in evaluating the behaviour of economic players under competition law principles. However, given the current trend towards de-regulation in communications, one should expect those principles to have a renewed application through Treaty provisions (in particular Article 86(2)) and the case law concerning the economic viability of undertakings entrusted with the provisions of services of general economic interest.

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79 Communication on Services of General Interest, COM (96) 443, para 28.
81 Chapter II.
82 Ibidem.
83 See generally The 1999 Communications Review.
In its 1999 Communications Review\(^84\) (and the secondary legislation stemming from it)\(^85\), the Commission confirmed the dual geographical and social role of the universal service obligations based on the notion of affordability\(^86\) as well as its dynamic and evolving nature.\(^87\) More importantly, it stressed the increased social dimension of the notion by highlighting the interrelation between communications services and the Information Society. The Commission explicitly states that its priority is to "ensure that all customers have the opportunity to reap the benefits of the Information Society". It also added that "this is essential to avoid the development of a 'digital divide' between those who have access to new services, and are comfortable using them, and those who are excluded from fully enjoying their benefits."\(^88\) The Commission explicitly referred to its impact, not only on access to services by consumers based in remote locations, but also on those with low income. Furthermore, consideration is given in the 1999 Review to the impact of communications on education as well as on the ability to work from home, the greater ability to interact with social services, health and local government, opportunities for the use of a wide range of entertainment services, as well as the development of e-commerce.

However, the Commission (without rejecting it in principle) declared that it considers inappropriate, in the current circumstances, the application of universal service obligations to the service providers of broadband communications services. The reason for this position is that extending universal services obligations to those services would entail a cross-subsidisation from a large number of customers to the small minority of users that are currently using those services. The Commission seemed to consider that this might have a detrimental effect on basic telephone service users with lower incomes. This reasoning appears to be slightly contradictory; surely the same argument could apply for both users in heavily populated areas and those based in remote locations. The question is what is the social importance to be attached to the take-up of

\(^{84}\) Ibidem.
\(^{88}\) The 1999 Communications Review, para 4.4.
broadband communications services. Despite this, the intention of avoiding an increase in regulatory burden is meritorious. This will lead to a shift of focus on the application of competition law in order to achieve the same result.

The proposed Universal Service Directive stemming from the 1999 Communications Review does not overlook the role of the Internet. Amongst the fundamental requirements of universal service is to provide users with a connection to the public telephone network on request. This is limited to a single network connection and does not extend to Integrated Services Digital Networks (ISDN) which provide two or more connections capable of being used simultaneously. However, connection to the public telephone network at a fixed location should be capable of supporting speech and data communications at rates sufficient for access to online data, such as that provided via the public Internet.

5.3 Universality and broadcasting

The notion of universality (perceived as a public service duty and linked to customers' access) can also be applied in broadcasting in both geographical and social terms. What importance or impact does EC law and, in particular, EC competition law have in this area?

On one hand, the idea of public service broadcasting, due to the key role played by the content in this type of service, is entrenched in national culture and the role of European legislation has undoubtedly to be looked at in the light of the principle of subsidiarity. On the other hand, the cultural implications of broadcasting and its role in promoting within Europe a Euro-centric culture and, conversely, protecting European broadcasting from extra-European influences, has an EC dimension recognised by the so-called Television Without Frontiers Directive. Along these lines, the Directive imposes.

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89 The application of the concept of universal service and broadcasting can be strictly linked to the idea of pluralism. Pluralism can be perceived both in active terms (as a facet of freedom of expression) and in passive terms as a synonym of choice and as the right to access a variety of sources of information. In both cases, competition law might have a role to play. In active terms, national provisions on licensing, media ownership and thresholds of concentration aim at ensuring both quality and a plurality of sources. These rules are outside the scope of this work.

obligations on Member States for the promotion of works and productions of European origin and an independent nature.

In my submission, the Television Without Frontier Directive also introduces a notion of cultural universality by requesting that Member States list events to which universal free access must be given to all (Article 3a). Insisting that certain events of national interest must be televised on a non-exclusive basis creates a new category of universal service with regard to broadcasting content as opposed to the service itself. However, the Directive is ultimately neutral with regard to the issue of public service broadcasting.\(^1\)

The definition itself of what constitutes public service broadcasting and what its function is or should be lacks clarity. There have been plenty of attempts to define it. One of the most developed theorisations of this concept is to be found in the British tradition, which has also been a forerunner in the evolution and implementation of the notion. The advanced stage of development of public service broadcasting in Great Britain, together with the comparatively precocious penetration of digital broadcasting in the EU, have placed the UK at the centre of the debate about the future role of public service broadcasting and constitutes\(^2\) a benchmark for analysis under a European perspective.

The traditional notion of public service broadcasting, which is still considered to be authoritative, stems from the ideas developed by John Reith (General Manager and Director General of the BBC, 1923 to 1938)\(^3\), who considered that the role of public service broadcasting was to inform, educate and entertain. Whilst these ideas still form the backbone of public service broadcasting, a more sophisticated definition was provided in 1985 by the Broadcasting Research Unit, which set out eight principles of public service broadcasting: universality of availability, with broadcast programmes available to the whole population; universality of appeal by catering to all interests and tastes; minorities should receive particular provisions; broadcasters should recognise

\(^1\) However it contains provisions on advertising \textit{minutage} (Article 11) which directly affects the method of funding all broadcasting

\(^2\) See Independent Television Consultation on Public Service Broadcasting of 30 May 2000.

\(^3\) \textit{Ibidem.}
their special relationship with the sense of national identity and community; broadcasters should be independent of government and distanced from all vested interests; universality of payment; broadcasting should encourage competition in good programming; and public guidelines for broadcasting should be designed to liberate rather than restrict programme makers. The notion of universality appears inextricably linked with the concept of public service broadcasting.

At EU level, the importance of public broadcasting has received a "constitutional endorsement" and has been recognised in the ninth Protocol to the Amsterdam Treaty. The ninth Protocol provides that, considering the direct link between the democratic, social and cultural needs of each society and the need to preserve media pluralism, the provision of the Treaty “shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit shall be taken into account." In accordance with the principle of subsidiarity, the question of the functions and aims of public service broadcasting is left to the national level.

Back to the UK example, the most recent report of the Independent Review Panel, chaired by Gavyn Davies in 1999, concluded that a “market failure” must lie at the heart of any concept of public service broadcasting. This was intended to be a guideline rather than a reconstruction of the origins of the notion in the sense that public service broadcasting must inform, educate and entertain (using the Reithian terminology) in a way which the private sector, left unregulated, would not do.

Against this background, if one analyses the role of competition law, two questions spring to mind. One is political and concerns the function of public service broadcasting (and is in fact subject to consultation in the UK). The other is legal in
character (perhaps subsidiary to the former) and concerns the application of general competition laws and, in particular, EC rules regulating this sector.

The principles developed by the UK Broadcasting Research Unit and the various forms of public service broadcasting definitions appear to concentrate on two types of issues. One revolves around a "protective" function of public service broadcasting (e.g. protection of minorities, national identity and community, equality in universality of payment) and another that one could say was "expansive" (the necessity of competition for good programming, the development of programme making, the provision of a centre of excellence for the making and broadcasting of excellence). If these functions were historically created by public service broadcasting due to market failures, one has to question whether, in the future, market and competition will continue to produce failures rather than improvements in both the protective and the expansive functions.

With regard to the protective function of public service broadcasting at European level, minimum standard requirements of a protective nature (i.e. in relation to national identities and independent productions) already operate through the Television Without Frontiers Directive. Moreover, the freeing of frequency due to the utilisation of digital broadcasting and the multiplication of channels, will undoubtedly have the impact of increasing supply and facilitate the task of meeting the small portions of demand which are normally protected by the public service broadcasting obligations. In general terms, it seems that the answer to the question of how to achieve the desired level of protection is to a large extent ideological or at least political. Is it true that if public service broadcasting obligations were removed, competition would move from excellence to the detriment of quality? Does this assume and rely on the somehow axiomatic view of a passive viewer and an active (and paternalistic) broadcaster? Is this in line with the nascent world of interactive services and increased choice of digital broadcasting?

The question is how to ensure an even playing field and maintain competition within it. It has been argued that public service broadcasting will soon be dead and will be

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substituted by public interest broadcasting (not requiring a regulator to sustain it). It is a curious coincidence that the expression “public interest”, used in a non-technical way as the epitome of market forces, as opposed to the source of regulation, coincides with the notion used in EC law to refer to public services. Is EC law contributing to this development?

The 1999 Communications Review, which marked the increased role of competition law in both telecommunications and broadcasting, appears to exclude from its scope the regulation of content. Some concerns have been expressed, particularly by the British ITC, about the prospect of uncoupling the issue of content from other aspects of regulation in broadcasting. The ITC seems to consider that a homogenous regulatory environment, including both telecommunications and TV broadcasting, which “does not adequately reflect key sector specific consideration will not operate in the best interests of all users of communication and broadcasting services.” With regard to convergence, the ITC view (which is similar to the one that has emerged in the responses to the Green Paper on Convergence) that the “convergence of technology and delivery mechanisms cannot be equated with convergence of markets or products.” The ITC also appears to object that the proposal derived from convergence tends to have an “industrial thrust”, that the Communications Review is concerned with firms rather than households and with producers rather than consumers. The ITC states that, on the contrary, regulation of television is derived from a different tradition and it exists principally for the protection and benefit of viewers. It is submitted that this assertion is based on a slight misinterpretation. Whilst it is true that the very premise of convergence is industrial in character, this is due to the fact that the driving force of innovation in a sector which is led by technology are firms with the potential to exploit the opportunity of innovation. Nevertheless, the focus of any protection of competition policy must be the consumer, albeit through protection of competition between firms. Demand is the primary focus of antitrust analysis and it is

100 Supra note VII-98 above, para 15.
the reaction of demand that will enable an industrially-driven concept such as convergence to become an economic reality.

The question should rather be whether consumer protection is not only economic but also cultural. It is indisputable that broadcasting involves a mixture of cultural and economic issues. However, the ITC stressed the position that in its opinion, the case for public service broadcasting is economically driven, albeit *a contrario*. It rests on market failure. In the ITC’s view there would be no need for State intervention to secure public service broadcasting if unregulated private markets were themselves able to provide the range, diversity and quality of broadcast output which is the aim of public service broadcasting.

In my view, this perspective unduly overshadows another aspect of broadcasting. As the ITC itself recognises, broadcasting has another economic characteristic; unlike the content of a telephone call, the content of a broadcast message is itself a traded commodity to which all normal economic considerations apply. This is an additional feature of broadcasting compared with telecommunication, which does not in itself create a distinction. In fact, the economic importance of content and the industrial convergence of methods of transmission create vertical and horizontal links in the supply chain. In this respect, competition law and policy has a role of paramount importance to play through the flexibility of doctrines of essential facility and complex and extended dominance described in the chapters above.

The ITC highlights the importance of content to advocate for the fact that content regulation cannot be uncoupled from means of delivery. The need for content regulation and the best structure to achieve this is outside the scope of this work. It is arguable that if content regulation is considered necessary, this function should be coupled with the regulation of competition in methods of delivery, preferably within the same regulator. However, regardless of the outcome of that debate, it appears clear that the

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101 *Ibidem, para 17.*
102 Following the Commissioning of a number of studies, the Commission concluded in the 1999 Communications Review that at present the creation of a Regulatory Authority at EU level would not provide sufficient added value to justify its
issue of public service broadcasting can and should be subject to the maximum possible extent to the forces of competition. Conversely, if the role of public service broadcasting obligations and regulation is not finished, its function should be reduced to a minimum (through licence requirements), letting market forces play their role and produce the best quality programmes.

Amongst the distortive effects that should be kept to a minimum, one should not forget the impact that financial or other forms of aid granted to public broadcasters, have on competition in related markets. The existence and, more importantly, the method of funding of public broadcasters is potentially subject to scrutiny under competition law and antitrust provisions. In this respect, EC rules and case law on State aid can play an important role. Indeed, the grant of a positive benefit, such as a subsidy or a fee of any kind, would qualify as State aid and would be subject to the relevant rules as to notification and approval. However, there are more subtle and disguised forms of aid that are relevant for the communications sector, which require closer scrutiny by the Commission.

Firstly, it is interesting to see how State aid rules apply in the context of public broadcasting financed by means of the fee system. Over recent years, a number of cases have been brought to challenge these national systems on competition law/State aid grounds. The matter has acquired a 'political dimension'. In September 1998, the CFI ruled against the Commission for its failure to initiate proceedings in the cases of the complaints brought by two Spanish broadcasters on the method of financing of the Spanish public regional and national broadcasters. This was followed by another,
similar case, in relation to French TV.\textsuperscript{107} Apparently, the Commission was preparing a TV paper containing guidelines on the application of EC rules on State aid to broadcasting. It is understood that the Paper was heavily objected to by Member States, who preferred a case-by-case approach, and has been provisionally abandoned.\textsuperscript{108} Whilst the ninth Protocol makes an unequivocal political statement in favour of public broadcasting, it can be argued that it does not in itself warrant the legality of licence fee-based systems. It is submitted that the fee system would be subject to the State aid provisions under Articles 87 to 88 and, as a result, would have a direct impact on the very notion of public service broadcasting at national level.

In my opinion, even acknowledging the role of broadcasting in national culture, a wider analysis must also take into consideration two additional factors: the strategic economic nature of broadcasting in the provision of services which go beyond TV broadcasting but are closely linked to it (e.g. interactive services); and the relationship between public services and other activities which spring from new technologies and are provided in a competitive and increasingly international market. This touches on the other main function of public service broadcasting which we have defined above as expansive.\textsuperscript{109}

In this respect, under EC law the ECJ held that even the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on activities open to free competition, is capable of constituting State aid if the remuneration received in return is less than the one which would have been demanded under normal market conditions.\textsuperscript{110} In relation to broadcasting, the Commission approved the funding of newly launched special interest channels set up by the German public broadcaster and financed with a licence fee\textsuperscript{111} and of a 24-hour news service by the BBC, also funded by a licence fee.\textsuperscript{112} As mentioned above, in both cases

\textsuperscript{107} Case T-17/96, TF1/Commission, [1999] ECR II-1757.
\textsuperscript{109} Whilst it is true that the EC Treaty provisions on State aid are subject to the public mission exception under Article 86(2), this exemption, as we have seen above, is in turn subject to the principle of proportionality. The debate on the function of public service broadcasting should shed light on and inform a potential analysis in the application of the principle of proportionality to this issue.
\textsuperscript{111} Kinderkanal Decision.
\textsuperscript{112} BBC News 24 Decision.
the Commission considered that the broadcasters were entrusted with those tasks by an official act of the authorities and that the funding system would not distort the development of trade to an extent contrary to the common interest. The public mission exemption of Article 86(2) was therefore applied. In my opinion, an Article 86(2) defence is becoming increasingly weaker in a sector where market forces operate effectively and competitively. In addition, as we have seen above, this argument revolves around the notion of proportionality which is a relative concept, affected by surrounding circumstances.

Of course, one could question whether the utilisation of state resources for activities which go beyond the remit of the public broadcaster are justifiable or proportionate. More controversially, one could see whether the remit entrusted by Member State to national broadcaster is proportional. The difficulty in this process is that the Commission does not have a benchmark value at European level to test the proportionality of the national public service broadcasters' remit. Nor is there a political intention to have such a benchmark at the European level. However, proportionality can be benchmarked against established European values, such as undistorted competition. This, to a large extent, is bound to bring into question the method of financing of public broadcasters, particularly as competition increases even within the activities of their public remits.

One of the strongest reservations in relation to the fee system concerns the use of this source of income in relation to activities which are outside the public service broadcasting remit. A modern communications company must have the ability to move

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114 In the Report from the High Level Group on Audiovisual policy, chaired by Commissioner Marcelino Oreja, *The digital Age: European Audiovisual Policy* (ECSC-EC-EAEC, Brussels - Luxembourg, 1998), the conclusions reached in relation to public broadcasting were that "public intervention should, as a matter of principle, be limited to areas where there is clear market failure" (p. 19), "two fundamental criteria that should be applied in making funding arrangements are: proportionality and openness. The first implies that public funds are provided exclusively for public service activities and do not go beyond what is necessary in this respect. Public service activities should be funded mainly from public sources. The second implies that Member States provide a clear definition of the public
"creatively" to new businesses. Arguably, a certain ability to operate by subsidiaries active in related and fully competitive markets could be justified under EC State aid law with the operation of the market investor principle, which excludes altogether the application of the Treaty rules on State aid. However, politically one might also wonder whether the limitation which would have to be imposed to avoid this internal cross-subsidy would simply have the effect of impairing the full utilisation of positive entrepreneurial forces in a market which is extending, both geographically and to new areas of activity. Another detrimental effect of this system is the creation of barriers to entry. A licence fee whose proceeds are attracted in a "monopolistic fashion" by only one broadcaster creates a position of market power in its favour. Whilst some regard this as being a benchmark of quality, it could be argued that the very existence of one single public service provider benefiting from a licence fee creates a deterrent for any potential new entrant who could compete for quality broadcasting. If public service broadcasting is to be maintained, as it is submitted should be the case, Member States should find in EC competition law the stimulus to find more efficient ways to do so in an environment which is continuously evolving.

6. Conclusion

This chapter has shown how EC law is bringing about a fundamental change in the legal systems of both the Union and its Member States. The notion of services of general economic interest or of public interest is increasingly being used as a new form of public service. This development is not merely semantic. In my view, it is the expression of the role that competition law is playing and the extent to which EC law in general, and EC competition law in particular, is penetrating one of the core areas of national sovereignty.

116 See D. Sawers, "The Future of Public Service Broadcasting", in M Beesley (Ed.), Markets and the Media (Institute of Economic Affairs, 1996), 83; see in particular the reference to the experience the Public Broadcasting System in the US at 96.
In fact, it is the prominence of competition law and internal market principles within the Union's legal regime that contributes to highlighting the economic character of public services. At the same time, EC competition law constitutes a form of State intervention that, in many instances, is either, de facto incompatible with the position of monopoly of State enterprises or, at the very least, regulates the conduct of the State in those activities which are open to competition.

In relation to communications, EC law has introduced new conceptual categories and doctrines which are equivalent in their aims to the active role of the State in these economic activities. However, they are conceived in the context of regulation and are aimed at private players. For instance, the Universal Service Obligations, as we have seen, have developed from a notion based on geographic universality to one of social inclusiveness. Due to the position of this doctrine within the regulatory package it is somewhat more in harmony with EC antitrust law principles which are taken into account within the package.

In the area of broadcasting, the relationship between EC law and national law is somewhat more complex. This is due to the multiplicity of values that are involved, which range from pluralism to right to information. The jurisdictional tension between the Union and its Member States is therefore more vivid. Of course, this is due to the importance that broadcasting has in popular culture as an instrument for conveying information (of whatever nature) and, ultimately, contributing to maintaining a cultural identity. The phenomenon of convergence between various forms of communications (i.e. telecommunications, the Internet, TV broadcasting and interactive services) creates an anomaly. In fact convergence, by blurring the boundaries of the different types of service within the sector, also challenges the boundaries of the public service remit exception under Article 86(2) with regard to the application of competition laws.

In principle, the relationship between public services and the application of competition law is not entirely conflictual. Public interest is conceptually the very basis for any competition law system. However, economic analysis is the instrument and the benchmark of evaluation of EC competition law. To the extent that the interests
pursued by the public services are not of a strictly economic nature, one must ask the
question as to whether they can be achieved through competition law and, if not,
whether they are to be pursued by other instruments. In relation to communications, one
should ask, more specifically, to what extent competition law and policy could
guarantee social and territorial cohesion. Finally, with regard to the specific issues
posed by broadcasting, the question is to determine whether competition is the synonym
of pluralism and quality.

As to the ability of competition law to bring about territorial and social cohesion
through communications this chapter showed that competition law, with the necessary
contribution of certain forms of regulation, can achieve these results. The reason for
this is that these values have a merely “derivative”, albeit very important, social value in
that their social character is a function of the ability of their customers, the public, to
access them. In turn, access derives from economic affordability and competition law is
the best instrument to ensure affordability combined with the promotion of investment
and development which is another essential element of the equation in policy terms. In
this sense, the notion of universality which, as shown above, has developed as a
surrogate of State action within competition policy, in my opinion adequately ensures
social inclusiveness in this area of the economy.

The issue of pluralism, which is a key concept in broadcasting, is somewhat more
complex. Undoubtedly, antitrust law can guarantee the plurality of market players to the
extent that such plurality guarantees economic competition. It can also ensure a
universalilty of access through affordability which, arguably, ensures variety in the types
of demand. If these two pillars are scrupulously preserved, they will logically lead to
pluralism, as a plurality of sources will have, in principle, an economic interest to meet
the demands of everyone in all its components. A system based on a multiplicity of
sources is in my view the best guarantee of pluralism and objective information. As it
happens, in relation to the Press, what counts is the system as a whole and competition
amongst broadcasters is the best instrument to obtain objectivity in the system as a
whole.
The limit of this reasoning is that it rests on economic considerations and it therefore fails in all those cases in which an economic rationale is not sufficient to induce market players to provide their services. This failure of course can also occur in relation to quality programming which can be argued to be different from efficient broadcasting. However, in my opinion, a vision whereby competition does not bring about the welfare of customers (including viewers) is ultimately tainted by a dogmatic perspective, which could equally apply to other sectors. In legal terms, this chapter shows that EC law cannot bring about a radical change in perspective at the national level. This is due to the inherently "political" scope of the public interest exception to competition law analysed above and the importance of the notion of proportionality. However, in my submission, competition law has already changed the concept of public interest within the Union. Arguably, its function is to reduce the need for other forms of State intervention and, in particular, intervention in economic forms that distort competition by increasing barriers to entry for other competitors. In addition, EC law creates an indirect but equally important effect. By constantly upholding the application of competition law in this sector it ultimately creates a competitive environment against which a system of public service, as currently conceived, appears increasingly obsolete. In legal terms, this implies that EC competition law gives another dimension to the application of the notion of proportionality in this area.
Conclusion

This study intended to analyse how EC antitrust law applies to the position of market power in communications and to what extent this legal instrument, based on economic analysis, interacts with the protection of the public interest in the Union's composite legal system. Communications are one of the basic cornerstones of our economy with far reaching societal and economic consequences. Therefore, the activities of market players in this sector are of a paramount importance in our society, both as a goal and as an instrument. Communications are a goal insofar as they are an economic activity of primary importance. However, they are also an instrument insofar as they perform an ancillary role for the conveyance of the content on which the Information Society, envisaged by the Commission and policy makers around the world, is based. They have a potential for promoting integration but, conversely, bear the risk of increasing cultural and social divisions. The sheer economic significance of this sector gave it a pivotal role in the liberalisation process which affected (and still does) public utilities in Europe. In addition, the sector's strategic importance, which extends beyond its economic role with substantial cultural and societal implications, attributes a particular value to positions of market power exercised within it. In this context market power can, when degenerates in abusive and anti-competitive practices hinder the economic and technical development of the sector, and does have an impact that, through the economic dimension of its activities, touches on a key area of our society.

Thesis of the Thesis

The centre of the study was the application of EC antitrust law to the position of market power. The thesis revolves principally around three strands of analysis. The relationship between antitrust and the liberalisation process on the one hand and ongoing regulation on the other; the issue of convergence and how antitrust analysis reacts to this economic phenomenon, both in the assessment of the economic circumstances and in the detection of abuses, in the converging and hence dynamic
sector; and finally the role of the public interest in this sector and how EC antitrust law has changed and will change the role of the national State in relation to communications.

This study highlights how the challenges faced by EC law are numerous and include: the choice between a model of regulation and the balance between regulation and competition law; the application of antitrust principles to an ever-evolving sector which is characterised by the industrial phenomenon of convergence; and finally, and most importantly, the preservation of the public interest through or within antitrust policy. Within the composite legal system of the Union, which entails the parallel existence of national and Union law, the legal regime to be applied to communications can have profound consequences on the expression of cultural values and the shaping of society as a whole. In this context, the Union's institutions face a number of challenging tasks. They must maintain an authoritative approach by founding their actions on strict economic tests. They have to ensure a harmonious relationship between regulation and competition (whose mutual boundaries are increasingly blurred) and deal with their decentralised applications.

The thesis supported here is that EC competition law, by providing a fundamental instrument of a general nature to control market power, has indirectly created a legal and economic environment which will lead to a crisis in the defence of public interest as currently conceived in national regulation. EC competition law not only operates as a benchmark of private players' behaviour, but, in the Community system, it has also been the bedrock of the liberalisation process which led to an application of its principles in relation to public entities.

Antitrust, liberalisation and regulation in EU communications

The reconstruction of the legal aspects of liberalisation shows how one of the fundamental principles of the Treaty, such as the establishment of the internal market, sparked the entire process. We have seen how, through the adoption of harmonised rules on liberalisation, EC law has gradually introduced elements of a regulatory model
to be sustained at the national level through the implementation of liberalisation directives. The analysis of the legislative provisions demonstrates the close links between the body of regulatory legislation and Community principles of competition. Undoubtedly, beside the political resistance opposed by the national monopolists to the adoption of a liberalised system, the process has been slow but ultimately successful. Within this gradual development, the Treaty principles of competition law have played an ever-increasing role. EC antitrust law had an inspiring function for the liberalisation process. In addition, the Commission’s action on a case-by-case basis and the EC Court’s case law has expanded the boundaries of application of competition law to former monopolists (on an individual rather than general basis). In particular, the Commission has supported nascent forms of competition through its decisions in the context of structural forms of abuse of market power. Therefore, the Commission made instrumental use of competition law principles as guiding lights in its ex ante legislative-regulatory action to introduce liberalisation as a form of internal market and supported this role by a case-by-case application of the competition rules to old and new dominant companies. EC antitrust law is at the centre of this dual process, albeit in an indirect way, insofar as ex ante regulation is concerned.

Looking forward, the question is whether regulation should take a secondary role vis à vis antitrust law and, if so, to what extent should its function be subordinate? This thesis shows that antitrust law has a number of advantages over regulation in communications primarily derived from a more precise economic analysis. In addition (and somewhat linked to the previous aspect), an antitrust-based approach ensures flexibility in market definition which can capture convergence in the correct time frame. Regulation runs the risk of either excessively anticipating changes which are not yet a reality or running behind the developments of the industry. Finally, antitrust can provide flexible instruments to detect more sophisticated forms of abuse in a number of situations such as: (i) conduct on a dominated market having an effect on the dominated market; (ii) conduct on the dominated market having an effect on markets other than the dominated market; (iii) conduct on markets other than the dominated market having
effect on the dominated market; and (iv) conduct on a market other than the dominated market having an effect on a market other than the dominated market.¹

As liberalisation consolidates, and more competitive markets are established, undoubtedly the role of antitrust law will expand and the role of regulation will be reduced. We are currently in the midst of this phase, although the introduction of competition is not uniform in all Member States and in a number of them the strength of national monopolies is still considerable. Indeed, the latest policy introduced with the 1999 Communications Review marks a clear step towards a system increasingly based on competition law. Whilst the principle of a reduction of the regulatory burden is to be looked at favourably, the role of regulation performed along harmonised lines and implemented at national level is still essential, instrumentally to ensure the further establishment of competitive forces. The process of transition is to be handled with care. The greatest risk would be to assume that the development of competition is where we would like it to be rather than at the stage where it actually is. The successful and meaningful application of competition law in communications presupposes the existence of a certain level of competition, which, in certain cases, requires regulation to be established in the first place. However, it is important that competition law penetrates the regulatory framework and the thesis shows that in the EC system this happens in two respects. Firstly, through the reduction of regulatory obligations and the increased reliance on general principles of EC competition law. Secondly, through the increased harmonisation between principles developed under general competition law in the regulatory framework. The introduction of a system in which regulatory obligations on incumbents are based on the competition law concept of dominance (with a consequent increased focus on economic analysis) is a first important step. In this latter sense, I consider a positive aspect to be the proposed adoption of the concept of dominance under the Article 13 of the proposal for a Framework Directive, which is modelled on the definition adopted under EC antitrust law and marks a step forward in this respect. Equally, it appears clear that the development of the doctrine of essential facilities has inspired legislative initiatives of paramount importance in the liberalisation process, such as the Regulation on unbundled local loop. However, reservations remain

¹ See Chapter IV above.
insofar as the proposed regulatory system introduces and codifies doctrines, such as that of collective dominance, which, as it has been seen above, despite being potentially relevant, require further consolidation before they can be utilised as a basis for regulation of a general nature. In addition, one should be wary of applying in a regulatory, *ex ante*, context an instrument such as leveraged dominance which, again, requires a detailed factual analysis. The doctrines of complex dominance, described and analysed above (i.e. extended dominance or even collective dominance) are best applied in individual cases and under a case-by-case economic analysis. This in itself seems to highlight the intrinsic limits of regulation.

More generally, the implementation of the process of liberalisation and the regulatory framework which stems from it as an instrument and an ongoing support is based on a co-ordination between the Commission and the national competition or regulatory authorities and between EC law and national law. The system of regulation currently proposed is based on strong co-operation between the Commission and NCAs. One of the systems envisaged in the proposed regulatory package is the issuing, on the part of the Commission, in co-operation with Member States and a High Level Communications Group, of Decisions on Relevant Product and Service Markets which will identify those products and service markets within the communications sector, the characteristics of which may be such as to justify the imposition of the regulatory conditions set out in the Directives on access and interconnection, universal service and licensing. This is one of the areas in which co-operation between competition law principles and regulation will be strongest. Also, this system would create a continuous link between the decisions of the Commission on an individual basis and its regulatory functions applied in co-operation with Member States. Whilst these forms of interaction between competition and regulation are to be considered as positive developments, the disadvantage of the envisaged system lies in the risk of crystallisation of decisions which have a judicial nature.

A hybrid system based on measures of a general nature and individual decisions risks being only marginally successful. More generally, at the national level, sector-specific authorities will often look at general principles of Community law to find an application
to the sector within their enforcement policy. Often licence terms would, for instance, replicate obligations inspired by antitrust principles, such as those aimed at the avoidance or prevention of discriminatory practices. One concern in this respect is Article 3 the proposed Regulation on the decentralisation of the application of Articles 81 and 82 which states that "where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws." In the field of communications this provision creates the undesirable risk of generating some confusion on the ability of the regulator to enforce certain regulatory provisions if, for instance, Article 82 also applies.

In any event, the analysis of the application of market power doctrines carried out in Chapter IV highlights how the EC competition law enforcement policy finds its limits in the application of general principles to specific pricing issues. Particularly in relation to excessive pricing, which can be a point of crucial importance to ensure affordability, the actions of the Commission are particularly weak. One has to read into this an intentional policy decision by which the Commission has decided that these issues are better dealt with by measures of a regulatory nature possibly at national level (although often on the basis of EC level guidelines, such as those on pricing in interconnection). The proposed reforms of the regulatory framework will create a further interaction between regulation and the Commission case law under competition laws. Notwithstanding the role of regulation, particularly pricing regulation, one should also stress the importance of ad hoc application of competition rules. This is particularly the case when pricing regulation acts as a ceiling to the incumbent's pricing policy and, in the light of its presence in other non-regulated markets, there is scope for cross-subsidising abuses in those markets sheltered by the fallacious defence of regulation in others. This enhanced integration between action of a general nature and individual decision is one of the greatest challenges facing the European institutions and in particular the credibility of the Commission's activities.
The Commission's activities in this sector and in relation to market power will be mostly focused on exclusionary practices and even pricing issues will tend to be looked at from that viewpoint, rather than from that of an industry price regulator. However, the Commission's role in support of Member States' regulatory action, with the addition of market definitions and guidelines on market analysis and calculation of market power, will have to be in harmony with its enforcement on an individual basis. Equally, there will have to be consistency between the Commission's decision practice on the individual level and the approach taken in the context of the regulatory package, given the impact that its case law will arguably have on the general decisions to be adopted under the Framework directive.

Communications and Convergence

Is convergence an industrial myth or economic reality? Or rather, what is the degree of actual convergence? Undoubtedly, telecommunications and broadcasting have an increasing number of overlaps and converging applications. It is not within the scope of this study to establish in economic or industrial terms the degree of convergence affecting the sector. However, in legal terms antitrust law is best placed to detect the current conditions of the relevant markets and assess market power against this background. The very conceptual premise of the reforms stemming from the 1999 Communications Review seems to be that regulation struggles to keep up with the pace of economic development. We have seen how convergence is highlighting and accelerating the discrepancies within the regulatory framework based on measures of a general nature. However, the thesis also demonstrates how the definitions of relevant markets, which by their nature must take a strict economic assessment, can fail to capture or reflect longer-term convergence, which can more appropriately be taken into consideration in its effect on competition analysis. In the long term, telecommunications, the Internet and broadcasting are bound to converge and interact mutually even further. Often, one form of communications will be the gateway to success in related activities. Power may give rise to abuses in those circumstances. The Commission will therefore have to face a double-edged challenge. Within the regulatory context it will have to ensure that it adopts a dynamic stance to avoid any
form of crystallisation and consequent discrepancy between economic reality and its legal obligations. In respect to its antitrust enforcement policy it will also have to draw a fine line between its assessment of current economic conditions and the wider horizon of the development of the sector as a whole.

Finally, convergence creates a link between a sector such as telecommunications, which has been the forerunner and driving force behind the entire liberalisation process in Europe, and another, broadcasting, in which the notion of public service is more profoundly rooted, primarily for political reasons. This has considerable implications for any approach in the protection of the public interest character of communications.

**Public Interest**

Chapter VII analysed how EC law is bringing about a fundamental change in the legal systems of both the Union and Member States and assessed the impact that this has on communications. The notion of services of general economic interest is increasingly being used as a new form of public service at European level. This is the expression of the role that competition law is now playing and the extent to which EC law in general, and EC competition law in particular, is penetrating one of the core areas of national sovereignty, particularly in relation to broadcasting. One of the theses of the present work was to demonstrate that the system of competition law deriving from Community law penetrates national systems and challenges both the current methods of protection and the very hierarchy of public interest values at national level. Despite the political influences expressed in relation to broadcasting by the Amsterdam Protocol, this process derives, somehow ineluctably, from a wider legal development and changed economic environment.

Competition law, as applied to the communications sector, has produced the necessary liberalisation and is sustaining it on an ongoing basis. If the reasons for an active involvement of the national State in the communications sector was the preservation of the public interest, an application of a legal instrument such as antitrust law which, albeit indirectly, discourages the intervention of the State (at least as a monopolist) in
any economic sector, brings into question the rationale for such an active role. This calls for action on the part of Member States to rethink their policy in protecting the national public interest in communications in accordance with EC law and in particular the principle of undistorted competition as emerging at EC level in a liberalised environment.

In addition, the industrial phenomenon of convergence creates increasing industrial links between various activities within communications, ranging from telecommunications to broadcasting, with the links between the two brought about by interactive digital service and the overarching and unifying role of the Internet. The strength and credibility of this system and the creation of a legal culture of competition led to an expansive role for these principles in that the convergence process spreads across a variety of activities. In economic terms the competitive environment created around residual public activities (particularly in broadcasting) will inevitably lead to developments in the commercial sphere to avoid losing the interest of the public and ultimately authority as operators.

The dividing line between maintaining a position of cultural leadership and following the interests of the audience is difficult to draw. In an environment which requires entrepreneurial energy this will lead public broadcasters to push the limits of their remit. The Davies Report on the Future Funding of the BBC in the UK remarked that "the digital age will increasingly be one in which many and most customers of television pay for packages tailored to their needs. As they become more accustomed to choice, to subscription and to pay-per-view, it could be that the licence fee will come to seem an anachronism".2 This process is undoubtedly accelerated by the operation of EC competition law. The limits that the EC rules on competition impose on operators who want to benefit from State aid risk creating in the long term a regulatory straightjacket which impairs their ability to operate freely in a competitive and converging environment in which boundaries between competitive and reserved activities are difficult to draw.

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2 Ibid., at p. 144.
In addition, doctrines developed at EU level can have a big impact on the approach to public service. In the context of communications, the notion of universal service in telecommunications seeks to reconcile non-economic principles of regulation with a regulatory policy designed to be in line with antitrust principles. This notion has contributed to bring about a shift from services provided by publicly financed organisations to services of a certain standard provided to the public (irrespective of their geographical location or social conditions). In other words, the focus is no longer on the provider but rather on the recipient. Furthermore, in relation to universal service, EC law has contributed to a transition of the notion from a purely geographical dimension to a social one based on affordability. This change in focus is broadly in line with the ranking of values of an antitrust analysis, which is inspired by the welfare of consumers. One can envisage that this model may be transferred, in an adapted form, to broadcasting. A regime based on the idea of transparent funding of universal service obligations or of public broadcasting obligations could be created at the national level in the same way that the cost of universal service obligations are compensated for universal service telecommunications providers. Whilst this still creates asymmetries, the distorting effects are reduced considerably, thus freeing up positive forces of competition. At the industrial level, it is convergence that drives this process. In legal terms, antitrust law provides a stimulus to change perspective in the assessment of public interest in communications by adding an economic dimension to the analysis.

EU law, including EC competition law, is not capable of providing (and should not attempt to provide) the answer as to how public interest in communications is best protected beyond its economic dimension and within national boundaries. This is, and should remain, in the national sphere. However, EU law and in particular EC competition law, provide a benchmark, or at least a point of reference whose influence can be crucial. It is in this apparently residual but yet fundamental sense that EC law will stimulate changes in the national perspective of the protection of public interest in communications.
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