

EU Competition Law and Sector-specific Regulation in the Converging Communications Industry

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To my parents and grandparents

To my brother

To Irene

Της δ' αρετής ιδρώτα θεοί προπάροιθεν έθηκαν αθάνατοι

Ησίοδος

I hereby declare that this thesis and the work reported herein was composed and originated entirely by myself, in the Faculty of Law at The University of Edinburgh.

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ABSTRACT

Part I traces the evolution of EU telecommunications policy (from 1987 to 1998) and presents an overview of and commentary on the main provisions of the current EU telecommunications regulatory framework. It discusses the principal policy documents which set the tone for the transition from a monopoly to a fully liberalised market and focuses on both liberalisation and harmonisation legislative measures in the EU.

Part II concentrates on specific abusive behaviour of the incumbents aimed at preserving their key bottleneck positions against newcomers, and examines how competition law can deal with such cases. In particular, it discusses the jurisprudence of the ECJ involving cases of refusal to supply and the European Commission's essential facilities cases, and attempts to define to what extent Article 82 (ex 86) of the Treaty is applicable to the control of bottlenecks. Furthermore, it analyses EU competition policy on the strategic alliances and mergers arising from the accelerating convergence of the telecommunications, media and information technology sectors.

Part III examines how the current EU telecommunications regulatory regime should be adapted to the emerging multimedia environment. It concludes that, at least during the transition phase towards the realisation of an effectively competitive market, specific regulation will play a fundamental role alongside competition law. It also assesses the scope and nature of the new regulatory regime in the converging environment and submits that a light-touch and predictable regulatory framework – based on the new commercial realities rather than on arbitrary and obsolete regulatory distinctions – is required. This means that a large majority of the prescriptive regulations currently in place will need to be replaced by a harmonised framework of general principles and overall targets which can identify and monitor barriers to competition within a converging market and can ensure equal and fair conditions for market players.

Part IV comments on the proposed Framework, Access, and Licensing Directives. It attempts to assess whether the forthcoming regulation for electronic communications networks and associated services is in line with the main policy objectives and those regulatory principles that underpin the existing regulatory framework and whose significance has been affirmed in responses to consultation: legal certainty, flexibility, continuity, and transparency.

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INTRODUCTION

Traditionally, throughout the world telecommunications services were provided in each country by one monopoly carrier. Such carriers were almost always owned by the government and operators as state agencies, often as part of the postal service.

Generally speaking, for industries where competition is easily introduced, a policy of free entry is not only appropriate but also indispensable. This is the only means through which the benefits of the competitive market will be realized. As Bellamy and Child, in relation to the advantages of a competitive market economy, have put it:

“the Community rules on competition are founded on the principle that a competitive market, rather than state control or private monopoly, is the best means of securing economic efficiency, as regards both allocation of resources and efficient production. ... The EC Treaty assumes that the Community is based on a market economy, i.e. an economy in which it is mainly left to competitive market forces to determine what products are bought and sold when, where and at what price. In such a society, the competitive activities of undertakings, driven by self-interest, will further economic development, and therefore the welfare of consumers and, at least in the long-term, higher employment”.¹

In addition, in support of the desirability of a competitive market structure, the European Commission has stated:

“a vigorous competition policy is a key element in maintaining both the efficient functioning of market and competitive pressures. Experience in the Community and elsewhere in the world has shown that competition is an efficient tool for ensuring that producers remain dynamic, concentrate on innovation, listen to the market, reduce costs and provide high-quality goods and services at the lowest possible prices. Continuing enforcement of the competition rules therefore is of paramount importance in bringing out the best in Community

¹ Bellamy and Child, *European Community Law of Competition*, London, Sweet and Maxwell, Fifth Edition, 2001, at para. 1-076, pp. 39-40.

industry".²

However, there are arguments according to which free entry is not considered desirable or efficient. Thus the advantages of competition (which presupposes free entry) are less clear-cut in some sectors of the telecommunications industry (especially in the operation of networks) where substantial economies of scale exist, and some of them would be lost if the market was divided between two or more operators. Although it is generally accepted that a competitive market creates incentives for individual firms to produce efficiently, it does not necessarily mean that the most efficient form of production will involve large numbers of firms. Indeed, when economies of scale are present, the result is that a single firm can produce outputs at a lower unit costs than can many small firms. So if there is more than one firm in the market, their combined costs will be higher than those of a single firm supplying the same customers. The consequence of this is that the lowest-cost provision of a service can only be achieved if a single firm supplies the entire market; competition becomes inefficient.³

So a possible rationale for restricting entry into industries with economies of scale is the public interest argument that entry can lead to wasteful and, therefore, undesirable duplication of fixed costs. This is the so-called 'natural monopoly' or 'destructive competition' theory, according to which telecommunications networks are natural monopolies, so that replicating the physical infrastructure is inevitably uneconomic.⁴ The influence of the 'natural monopoly' theory is obvious from the early papers of the Office of

² European Commission, XXIst Report on Competition Policy (1991), point 3.

³ For further analysis see, for instance: Philips, L., *Competition Policy: A Game Theoretic Perspective*, 1995, Cambridge: Cambridge University Press; Rosenberg, N. and Landau, R. (eds.) *The Positive Sum Strategy*, 1986, Washington DC: National Academy Press; Samuelson, P. and Nordhaus, W.D. (1985). *Economics*, 1985, 12th ed.; Stigler, G. (1964). "The Theory of Oligopoly", (1964), *Journal of Political Economy*, Vol. 72, p. 44; Tirole, J. *The Theory of Industrial Organisation*, 1998, Cambridge, Mass.: MIT Press; Panzar J.C. and Willig R.D., "Free Entry and the Sustainability of Natural Monopoly", (1977), 8 (1) *RAND Journal of Economics* 1; Coursey D., Isaac R.M., Luke M. and Smith V.L., "Market Contestability in the Presence of Sunk (Entry) Costs", (1984), 15(1) *RAND Journal of Economics* 69.

⁴ See for instance: Posner R., "Natural Monopoly and Its Regulation: A Reply," (1970) 22 *Stanford Law Review* 540; Posner R., "Natural Monopoly and Its Regulation," (1969) 21 *Stanford Law Review* 518; Stigler, G., "The Theory of Oligopoly", (1964), *Journal of Political Economy*, Vol. 72, p. 44.

Telecommunications (OfTel),⁵ the regulator for the UK telecommunications industry which was set up under the Telecommunications Act 1984. The OfTel's papers are important and carry significant weight due to the fact that the UK telecommunications regulator is considered to be the most influential and most sophisticated amongst the national regulatory authorities across Europe.

Natural monopoly is defined as a market in which a single firm is more cost-efficient than two or more firms, meaning that competition is inefficient.⁶ Hence, as the theory in question goes, even if perfect competition was possible, it would be undesirable and impracticable because, as it requires a large number of small firms, it would miss the advantages that a single powerful firm can offer.

Mankiw and Whinston are amongst the economists who argued against the presumption that free entry is desirable for social efficiency.⁷ They demonstrated that, in a monopolistically competitive market, free entry can result in excessive entry from a social standpoint. So they pointed out that entry restrictions are often socially desirable. They accepted the notion that there is no such thing as perfect competition, and underlined the concept of 'business-stealing effect' – a phenomenon which characterizes most markets, and exists when the entry of new competitors causes the firms which are already in the market to reduce output. They illustrated that "the marginal entrant's contribution to social surplus is equal to his profits less the social value of the output lost owing to the output restriction he engenders in other firms" and, therefore, "the business-stealing effect makes entry more attractive than is socially warranted".⁸ Their conclusion was that (also because of the existence of imperfect competition) excessive entry is present as "marginal entry is more desirable to the entrant than it is to society because of the output reduction entry causes in other firms".⁹ And Suzumura and Kiyono argue that the results suggest the strengthening of the protection of incumbent firms from

⁵ See for instance, OfTel, "Report of the Director General of Telecommunications for the Period 1 August to 31 September 1984 to the Secretary of State for Trade and Industry", H.C. 457, 1984-1985 (London: HMSO, 1985), at para. 1.5. Also, OfTel, "Report of the Director General of Telecommunications for the Period 1 January to 31 December 1985 to the Secretary of State for Trade and Industry", H.C. 461, 1985-1986 (London: HMSO, 1986), at para. 1.3.

⁶ Pelkmans, Jacques and Young, David, *Telecoms – 98. Centre for European Policy Studies*, Brussels 1998, at p. 32.

⁷ N. Gregory Mankiw and Michael D. Whinston, "Free entry and social inefficiency", 1986, *Rand Journal of Economics*, 17(1), 48.

⁸ *ibid.*, at p. 49.

⁹ *ibid.*, at p. 57.

the threat of potential entry.¹⁰

From the above, it seems that there is a conflict between the objective of promoting competition, on the one hand, and the undesirable results that competition can bring where economies of scale are present, on the other. What is clearly needed is to find the right balance which will allow us to have the advantages of competition without having to bear the higher unit costs as more firms enter the market. This kind of trade-off is recognized by Vickers and Yarrow when they point out that

“the problem is that market power is greater when there are fewer firms, and monopolistic behaviour worsens allocative efficiency. The trade-off between allocative efficiency and scale economies is central to many problems in competition policy, and precisely the same question arises for example in relation to the licensing of network operators to compete with BT [British Telecom]”.¹¹

However, the natural monopoly argument is not so strong. Indeed, it is believed that the claim that competition is not possible in the utility industries has been over-extended. The results of Shin and Ying's analysis, for instance, suggest that local telephone companies are not classical natural monopolies.¹² So the fact that local exchange carriers are protected monopoly markets is regarded as unjustified.¹³ In addition, since the BOCs (Baby Bells) were found not being natural monopolies, it is supported that AT&T (which was providing long distance services) was also remotely possible to have monopoly characteristics before its breakup.¹⁴ Moreover – and contrary to Mankiw's and Whinston's results (who talk about excessive entry) – Shin and Ying conclude that “the results suggest that the benefits to breaking up the monopoly outputs of existing local exchange carriers substantially outweigh the potential losses in efficiency”, that this “would likely produce considerable cost savings to society”

¹⁰ See K. Suzumura and K. Kiyono, “Entry Barriers and Economic Welfare”, 1987, *Review of Economic Studies* LIV:156. For more analysts who reach the same conclusions, see A.K. Dixit and J. E. Stiglitz, “Monopolistic Competition and Optimal Product Diversity”, 1977, *American Economic Review* 67:297; also M.K. Perry, “Scale Economies, Imperfect Competition, and Public Policy”, 1984, *Journal of Industries Economics* 32:313.

¹¹ J. Vickers and G. Yarrow, *Privatisation: An Economic Analysis*, 1988, at p. 48.

¹² Richard T. Shin and John S. Ying, “Unnatural monopolies in local telephone”, 1992, *Rand Journal of Economics*, 23(2):171.

¹³ *ibid.*, at p. 182.

¹⁴ *ibid.*, at p. 179.

and that entry into local exchange markets should be permitted.¹⁵ Apart from the economic arguments, there is empirical evidence – based on the strategy and the huge investment undertaken by telecommunications companies – suggesting that (at least) longlines telecommunications do not have the characteristics of a natural monopoly.¹⁶

Another weakness in the natural monopoly argument is the fact that the telecommunications industry is unique among the utility industries: rapid technological developments can transform a natural monopoly into an industry where efficient competition prevails. As J.G. Sidak illustrated, the local telephone monopoly will “pass away as consumers by the turn of the century are able to buy local telephone service from the cable television company, the cellular company, a competing access provider that has installed its own fiber-optic loop, or any one of several providers of wireless personal communications services”.¹⁷ The notion that technical change can alter the profile and structure of the telecommunications industry was already recognized by Sharkey in 1982 when he concluded that “changing technology is expanding the boundaries of the industry and blurring the distinctions between communications and information processing. Certainly under the broadest definition this evolving industry is not a natural monopoly”.¹⁸ Moreover the aforementioned technological advances – mainly the microwave radio technology – give many large companies the opportunity to bypass the local network (i.e. without using the established local exchanges) and offer long distance telephone services to certain major customers.¹⁹

From the above it is concluded, therefore, that in recent years, there has been an increasing realization throughout the world that in many respects the telecommunications sector, which was traditionally dominated by monopoly undertakings is not in fact a natural monopoly, and that its liberation from the

¹⁵ at p. 181. The same conclusions are supported by L.C. Hunt and E.L. Lynk, “Industrial structure in US telecommunications: Some empirical evidence”, 1991, *Applied Economics* 23:1655, while the opposite ones are reached by L.H. Roller, “Proper quadratic cost functions with an application to the Bell system”, 1990, *Review of Economics and Statistics* 72:202.

¹⁶ See for instance, Stephen G. Breyer, “Antitrust, Deregulation, and the Newly Liberated Marketplace”, 1987, *California Law Review* 75:1005, at pp. 1020-1021.

¹⁷ J.G. Sidak, “Telecommunications in Jericho”, 1993, *California Law Review* 81:1209, at p. 1210.

¹⁸ W.W. Sharkey, *The Theory of Natural Monopoly*, 1982, at p. 213.

¹⁹ For the method of bypassing, the problems associated with that and the potential approaches to the problem, see Stephen G. Breyer, “Antitrust, Deregulation, and the Newly Liberated Marketplace”, 1987, *California Law Review* 75:1005, at pp. 1027-1031.

ownership of the State would stimulate efficiency and investment in new technology.

This new awareness has accelerated the trend towards gradually opening commercial activities in these areas to competition, coupled with, or proceeding independently, privatization of the utilities (i.e. the monopoly undertakings) themselves so that they become commercial undertakings on an equal footing (except only for their market power) with their competitors.

Indeed, beginning in the 1980s and continuing into the 1990s, the telecommunications industry in almost all countries experienced privatisation – i.e. the conversion of the incumbent operator from being a state-owned public body to a privately-owned entity.

It should be stressed that privatization is often linked with the concept of liberalisation. However, the nature of the relationship between privatization and the process of liberalization has been far from straightforward. Indeed, even further, the policy drivers behind privatization of the incumbent have tended to be based around state revenue concerns rather than the objective of liberalization.

This is illustrated when examining the relevant UK experience.

In the UK, after 1974, a new philosophy dominated Conservative party policy as a consequence of the dissatisfaction with the performance of nationalized industries. Under the new approach, public ownership was not deemed any more to be the most appropriate form for dealing with natural monopolies. It was thought that there was too much intervention in the market and a change was needed in order to move towards management structures which were commercially and market orientated. As Hutton put it, “the state was to be rolled back; and the felicitous invisible hand of market forces was to be ungloved”.²⁰ The practical expression of this idea was the adoption of the privatization program by the Thatcher government.

Alongside the ideological antipathy of the Conservative party to public enterprise, there was the influence of the Austrian School economists, who saw the growing economic role of the state as a threat to liberty and democracy. Sir Keith Joseph was clearly influenced by this notion when he stated that “our conviction that a market economy with freedom to own property and engage in production of goods and services is an essential

²⁰ W. Hutton, *The State We're In*, London, 1996, at p. 11.

condition of all other freedoms”.²¹ Another motive which led towards the policy of privatization was the growth of public spending as a proportion of the GDP. So the intention of the Conservative party was to “allow State spending and revenue a significantly smaller percentage slice of the nation’s annual output and income each year”.²² The idea was that the commitment of the Conservative party to controlling public expenditure could be more easily achieved by selling public assets than by cutting public spending. There was the belief that privatization would reduce the Public Sector Borrowing Requirement. Moreover one of the most fundamental targets of the privatization programme was the achievement of a successful flotation and the promotion of wider share ownership. This would help towards the realization of the concept of the “property-owning democracy”.²³ This target was related to the fact that privatization could bring fast and, some times, substantial gains which small investors have made on the shares. This could be (and so it proved) a decisive factor helping the Conservative party to increase its political benefits. Those political benefits are reflected by increased votes from grateful taxpayers and shareholders who received their shares at a discount. Indeed, this policy provided an opportunity to offer shares to the general public with favourable terms.²⁴ For instance, inter alia, shares were offered at a discount, smaller investors could be helped by the phasing of payments in instalments, and vouchers were offered as a substitute for future bonus shares.²⁵ This encouragement of wider share ownership was illustrate by Madsen Pirie who, pointing out that the owners of shares and those who work in the private sector are more likely to vote Conservative,²⁶ concluded that “the golden rule about privatizing is always to give people greater advantage than they previously enjoyed. In Britain, we say the rule is: never cancel a benefit ... however unjust it is ... especially if you can buy it instead”.²⁷ He defended the Government’s decision to sell at a level which was well below the real value of the shares

²¹ Centre for Policy Studies, *Why Britain Needs a Social Market Economy*, London, 1975, at p. 4.

²² Angus Maude, *The Right Approach to the Economy*, Conservative Central Office, London, 1977.

²³ See Dennis Swann, *The Retreat of the State*, 1988, at p. 235.

²⁴ See Dennis Swann, *The Retreat of the State*, 1988, at p. 235.

²⁵ For details, see R. Fraser (ed.), *Privatisation: The UK Experience and International Trends*, 1988, at Chapter 3. See also C.P. Mayer and S.A. Meadowcroft, “Selling Public Assets: Techniques and Financial Implications”, *Fiscal Studies* 6, 1985, 4, at pp. 50-52.

²⁶ See M. Walker, *Privatisation: Tactics and Techniques*, 1988, at pp. 3-10.

²⁷ See M. Walker, *Privatisation: Tactics and Techniques*, 1988, at p. 6.

saying that “it’s very important that the people who buy the shares should perceive an immediate gain”,²⁸ and did not hesitate to admit that underpricing was essential in order to attract new shareholders which means, according to his view, more votes for the Conservative party.²⁹ However, this policy has been subject to major criticism.³⁰

Indeed, the underpricing of the shares led to a substantial redistribution of wealth to the successful applicants. This redistribution was considered undesirable for several reasons, inter alia because of the huge transaction costs involved, because there is no obvious social reason to justify those benefits and because bankers, lawyers, share underwriters and generally all who participated in the privatization process made substantial gains at the expense of the taxpayer.³¹ As Vickers and Yarrow concluded, trying to evaluate whether underpricing is the best way to promote the target of wider share ownership,

“the principal stated objectives of the Government have been to maximize sales proceeds and to widen share ownership. The underpricing of major share issues has meant that the first of these aims has not been achieved at all successfully, and the second has been met in a highly expensive and rather distorted way ... It is hard to see how the methods of selling state assets can be judged other than a failure in terms of the general public interest and in view of the opportunities available. Their short-run success in political terms is another matter”.³²

Finally, privatization was seen as a means of disciplining and reducing the trade union power,³³ as a commitment and obsession of the Conservative party to cope with trade union pressure. This is illustrated in the Conservative election manifesto for 1979, which pointed out that “Parliament and no other

²⁸ See M. Walker, *Privatisation: Tactics and Techniques*, 1988, at p. 10.

²⁹ See M. Pirie, *Privatisation: Theory, Practice and Choice*, 1988, at p. 10.

³⁰ See Vickers and Yarrow, *Privatisation: An Economic Analysis*, 1988, at pp. 173-181; C.P. Mayer and S.A. Meadowcroft, “Selling Public Assets: Techniques and Financial Implications”, *Fiscal Studies* 6, 1985, 4, at pp. 55 and onwards; M. Bishop and J.A. Kay, *Does Privatisation Work? Lessons from the UK*, 1992, at p. 29.

³¹ See Vickers and Yarrow, *Privatisation: An Economic Analysis*, 1988, at p. 180. See also F. Hawkings, “Selling British Telecom”, 3 (1987) 7 *Policy Studies* 1 at p. 3.

³² See Vickers and Yarrow, *Privatisation: An Economic Analysis*, 1988, at pp. 192-193.

³³ See M. Debek, “Privatisation as a Political Priority: The British Experience”, 1993, 41 *Pol. Stud.* 24, at pp. 36-38.

body stands at the centre of the nation's life and decisions".³⁴

John Moore, criticizing the inefficiency of the public enterprises, underlined the importance of privatization by connecting it with the objective of improving efficiency. He concluded that privatization can be extended to those markets where competition was considered to be impractical, as "privatization policies have now been developed to such an extent that regulated private ownership of natural monopolies is preferable to nationalization".³⁵ However, is this correct or not?

Generally, there is no evidence supporting the basic notion of this statement, namely that public enterprises are inefficient and that privatization improves (under all circumstances) efficiency.

Many studies have tried to compare the performance of public and private enterprises and to establish an empirical justification and provide evidence in favour of one or other type of ownership.

One major study concerning the relative efficiency of public and private enterprise was carried out by Richard Pryke. He based his analysis on the performance of private and public firms engaged in the same activity in three different areas: nationalized British Airways compared with British Caledonian, a private operator; nationalized Sealink UK which provides shipping services versus privately owned European Ferries; and nationalized British Gas Corporation and the Electricity Boards compared with Currys and Comet, the two largest electrical groups in private ownership.³⁶ His verdict was that "public enterprise has performed relatively poorly in terms of its competitive position, has used labor and capital inefficiently and has been less profitable".³⁷ The explanation which was given for the disappointing performance of the public enterprise had nothing to do with good or bad management. What counted was the ownership factor.³⁸ So, he concluded,

³⁴ "The Conservative Manifesto 1979", Conservative Central Office, London 1979, at p. 21.

³⁵ John Moore, "The Success of Privatisation", in J. Kay, C. Mayer, and D. Thompson (ed.) *Privatisation and Regulation: The UK Experience*, 1986, at p. 95.

³⁶ Richard Pryke, "The Comparative Performance of Public and Private Enterprise", in J. Kay, C. Mayer, and D. Thompson ed. *Privatisation and Regulation: the UK Experience*, 1986, at pp. 102-103.

³⁷ Richard Pryke, "The Comparative Performance of Public and Private Enterprise", in J. Kay, C. Mayer, and D. Thompson ed. *Privatisation and Regulation: the UK Experience*, 1986, at pp. 103-104.

³⁸ Richard Pryke, "The Comparative Performance of Public and Private Enterprise", in J. Kay, C. Mayer, and D. Thompson ed. *Privatisation and Regulation: the UK Experience*, 1986, at p. 117.

“what public ownership does is to eliminate the threat of take-over and ultimately of bankruptcy and the need, which all private undertakings have from time to time, to raise money from the market. Public ownership provides a comfortable life and destroys the commercial ethics ... public ownership leads to performance which is relatively poor by private enterprise standards”.³⁹

Pryke’s study attracted wide attention in the UK and became very influential, especially in those political circles that supported privatization. For instance, John Moore – in order to give a picture of an overall poor performance of the major nationalized industries – used Pryke’s conclusions as he quoted him: “... most of the industries display serious inefficiency because they do not use the minimum quantities of labour and capital to produce the goods and services that they provide. Furthermore, resources are being misallocated because of the widespread failure to pursue the optimum policies for pricing and production. Far too many of the nationalised industries produce at a loss, engage in average cost pricing or practice cross-subsidisation”.⁴⁰ However, there were two major problems with Pryke’s study. First, his analysis concerned only three areas of activity (which is obviously a small sample size) and, therefore, his conclusions could not refer to other industries since generalization is scientifically unacceptable. Second, he failed to recognize that profit and economic efficiency were never the primary objective of nationalised industries, as there were political and financial constraints on them. Consequently, the comparison of the performance between private and public enterprises in terms of productivity was unsuitable for giving the right picture.

This was identified by Robert Millward who, surveying a wide range of studies, pointed out that, even where there is evidence that private enterprises have lower unit costs in comparison with public enterprises, this does not necessarily mean that their overall performance is better, as “low profitability is not inconsistent with an efficient management”.⁴¹ The reason is that there are also other factors (e.g. quality of services) which must be taken into account as

³⁹ Richard Pryke, “The Comparative Performance of Public and Private Enterprise”, in J. Kay, C. Mayer, and D. Thompson ed. *Privatisation and Regulation: the UK Experience*, 1986, at p. 118.

⁴⁰ John Moore, “Why Privatise?”, in J. Kay, C. Mayer and D. Thompson ed., *Privatisation and Regulation: the UK Experience*, 1986, at p. 83.

⁴¹ Robert Millward, “The Comparative Performance of Public and Private Ownership”, in J. Kay, C. Mayer, and D. Thompson ed *Privatisation and Regulation: the UK Experience*, 1986, at p. 143.

well as the fact that there are different objectives placed on and constraints imposed on public firms. He found that there was no evidence to support the belief that there is less managerial efficiency in public firms⁴² but, at the same time, concluded that there is difference in performance (in favour of private firms) when effective competition is present.⁴³

There is a lot of support for Millward's conclusion that it is competition rather than the ownership factor that enhances the economic performance of firms (public or private). For instance, Caves and Christensen argued that the association of public enterprises with inefficiency "stems from the isolation from effective competition rather than public ownership per se"⁴⁴ whereas Professor Swann pointed out that "changes of ownership in the absence of competition do not inevitably lead to improvements in performance".⁴⁵ This point was taken further by Kay and Thompson, who supported the notion that change of ownership is not needed. Liberalisation is adequate to provide considerable benefits.⁴⁶ However, it was generally accepted that under competition private enterprises perform more efficiently. This is the mainstream theoretical argument,⁴⁷ although Vickers and Yarrow retained some reservations when they argued that "this does not mean that, in competitive markets, ... public enterprise is always and everywhere the less efficient type of ownership".⁴⁸ In the absence of competition, however, there can be no presumption in favour of private firms. On the contrary, we can see the performance of public firms outweighing the performance of their private counterparts, as "the regulation of a private enterprise to prevent abuse of its monopoly power (in an

⁴² Robert Millward, "The Comparative Performance of Public and Private Ownership", in J. Kay, C. Mayer, and D. Thompson ed *Privatisation and Regulation: the UK Experience*, 1986, at p. 143.

⁴³ Robert Millward, "The Comparative Performance of Public and Private Ownership", in J. Kay, C. Mayer, and D. Thompson ed *Privatisation and Regulation: the UK Experience*, 1986, at p. 140.

⁴⁴ D. W. Caves and L. R. Christensen, "The Relative Efficiency of Public and Private Firms in a Competitive Environment", 1980, *Journal of Political Economy*, 88:958-976.

⁴⁵ Dennis Swann, *The Retreat of the State*, 1988, at p. 302.

⁴⁶ J.A. Kay and D.J. Thompson, "Privatisation: A Policy in Search of a Rationale", *Economic Journal*, 96 (1986), pp. 18-32. For an analytical attempt to answer the question of whether public enterprise can be regenerated without change of ownership and whether public firm reform can create more efficiency, see C.D. Foster, *Privatisation, Public Ownership and the Regulation of Natural Monopoly*, 1992, Chapter 10.

⁴⁷ See, for instance, J. Kay, C. Mayer, and D. Thompson ed *Privatisation and Regulation: the UK Experience*, 1986, at p. 16. Also J. Vickers and G. Yarrow, *Privatisation: An Economic Analysis*, 1988, at p. 43.

⁴⁸ J. Vickers and G. Yarrow, *Privatisation: An Economic Analysis*, 1988, at p. 43.

uncompetitive environment) may introduce serious distortions which result in its performance being worse than that of a corresponding public enterprise” and, therefore, “denationalizing an enterprise into an uncompetitive environment is likely to be positively harmful”.⁴⁹

Consequently, regardless of the comparison between private and public sector performance – and the conclusion of that comparison will depend mainly on political preferences – what has to be kept in mind is that privatization will improve performance of an enterprise only when accompanied by the opening of the market to competition.

Unfortunately, as described above, the policy drivers behind privatization of the incumbent have tended to be based around state revenue concerns rather than the objective of liberalization. Worries that a state-owned incumbent might inhibit market entry was of less significance in comparison with such revenue-raising concerns. Even more importantly, the process of privatization has, itself, sometimes acted as a barrier to the process of liberalization. Again, the UK experience provides us with an indicative example:

During the 1980s, entry into the UK telecommunications market was characterized by the challenge of competing with a complete monopolist (BT) which operated under massive economies of scale. This means that the new entrant – who lacks economies of scale in the early years at least – will have to accept low margins initially. A great deal of investment is needed as well as the ability to bring unit costs down to a level which is competitive with the incumbent. However, it takes a long time to expand financing and to increase productivity, and therefore, in order to survive, some protection is needed. This is a variant of the so-called ‘infant industry’ argument which is critical as to whether and to what extent measures advocating free entry into the telecommunications industry can promote effective competition. The infant industry argument was the main justification offered for support of the BT/Mercury duopoly policy, which is a version of restricting competition policy. Indeed, the aim of the duopoly policy – which was announced by the UK Government in November of 1983 – was to protect Mercury by providing it with the time to become established without the threat of further entry.⁵⁰ The Government decided that the time during which Mercury would be freed from

⁴⁹ J. Kay, C. Mayer, and D. Thompson ed *Privatisation and Regulation: the UK Experience*, 1986, at p. 16.

further entry into the market would be a period of seven years. In return for this comfort, Mercury took on certain service obligations concerning the development of its network. As Bryan Carsberg put it in justifying the duopoly policy,

“given the starting position in which BT was dominant, the licensing of two new competitors instead of one might have resulted in a division between the two new competitors of the business of customers who were prepared to move away from British Telecom, with the result that each of the competitors would have been weaker than a single competitor”.⁵¹

The infant industry argument, however, proved to be a weak one. Indeed, the protection of BT and Mercury from further entry favoured only them and did not help towards the direction of a competitive marketplace. More interestingly, while the duopoly attempted to allow Mercury some security in the early stages of its development and to give BT time to adjust to competition in the private sector, it could be safely argued that those targets were realized in a much more extended period of time than normally required. Thus it is not an exaggeration when it is argued that BT was the major beneficiary from the duopoly policy. As Beesley and Laidlaw pointed out,

“the conclusion to be drawn from the competitive interchange between BT and Mercury during the Duopoly era is that BT was able to accommodate itself to the newcomer without difficulty, ... competition from Mercury has evidently not been the external shock that could induce BT’s managers to make exceptional efforts to improve productivity”.⁵²

The same conclusion was reached by Vickers and Yarrow who pointed out that, instead of pursuing a policy of prohibiting further entry, “help should have been targeted directly to Mercury. A ban on further entry gives vastly more

⁵⁰ See B. Carsberg, “Regulation of British Telecom: A Reply to Beesley, Laidlaw and Gist”, (1987), 11(3) Telecommunications Policy 237, at p. 238.

⁵¹ B. Carsberg, “Injecting Competition Into Telecommunications”, in Cento Veljanovski (ed.), *Privatisation and Competition: A Market Prospectus*, IEA, 1989, at p. 88.

⁵² See M. Beesley and B. Laidlaw, “The Development of Telecommunications Policy in the UK, 1981-1991”, in *The Regulatory Challenge*, 1995, M. Bishop, J. Kay and C. Mayer ed., at pp. 322-323.

benefit to BT than to Mercury given the relative sizes of the new firms”⁵³.

In sum: the protection which was given to BT and Mercury against any third entrant did not achieve the aim of developing Mercury into a substantial competitor. On the contrary, BT was the major beneficiary of this policy as it was given time to adjust to competition in the private sector and establish itself. This policy not only failed to promote competition but also created a substantial risk that the two firms would settle down into a cosy duopoly. The realization of this hypothetical scenario could mean that new potential entrants would find it almost impossible to enter and compete. The conclusion is that what the duopoly policy accomplished was success in delaying effective competition for a long period of time. Instead, a policy of free and efficient entry should have been considered more seriously and introduced as soon as possible. Although it is true that liberalization does not necessarily mean that effective competition will emerge, at least it is the only way capable of imposing competitive disciplines on the incumbent operator. It is only the efficient entry (or the threat of it) and growth of new rivals that can increase the competitive challenge and expand the productivity of the incumbent as it tries to respond.

However, the privatisation of these large, previously state-owned carriers, accompanied by the subsequent liberalisation, involves serious problems of remaining monopoly power or market failure due to the accrued advantages conferred upon them by their history and position as compared with those of potential competitors. Indeed, the newly privatised companies benefited from having:

- 100 per cent share of the market at the time of privatisation;
- ownership and control of key physical assets, for instance ownership of vital networks or privileged use of public rights of way to which competitors must have access if they were to be able to compete;
- possession and control of intangible assets such as radio frequencies, and telephone numbers;
- a vast customer base, bringing with it possibilities of cross-marketing of non-basic products and services;
- the accumulated assets and economies of scale and experience of the telecommunications market;
- being vertically integrated;

⁵³ J. Vickers and G. Yarrow, *Privatisation: An Economic Analysis*, 1988, at p. 239.

- the 'information advantage', i.e. the database of information developed over many years and enjoyed by the incumbent, which is not available to its competitors or even perhaps to the regulator.

Given the extent of the accrued advantages conferred upon these carriers, it is certain that there would be a difficult transition period before the privatised company could become competitive, and during this time it could use its substantial power to charge customers monopoly prices as well as engage in strategic games to deter new entrants.

The unleashing of such power on the market has provoked the realization that the market power which is enjoyed by the former State undertakings must be circumscribed by effective regulation. Therefore, it is essential that regulation of the incumbent be implemented so as to prevent monopolistic abuse and anti-competitive behaviour.

The following list comprises the major principles of effective regulation:

- Regulation should prevent a possible abuse of monopoly power. Such abuse might arise if prices were very high in relation to costs so that super-normal profits were earned. Super-normal profits relate to the concept of monopoly profits. In a competitive situation, it is assumed that there should not be an excess profit as this will be competed away.
- Regulation should not distort business decisions. Only where there is a demonstrable competitive or market failure is there a need for regulatory intervention, as economic regulation will always be inferior to effective competition.
- Costs of regulation should be limited to what is essential.
- Regulation should try to 'mimic' the likely operation of a competitive market. If this can be achieved, it means that resources will be used as efficiently and as well in one case as in the other.
- Regulation should enable the regulated business to attract capital from investors or to justify to shareholders the retention of capital for further investments in the regulated business
- Regulation should encourage management efficiency in operations and investment
- Regulation should minimise the scope of regulatory intervention in management decision-making, subject to the need to specify

commercial and public service objectives

- Regulation should provide incentives for achieving efficient use of resources.

For 'effective' regulation to occur, it is important that an appropriate model or industry structure is developed so as to enable effective competition to emerge. Effective competition can be considered as being in operation when a customer can make a decision independent of any operator across the whole telecommunications industry, or when a customer can choose from a multitude of services and/or deal directly with a large number of service providers without regard to the infrastructure that carries the chosen service from the service provider to the customer. Oftel has attempted to specify the circumstances under which effective competition is present in the telecommunications markets. In particular, it points out that, for competition in telecom markets to be considered effective, there must be clear evidence of:

- vigorous rivalry between suppliers;
- absence of persistent excessive profits;
- absence of market power;

while from the consumer perspective it will mean:

- quality of service that meets requirements;
- keen prices;
- availability of innovative services;
- wide choice;
- availability of appropriate information on prices and quality;
- efficiency in the provision of services;
- value for money on a par with that in leading competitor countries.⁵⁴

In addition, Oftel has laid down "effective competition indications", making reference to three levels:

a) Structural:

- A reasonable number of competitors with none dominant;
- And/or none with market power;
- Limited entry barriers such that threat of entry is a competitive discipline;

⁵⁴ Oftel strategy statement, "Achieving the best deal for telecoms consumers", January 2000, at para 4.15.

- Absence of inefficient suppliers;
- Sets of prices which broadly reflect underlying costs (ie absence of persistent excessive profits).
- Changes in market structure over time, especially a tendency to reduce concentration.

b) Supplier behaviour:

- Active competition in price and quality and innovation;
- Absence of anti-competitive behaviour;
- Absence of collusion;
- Meeting consumer needs;
- Efficient provision of services.
- Recent entry.

c) Customer behaviour:

- Information available to customers to help make effective choices;
- Consumers confident/knowledgeable in using information and in taking advantage of market opportunities;
- International benchmarking against customer counterparts in equivalent countries indicate achievement of 'best or near best deal' for UK customers.
- Absence of barriers to switching.⁵⁵

In addition, apart from the fact that an appropriate industry structure must be developed in order for effective regulation to occur, and to enable effective competition to emerge, it should be stressed that regulation is viewed as a tool that can be decreasingly used as effective competition develops. In other words, competition rather than regulation per se should be the main goal in developing a regulatory framework.

This is exactly the major aim of this thesis. In particular, it will be shown that the current EU regulatory regime cannot work satisfactorily in the future converging environment since, in its current form, it is not flexible enough and thus not capable of predicting and coping with rapid market developments. The acceptance that the current framework is not sufficient to address the issues of

⁵⁵ Oftel strategy statement, "Achieving the best deal for telecoms consumers", January 2000, at Appendix 2.

a fully converged market – especially the access issues – subsequently raises the question of whether competition law alone can be an effective instrument for the realisation of that target.

Taking account of the transitional nature of the sector-specific measures, and of the overall objective that regulation should be kept to the minimum where competition is self-sustaining, it will be argued that it is necessary to develop mechanisms to ensure the gradual phasing-out of sector-specific regulation. In the meantime, sector-specific regulation will continue to play a fundamental role alongside the application of competition law. The role of economic regulation in particular will be to provide the temporary measures in order to guarantee equal and fair conditions to all market players until the converged telecommunications, media, and IT markets have matured.

Finally, taking into account the need to dis-engage from detailed regulation and achieve the desired flexibility in the new dynamic and fast-moving markets, this thesis will attempt to assess whether the forthcoming regulation for electronic communications networks and associated services is in line with the main EU policy objectives and principles and can contribute towards a new regime characterised by transparency, continuity, legal certainty and predictability.

All the above demonstrate the different requirements that regulation has to serve throughout the transition from a regime of a State-run monopoly to an effectively competitive market. This process can be broadly divided into **four phases**:

A) The **first phase** of this transition is associated with a policy aimed at breaking down the monopolies and lifting of legal barriers (liberalisation process). In addition, detailed provisions are put in place for regulating the newly liberalised telecommunications market. These provisions must comply with a number of basic principles and have as a main target the establishment of a fair and even-handed regulatory regime.

This first phase is described in Part I of this thesis which traces the evolution of EU telecommunications policy and presents an overview of and commentary on the main provisions of the current EU telecommunications regulatory framework. In particular, it discusses the main policy documents which set the tone for the transition from a monopoly to a fully liberalised market and focuses on both liberalisation and harmonisation legislative measures in the EU.

B) The **second phase** of this transition – following the establishment of an ex ante regulatory framework – consists of the application of the regulatory regime and the complementary application of competition law which is equally important in order to ensure that the already removed legal barriers will not be replaced by a de facto monopolistic market structure.

Indeed, although the first target – i.e. lifting regulatory restrictions and abolishing legal monopolies – has been achieved, this is not the end of the process. On the contrary, it is only the beginning of the crucial and difficult tasks which lie ahead for competition and regulatory authorities alike. This is true since the introduction of effective competition implies much more than the translation into national law of Directives abolishing legal monopolies in the Member States; full liberalisation would be meaningless without the vigorous enforcement of ex-ante regulation and competition law alike.

In the context of this second phase, the access issues are of major significance due to the opportunity for new market players to enter the market and, at the same time, the incumbents' desire to retain their key bottleneck positions. This is discussed in Part II (Chapter 2) of this thesis which focuses on specific abusive behaviour of the incumbents aimed at preserving their key bottleneck positions against newcomers, and examines how competition law can deal with such cases. In particular, it discusses the jurisprudence of the ECJ involving cases of refusal to supply and the European Commission's essential facilities cases, and attempts to define to what extent Article 82 (ex 86) of the Treaty is applicable to the control of bottlenecks. It also examines whether the 1998 Access Notice succeeds in promoting the Commission's objectives, namely a policy fostering both infrastructure-based and services-based competition, encouragement of new entry, and promotion of innovation as well as legal certainty and predictability.

In addition, competition law can address the serious anti-competitive problems which might arise by the creation of strategic alliances and mergers due to the accelerating change of markets with the technological and market-led convergence of the telecommunications, media and IT sectors. This is discussed in Part II (Chapter 3) of this thesis which analyses how companies are positioning themselves in the move towards multi-media in order to take advantage of the new opportunities. Thus EU competition policy – after its success in liberalising the telecommunications markets – has a new challenge

to confront: potential anti-competitive behaviour generated by this rapid change, and the new opportunities and possibilities for horizontal and vertical integration between market players who try to occupy the key positions and control market developments.

C) A **third phase** can be identified due to the convergence of telecommunications, media, and IT sectors and its challenges to current regulatory approaches. Indeed, the nature of competition law which is inherently flexible allows for the application of its rules and the effective handling of the issues appearing in the converging markets. On the contrary, for ex-ante regulation to deal with the convergence phenomenon, in depth and radical reconsideration of the current regulatory regime is required. This third phase is dealt with in Part III of this thesis which examines how the current EU telecommunications regulatory regime should be adapted to the emerging multimedia environment. It raises the question whether market forces and competition law should be the sole drivers for the development of an effective communications market. It concludes that sector-specific regulation will continue to be necessary. Of course, the long-term objective, that competition law will take over and specific regulation will fall away, remains valid. However, this will happen only with the realisation of an effectively competitive market. In the meantime, during the transition phase, specific regulation will play a fundamental role alongside the application of competition law. Specific regulatory rules will still be required in order to promote and establish effective competition and to guarantee equal and fair conditions to all market players until the converged market has matured. Indeed, moving directly to the application of competition rules alone could lead to new forms of integrated dominance and to new multimedia market monopolies. Until the market has matured, therefore, dominant players holding potentially bottleneck positions must be prevented from strengthening their positions and controlling market development; gates cannot be allowed to close before they have even started to develop.

D) The **fourth phase** is associated with the fact that convergence compels reconsideration of the present regulatory regime's basic principles and tools and, therefore, the key question concerns the scope and nature of the new infrastructure regulatory regime in the converging environment. It is submitted

that, since convergence is an evolutionary rather than a revolutionary process, what is required is a regulatory regime which will draw on the basic principles set out within the Open Network Provision (ONP) telecommunications framework. These principles will be extended and applied equally to the broadcasting sector in order to provide a common regulatory approach to communications infrastructure in the European Union. However, this expansion of ONP telecommunications rules to the other sectors will be counterbalanced if a clear, light-touch and predictable regulatory framework – based on the new commercial realities rather than on arbitrary and obsolete regulatory distinctions – is established. This means that a large majority of the prescriptive regulations currently in place will need to be replaced by a harmonised framework of general principles and overall targets which can identify and monitor barriers to competition within a converging market and can ensure equal and fair conditions for market players. This is precisely the scope of the fourth phase which is discussed in Part IV of this thesis and examines critically some of the most significant Commission's proposals.

In particular, it identifies the most important issues found in the Proposed Framework and Access/Interconnection Directives and attempts to assess whether these Directives are in line with the main policy objectives and those regulatory principles that underpin the current regulatory framework and whose significance has been confirmed by the vast majority of the comments received in the course of the public consultation. Moreover, it comments on the forthcoming licensing framework for electronic communications networks and services. Its aim is to examine whether the current situation requires adaptation and, if so, what kind of changes are needed in order to ensure that the Proposed Authorisation Directive can contribute to lighter and more transparent national licensing regimes.

The overall aim of Part IV is to assess whether the Commission's goal of having a regulatory framework for electronic communications networks and associated services characterised by legal certainty, predictability, flexibility, continuity and transparency is achieved.

PART I

THE EVOLUTION OF EU TELECOMMUNICATIONS POLICY AND LAW

Chapter 1

The Transition from a Regime of a State-run Monopoly to a Liberalised Market

1. INTRODUCTION

Until recently, almost all the Member States traditionally treated telecommunications as one of a number of sectors where special or exclusive rights were reserved to the State or to firms which were State-sponsored in some way. So, each of these organisations has enjoyed a monopoly in the provision of networks, services and terminal equipment.

There were two reasons for such an approach. First, there was the fear that, if special or exclusive rights were withdrawn, States would become dependent on foreign enterprises and, therefore, for reasons of national security, these rights should stay reserved to the States. Second, telecommunications, and particularly voice telephony, have been regarded as a public service, fulfilling the important social function of enabling people to communicate. So, public telecommunications organisations (PTOs) fulfilled their public service duties in exchange for these *de facto* or *de jure* exclusive rights to provide telecommunications services.

This situation changed due to a combination of factors, including:

- Developments in technology, particularly digitalisation, and increasing use of optic fibres and microelectronics. These technological advances led to convergence of telecommunications and information technology, and undermined the argument for the maintenance of national monopolies.

- The international character of the telecommunications sector, which led to both external and internal pressure for liberalisation. Indeed, there were demands for reciprocity by US firms and demands for liberalisation and market opening within the Community by the European industry.

- The deregulation and liberalisation of telecommunications markets in the

US increased the fears of the Commission of the European Communities (hereafter the Commission) that European firms were at a competitive disadvantage and that they would lose ground in the telecommunications sector. After AT&T and IBM entered European markets through joint ventures and other cooperation agreements, the danger of Europe's telecommunications market being occupied was obvious. The Commission realised that action should be taken if Europe was to remain competitive.

In order to increase the competitiveness of the European telecommunications industry, the Commission proposed opening the internal telecommunications market to competition by means of national liberalisation and harmonisation measures. That part of the Commission's policy aimed at breaking down the monopolies and lowering barriers to entry is called 'liberalisation', while the process with the objective of establishing equivalent trading conditions and competition on equal terms is known as 'harmonisation'.

The aim of this Chapter is to follow the evolution of the EU telecommunications policy as well as to present an overview of and to comment on the main provisions of the current EU telecommunications regulatory framework. It comprises three major sections. Section 2 introduces the main policy documents which set the tone for the transition from a monopoly to a fully liberalised market. Sections 3 and 4 deal with the liberalisation and harmonisation legislative measures respectively.

2. POLICY PAPERS

2.1. The 1987 Green Paper

The first step in a ten-year process of harmonisation and liberalisation – which was completed with the full liberalisation of telecommunications in the majority of the Member States on 1 January 1998¹ – was taken with the 1987 Green Paper on the development of the common market for telecommunications services and equipment.²

While the document itself did not impose any particular measures, it was intended to set forth a number of proposals in order to encourage public comment and start a debate. The Green Paper specified its overriding aim as providing the European user with a broad variety of telecommunications services on the most favourable terms. This could be achieved only with the introduction of more competition in the telecommunications market, combined with a higher degree of harmonisation in order to maximise the opportunities offered by a single EU market, e.g. through economies of scale.

In particular, the 1987 Green Paper established a series of principles based on the consensus on the need for reform:

- Rapid full opening of the terminal equipment market to competition.
- Full mutual recognition of type-approval for terminal equipment.
- Reinforcement of the rapid development of standards and specifications at national and European level.
- Full application of EC competition rules to the sector.
- While monopolies could be maintained over the basic telecommunications network, the provision and operation of services not considered to be of social meaning (generally value added services) should be open to competition. In other words, progressive opening of telecommunications markets to

¹ It should be noted that five Member States were permitted to defer the opening of their market beyond that date. For two Member States (Luxembourg and Spain), their markets were fully liberalised in the course of 1998. Three (Ireland, Portugal and Greece) were permitted to defer full liberalisation until 1 January 2000 (in the case of Ireland and Portugal) and 31 December 2000 in the case of Greece.

competition was contemplated.

– Establishment of open access conditions to networks and services through the Open Network Provision (ONP) programme.

– At the time, both operational and regulatory functions were accumulated by the PTOs. The Green Paper proposed a clear separation of regulatory and operational activities in the Member States so that regulatory functions would be entrusted to a body independent of the national telecommunications organisations.

Acceptance of the aforementioned principles by the Member States was based on a compromise regarding their scope. Indeed, the position taken by the Commission in the 1987 Green Paper reflected the balance between national public interest and the competition rules of the Treaty as required by Article 86(2) EC [ex Article 90(2)]. In a few words, the key provisions of the Green Paper, which essentially functions as the Community's policy outline for opening the market for telecommunications services and equipment, aimed at deregulation and increased competition. But the provision of network infrastructures and basic services (especially voice) were to remain unchallenged, under the exclusive control of the national PTOs. With regard to enhanced services and terminal equipment, however, the Green Paper called for essential liberalisation.

2.2. Satellite Communications

The 1987 Green Paper identified satellite communications as one of the areas needing specific attention in order to set out common policy orientations in the European Union. As a result, the Commission produced in November 1990 its Green Paper on satellite communications.³

In a few words, the Satellite Green Paper proposed the extension of the principles of EU's telecommunications policy to the satellite area. In particular, the Green Paper suggested four important changes:

² Towards a dynamic European economy: Green Paper on the development of the common market for telecommunications services and equipment, COM(87) 290 final, 30.06.1987.

- Full liberalisation of the earth segment, including both receive-only and receive/transmit terminals, subject to appropriate type approval and licensing procedures where justified to implement necessary regulatory safeguards;
- free (unrestricted) access to space segment capacity, subject to licensing procedures in order to safeguard those exclusive or special rights and regulatory provisions set up by Member States in conformity with Community law and based on the consensus achieved in Community telecommunications policy. Access should be on an equitable, non-discriminatory and cost-oriented basis;
- full commercial freedom for space segment providers, including direct marketing of satellite capacity to service providers and users, subject to compliance with the licensing procedures mentioned above and in conformity with Community law, in particular competition rules; and
- harmonisation measures as far as required to facilitate the provision of Europe-wide services. This concerns in particular the mutual recognition of licensing and type approval procedures, frequency co-ordination and co-ordination with regard to Third Country providers.

The objectives laid down in the Satellite Green Paper had the full political support of the Council which adopted in December 1991 a resolution on the development of the common market for satellite communications services and equipment.⁴ In particular, the Council resolution set out four major objectives for EC policy in the field, namely:

- Harmonisation and liberalisation for appropriate satellite earth stations including, where applicable, the abolition of exclusive or special rights in this area, subject in particular to conditions necessary for compliance with essential requirements;
- harmonisation and liberalisation as far as required to facilitate the provision and use of Europe-wide satellite telecommunications services subject, where applicable, to conditions necessary for compliance with essential requirements and special or exclusive rights;

³ Towards Europe-wide systems and services: Green Paper on a common approach in the field of satellite communications in the European Community, COM(90) 490, 20.11.1990.

⁴ Council Resolution of 19 December 1991 on the development of the common market for satellite communications services and equipment, 92/C 8/01, OJ C8/1, 14.01.1992. See also the European Parliament Resolution of 19 January 1993 on a common approach in the field of satellite communications in the European Community, A3-0424/92, OJ C42/30, 15.02.1993.

– separation in all Member States of regulatory and operational functions in the field of satellite communications;

– improved access to the space segment and access to the space capacity of inter-governmental organisations operating satellite systems and effective and accelerated procedures for the establishment of the access to separate satellite systems.

On the basis of the Satellite Green Paper, several measures have been taken:

– On 29 October 1993 the Council adopted a Directive which introduced mutual recognition for type approval of satellite earth-station equipment.⁵

– On 13 October 1994 the Commission adopted the Satellites Directive⁶ which amended the Terminal Equipment and Services Directives and abolished special and exclusive rights for the provision of satellite services and equipment.

– On 22 December 1994 the Council adopted a Resolution on provision of, and access to, space segment capacity.⁷ This Resolution followed a Communication⁸ of the Commission on the subject to ensure multiple signatory and direct access arrangements with the intergovernmental satellite organisations, in particular EUTELSAT, INTELSAT and INMARSAT.

Finally, in order to adopt a more dynamic and consistent approach in the field of satellite communications and to deal with the fact that the US was taking the lead in launching initiatives for the development of world-wide personal communications systems (S-PCS) and broadband, multimedia satellite infrastructures, the Commission presented in March 1997 an Action Plan⁹ which foresaw three main areas of activity:

– competition of the internal market, i.e. implementation of the necessary

⁵ Council Directive of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment, 93/97/EEC, OJ L290/01, 24.11.1993.

⁶ Commission Directive of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, 94/46/EEC, OJ L268/15, 19.10.1994.

⁷ Council Resolution of 22 December 1994 on further development of the Community's satellite communications policy, especially with regard to the provision of, and access to, space segment capacity, 94/C 379/04, OJ C 379/5, 31.12.1994.

⁸ Communication from the Commission to the Council and the European Parliament on satellite communications: the provision of – and access to – space segment capacity, COM (94) 210 final, 10.06.1994.

regulatory framework with regard to satellites;

- a coherent approach of the European Union in discussions at an international level in the relevant fora to defend European interests; and
- reinforcement of European research and development in this area.

The Satellite Action Plan was endorsed by Council¹⁰ and by the European Parliament,¹¹ and gave rise to the creation of industry working groups, both on research and development and on regulatory matters.¹²

2.3. The Creation of a Framework for Full Competition in Telecommunications Services

2.3.1. The 1992 Review and the Council Resolution of 22 July 1993

At the time of adoption of the Services¹³ and ONP Framework¹⁴ Directives in 1990, the Commission recognised that, given the boom of technological change, further liberalisation was required and it promised that in 1992 it would review the situation of the telecommunications sector. So, the compromise on limited liberalisation (a position taken by the Commission in the 1987 Green Paper which reflected the balance between national public interest and the competition rules of the Treaty) was not permanent.

More specifically, the Services Directive called for an overall assessment of

⁹ Communication from the Commission: "European Union Action Plan: Satellite Communications in the Information Society", COM(97) 91 final, 05.03.1997.

¹⁰ 2021st Council meeting, Luxembourg, 27 June 1997, 9310/97, Presse 218 - G.

¹¹ Resolution A4-0279/97, 21 October 1997.

¹² See for instance the Report of the Satellite Action Plan (SAP) Regulatory Working Group (RWG), "Market access: Problems and Solutions", February 1998. <http://www.ispo.cec.be/infosoc/telecompolicy/en/saprep13.doc>.

¹³ Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (hereafter the Services Directive), 90/388/EEC, OJ L192/10, 24.07.1990.

¹⁴ Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (hereafter the 1990 ONP Framework Directive), 90/387/EEC, OJ L192/1, 24.7.1990.

the situation in the telecommunications sector and formed the Commission's cornerstone for reviewing the justification of the Article 90(2) exception for the monopolies on voice telephony by 1992. As it was stated:

"In 1992, the Commission will carry out an overall assessment of the situation in the telecommunications sector in relation to the aims of this Directive. In 1994, the Commission shall assess the effects of the measures referred to in Article 3 in order to see whether any amendments need to be made to the provisions of that Article, particularly in the light of technological evolution and the development of trade within the Community".¹⁵

So, the 1992 Review¹⁶ and the subsequent Communication on the consultation on this document¹⁷ formed an effort to lift the exception which had previously been made for public voice telephony and to move towards full services liberalisation. In the 1992 Review, the Commission stressed the competitive disadvantage of European users due to limited national markets, and the remaining monopoly on voice services, which caused distortions in prices and tariff structures, and delayed investment and innovation.

The reforms proposed in the 1992 Review were fully supported by the Council as expressed in its Resolution of 22 July 1993.¹⁸ In this Resolution it was accepted that liberalisation of telecommunications service markets was the inevitable result of technological and market developments and, therefore, full liberalisation of public voice telephony services was set for January 1, 1998, in order to allow time for structural adjustment.

In general, the Council Resolution set out an overall timetable for the future development of telecommunications up to the end of the decade. It also set out six short-term and four long-term goals for the Community's telecommunications policy. In particular, it was agreed that a realistic approach to further liberalization should be followed, taking into account the need for adjustment in peripheral regions with less developed networks. Furthermore, it

¹⁵ Article 10 of the Services Directive.

¹⁶ Commission Communication on the 1992 Review of the situation in the telecommunications services sector, SEC(92) 1048 final, 21.10.1992.

¹⁷ Communication of 28 April 1993 to the Council and European Parliament on the consultation on the review of the situation in the telecommunications services sector, COM(93) 159 final, 28.4.1993.

was decided that there was a need for rapid and effective implementation of the current regulatory environment, in particular the Services Directive. Moreover, the Council Resolution supported an adaptation of ONP principles in respect of the entities covered and definition of universal service principles, interconnection rules and principles for access charges. Finally, a broad consensus was achieved for the development of a Community policy in the field of mobile and personal communications as well as in the field of telecommunications infrastructure and cable TV networks.

In sum, the Council gave its political support for the following objectives:

- to liberalise the provision of all public voice telephony services by 1 January 1998;
- to publish a Green Paper on mobile and personal communications; and
- to publish, before 1 January 1995, a Green Paper on the future policy for telecommunications infrastructure and cable TV networks.

The aforementioned objectives were also endorsed by the European Parliament in its Resolution of 31 May 1993.¹⁹

2.3.2. Bangemann “Information Society” High Level Group and the 1994 Action Plan

In December 1993, the Commission’s White Paper on Growth Competitiveness and Employment,²⁰ with the full political support of the Council, made clear that the Union’s telecommunications policy should be at the heart of the Union’s general policy. Indeed, the White Paper highlighted the role of telecommunications as an essential information backbone supporting growth and competitiveness in the Union and assisting the transition towards the

¹⁸ Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market, 93/C 213/01; OJ C213/1, 06.08.1993.

¹⁹ European Parliament Resolution of 20 April 1993 on the Commission’s 1992 review of the situation in the telecommunications services sector, A3-0113/93; OJ C150/39, 31.05.1993.

²⁰ White Paper on Growth, Competitiveness, Employment – The challenges and ways forward into the 21st century, COM(93) 700, 05.12.1993.

information society.

In order to identify specific measures to be adopted, the Delors White Paper requested reports to be drawn up by a committee of experts. So, the Bangemann group was set up in December 1993 to advise the Council on the measures that would be necessary to address the infrastructure needs of the developing information society. Its aim was to create a new incentive for examining the Community's response to new developments in multimedia, digital and broadband technologies.

The Report²¹ of the Bangemann Group was adopted at the European Council in Corfu on 24-25 June 1994. It dealt with the impact that the Global Information Society might have on European business, society and the quality of life. According to the Report, public administrations could not afford to retain the high levels of investment required to ensure that their national telecommunications industry remained competitive. It was therefore critical to liberalise the market to allow for private investment. This was why it requested the Member States to

“accelerate the on-going process of liberalisation of the telecoms sector by: opening up to competition infrastructures and services still in the monopoly area; removing non-commercial political burdens and budgetary constraints on telecommunications operators; and setting clear time-tables and deadlines for the implementation of practical measures to achieve these goals”.²²

It also emphasised that provision of the networks and the new services should be left to the private sector and that the role of government is to “safeguard competitive forces and ensure a strong and lasting political welcome for the information society, so that demand-pull can finance growth ...”.²³

In addition, the Report recommended the establishment of a single regulatory authority in order to coordinate interconnection, radio frequency allocation, licensing and, generally, measures aimed at facilitating the information society.²⁴

Moreover, the Report recommended that interconnection of networks and

²¹ Europe and the global information society – Recommendations to the European Council, 26.05.1994.

²² *ibid.*, p. 10.

²³ *ibid.*, p. 7.

²⁴ *ibid.*, pp. 11-12.

interoperability of services and applications should be primary objectives of the European Union. To this end, it referred to the need for a review of the European standardisation process in order to accelerate the definition of standards which the market requires.²⁵

Another important issue was that high tariffs for long distance and international calls in the past had delayed the widespread development of high speed corporate networks in Europe. In order to encourage investment, therefore, it was proposed that price caps on such services need to be removed and tariffs must be rebalanced so that charges are more in line with costs. This can have the advantage of introducing transparency in cost structures – a substantial issue for interconnection arrangements. Thus, the Bangemann Report proposed that international long distance and leased line tariffs should be adjusted as a matter of urgency to bring these into line with rates prevailing in other advanced industrialised regions and there should be fair sharing of public service obligations among operators.²⁶

Furthermore, it suggested that issues of intellectual property, privacy and security of information, electronic and legal protection, as well as common rules on cross-media ownership, should be addressed in the context of furthering European competitiveness. It justified its view by pointing out that without appropriate levels of protection, lack of consumer confidence would undermine the development of the information society.²⁷

Finally, the Report made another significant contribution, especially for those who attempt to analyze certain important legal and regulatory issues as well as major developments in EU telecommunications policy. It showed clearly that the concerns of European telecommunications policy were changing: starting with the aim to reduce government intervention and to deregulate, we have passed to the next stage where re-regulation and control of private parties are the main concerns.

The first Commission document in response to the Bangemann report was its Action Plan on the Information Society in Europe.²⁸ This Communication sought to obtain agreement on the principle of infrastructure liberalisation as

²⁵ *ibid.*, pp. 12-13.

²⁶ *ibid.*, p. 13.

²⁷ *ibid.*, pp. 16-18.

²⁸ Commission Communication, "Europe's Way to the Information Society: An Action Plan", COM(94) 347 final, 17.07.1994. An updated Action Plan was adopted by the Commission in November 1996.

one of the main initiatives to be taken to open the way for the development of the network and applications on which the information society relies. The action plan covered four areas. Generally speaking, it covered the regulatory and legal aspects of Europe-wide communications (trying to follow the suggestions of the Bangemann report for infrastructure liberalisation and for the establishment of a European authority, as well as to address matters concerning standardisation, tariffs, external trade and a number of issues introduced by multimedia convergence), steps towards the realization of TENs (Trans-European Networks) and related services and applications, along with a consideration of social and cultural issues.

2.4. Extending Competition from Services to Network Infrastructure

2.4.1. Infrastructure Green Paper (part I)

As already mentioned, by Council Resolution of 22 July 1993, the Council gave its support to the Commission's intention to publish a Green Paper before 1 January 1995 on telecommunications infrastructure and cable television networks.

Infrastructure liberalisation was a sensitive issue for the PTOs and their Member States. Indeed, the PTOs had traditionally sought to maintain their monopolies in order to protect their financial stability and to retain the massive economies of scale and scope needed to deal with their universal service obligations. Furthermore, studies²⁹ showed that high tariffs and lack of availability of basic infrastructure were hampering innovation and the development of liberalised services, and that alternative infrastructure – such as the networks owned by cable TV companies – could become competitive alternatives to the telecommunications organisations by providing more transmission capacity. The Commission hoped that alternative infrastructure

²⁹ "The impact of liberalisation of Alternative Terrestrial Infrastructure for Non-reserved Services", Coopers and Lybrand, 1994; and "The Effects of Liberalisation of Satellite Infrastructure on the Corporate and Closed User Group Market", Analysys, 1994.

will bring down the cost of leased lines for the provision of value-added telecommunications services, will play an important role in promoting competition, and will increase availability and choice.

So, on 25 October 1994, the Commission published its Green Paper on the liberalisation of telecommunications infrastructure and cable television networks.³⁰ This Communication was the first part of the Commission's Green Paper and set out the principle and timetable for liberalising the telecommunications infrastructure. The aim of the Commission was to enable operators of infrastructure authorised for certain purposes, such as cable TV, to make their infrastructure available for the provision of telecommunication services which have already been liberalised. In order to achieve its target, the Green Paper proposed a general principle that the providers of telecommunications services which are open to competition should have a free choice of the underlying infrastructure with the delivery of such services, provided that the necessary safeguards are in place.

On the basis of this principle, the first part of the Green Paper stated that immediate action was necessary to remove restrictions on the use of own or third-party infrastructure in the following areas:

- for the delivery of satellite communication services;
- for the provision of all terrestrial telecommunication services already liberalised including the use of cable television. This affects voice and data services for corporate networks and closer user groups, as well as all other telecommunication services, other than the provision of voice telephony services to the general public;
- to provide links, including microwave links, within the mobile network for the provision of mobile communication services.

The Green Paper stated that action in the above areas would remove substantial barriers to the provision of services open to competition and, in that case, would make the liberalisation measures fully effective.

³⁰ Communication to the Council and the European Parliament, Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks – Part I: Principle and Timetable, COM(94) 440 final, 25.10.1994.

2.4.2. Infrastructure Green Paper (part II) and the Communication of 3 May 1995

On 22 December 1994, the Council adopted a Resolution on the principles and timetable for the liberalisation of telecommunications infrastructure.³¹ The Council adopted the principle of parallel liberalisation of telecommunications services and the underlying infrastructure and, consequently, stated that the provision of telecommunications infrastructure should be liberalised by 1 January 1998. In the same Resolution, a broad consensus was achieved on the key objectives of the future regulatory framework for a fully liberalised telecommunications sector. The Council requested that the regulatory framework should include safeguards necessary to guarantee universal service, establish interconnection rules and common licensing conditions and procedures, and to provide for comparable and effective market access (including in third countries) and for fair competition.

On 25 January 1995 the Commission published the second part of its Green Paper on the liberalisation of telecommunications infrastructure and cable television networks.³² Part II set out the details of how the general principles set out in Part I will be implemented within the timetable envisaged in Part I. The topics discussed in the second part of the Green Paper were the main themes of the Resolution of 22 December 1994. Generally, it contained an in-depth discussion of the major issues involved in future network regulation.

In particular, and with regard to universal service, three basic issues were raised: the scope of universal service, a common approach to costing universal service and the means of financing uneconomic aspects of universal provision in a competitive environment. In the first point, a clear policy position was taken to the effect that, in the short to medium term, only telecommunications-related public service obligations should be treated as universal service obligations. In the longer term, the scope of universal service obligations might be extended in accordance with expanding consumer needs and technological progress (e.g. multimedia services). Secondly, the Green Paper recommended that the cost of universal service should be based on calculations of long run avoidable

³¹ Council Resolution of 22 December 1994 on the principles and timetable for the liberalisation of telecommunications infrastructures, 94/C 379/03, OJ C379/4, 31.12.1994.

³² Green Paper on the liberalisation of telecommunications infrastructure and cable TV networks – Part II: A common approach to the provision of infrastructure for telecommunications in the European Union, COM(94) 682, 25.01.1995.

cost, or incremental costs. Finally, on the financing, the Green Paper indicated a preference for using universal service funds rather than access charges.

Moreover, the Green Paper pointed out that the EU approach to interconnection should take the form of detailed and specific legislation under ONP. In particular, it stated that there should be a Directive on interconnection which would harmonise conditions for public network access, covering: a) the rights and obligations on public communications infrastructure providers with regard to interconnection requests, b) charging principles for interconnection of public telecommunications networks and services, c) common rules for fair competition, and d) dispute resolution mechanisms.

The Green Paper also recognised that licensing of telecommunications infrastructures and services should remain a matter for national regulatory authorities. At the same time, an overall framework was required which would set the selection criteria for the award of licences and authorisations, the conditions attached to communications infrastructure licences and the provision of telecommunication services.

Part II of the Green Paper was subject to widespread consultation and discussion which formed the basis for a Communication to the Council and the European Parliament of 3 May 1995.³³ This Communication summarised the results of the consultation and listed a catalogue of the legal measures required, covering both the liberalisation and harmonisation steps.

As regards liberalisation, the Communication proposed the following measures:

- a Directive concerning cable television networks;
- a Directive concerning mobile and personal communications; and
- a Directive concerning the full liberalisation of telecommunications infrastructures and services as of 1 January 1998.

With regard to the harmonisation measures accompanying the liberalisation process, a package of measures was proposed, including:

- a Directive on open network provision for voice telephony;
- a Directive on the application of the principle of open network provision to

³³ Commission Communication on the consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, COM(95) 158 final, 3.5.1995.

interconnection;

- a Directive for the adaptation of both the ONP Framework Directive and the ONP Directive for leased lines to a fully competitive environment; and
- a Directive regarding the grant of telecommunications licences.

It is extremely important to emphasise the significance of the aforementioned proposals because they extended beyond the issue of infrastructure liberalisation. Indeed, the Infrastructure Green Paper and the consequent consultation process – having a broad political support and commitment³⁴ – established the legal foundations of the overall regulatory regime to achieve the full liberalisation of telecommunications services and networks by 1 January 1998.

2.5. The Mobile Green Paper: The Development Towards a Universal Mobile Telecommunications System

As called for by the Council and the European Parliament in their Resolutions on the 1992 Review, the Commission adopted in April 1994 a Green Paper setting out the policy for the development of mobile and personal communications.³⁵

According to the Mobile Green Paper, mobile communications was the fastest growing area within the telecommunications sector, driven by rapid advances in technology, by a growth of commercial opportunities and falling prices. Even at that time, the EU had more than 11 million subscribers to mobile cellular telephony systems and a further eight million users of other mobile systems such as paging and Private Mobile Radio (PMR) Systems. Forecasts suggested that by the year 2000 there could be nearly 40 million users in the EC and that with the growing expansion into personal

³⁴ Council Resolution of 18 September 1995 on the implementation of the future regulatory framework for telecommunications (OJ 1995 C 258/1); European Parliament Resolution of 7 April 1995 (OJ 1995 C 109/310); and European Parliament Resolution of 19 May 1995 (OJ 1995 C 151/479).

communication services this could reach a figure of 80 million users by 2010. Also, it was obvious that the growth of mobile telecommunications will have a significant impact on the whole of the telecommunications industry, especially regarding massive private and public investment in telecommunications networks and services. The above reasons, therefore, led the Commission to realise that building the right regulatory environment for the development of mobile communications into a mass market should be a priority.

The Mobile Green Paper identified basic principles for discussion, the ultimate objectives of which were:

- to permit the development of a Union-wide market for mobile services, equipment and terminals;
- to identify common principles where required for achieving this target;
- to help the evolution of the mobile communications market into pan-European personal communications services; and
- to facilitate and promote trans-European networks and services in the sector.

According to the Mobile Green Paper, a number of Member States still maintained exclusive or special rights for certain mobile services, in apparent conflict with the Treaty competition rules. In challenging special and exclusive rights, the Mobile Green Paper wanted to ensure that only objective factors could be used to limit market entry. Radio frequencies are the central resource of the mobile communications market and for this reason many Member States tried to use the lack of available frequencies as an excuse for their refusal to issue mobile licences. So it seems that a predictable and clear environment for frequency allocations is a vital precondition and incentive in order to encourage investment. Hence it is significant to ensure that the allocation of frequencies must be subject to objective, transparent and non-discriminatory criteria. The Mobile Green Paper also suggested that licences should not contain any other restrictions other than those justified on the grounds of the essential requirements. Therefore, reasons for restrictions on the issue of new licences will be a lack of available frequencies or security of network operation and data protection. Furthermore, restrictions will be justified when they are vital to

³⁵ Towards the personal communications environment: Green Paper on a common approach in the field of mobile and personal communications in the European Union, COM(94) 145 final, 27.04.1994.

protect the public service requirements, namely permanence, availability and quality of service.

Amongst the most important barriers to the development of mobile communications is the prohibition or restriction, imposed on mobile network operators, to use their own transmission infrastructure or sharing infrastructure with another party. Indeed, mobile operators in many Member States are obliged to use leased line capacity of telecommunications organisations for both internal network connections and for the routing of long distance portions of calls. Charges for leased lines can be high with consequent impact on the pricing of mobile services, particularly for international interconnection. This eventually leads to distortion of market structure and acts as an obstacle to the provision of advanced services.

Therefore, the issue of interconnection between mobile and fixed networks, between mobile networks of the same or different technologies and between mobile operators and service providers is particularly important. This is the reason why, according to the Mobile Green Paper, interconnection conditions at the aforementioned interfaces must be based on objective criteria. They also must be transparent, non-discriminatory, cost-oriented and compatible with the principle of proportionality. Furthermore, interconnection conditions must cover basic tariff principles and dispute resolution procedures and must respect the essential requirements. So the Mobile Green Paper supported the idea of granting the right for mobile operators to use their own, each other's or third-party infrastructure for the provision of their licensed activities with the further right to interconnect their networks.

In order to remove the barriers to further development of the sector, the Mobile Green Paper made five major proposals, namely:

- abolition of special and exclusive rights over mobile communications, subject where required to appropriate licensing conditions;
- removal of all restrictions on the provision of mobile services by independent service providers and through direct service provision by mobile network operators;
- full freedom to develop infrastructure should be permitted to mobile network operators;
- unrestricted combined offering of services via the fixed and mobile networks;
- further development of standardisation and licensing procedures in order

to facilitate pan-European operation and service provision.

After extensive consultation following the Mobile Green Paper, the Commission adopted in November 1994 a Communication on mobile and personal communications.³⁶ The Communication contained a comprehensive programme for action, including:

- full application of the competition rules;
- the development of a Code of Conduct for service providers;
- full access of service providers to the market;
- agreement on procedures for licensing of satellite-based personal communications;
- promotion of the availability of frequencies and numbers; and
- promotion of targeted programmes to support market entry of emerging mobile technologies.

The objectives laid down in the Mobile Green Paper and the consequent Communication had the full political support of the European Parliament³⁷ and the Council³⁸ and prepared the ground for the Mobile Directive³⁹ which was adopted by the Commission in January 1996.⁴⁰

³⁶ Communication from the Commission to the European Parliament and Council on the consultation on the Green Paper on mobile and personal communications, COM(94) 492 final, 23.11.1994.

³⁷ See the European Parliament Resolution of 19 May 1995 on the Commission Communication to the European Parliament and the Council "Towards the personal communications environment: Green Paper on a common approach in the field of mobile and personal communications in the European Union" (COM(94)0145 - C4-0061/94) and on the Commission communications to the European Parliament and the Council on the consultation on the Green Paper on mobile and personal communications (COM(94)0492 - C4-0046/95) (A4-0097/95; OJ C151/473, 19.06.1995).

³⁸ See the Council Resolution of 29 June 1995 on the further development of the mobile and personal communications sector in the European Union, 95/C 188/02; OJ C188/3, 22.07.1995.

³⁹ Commission Directive of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications, 96/2/EC, OJ L20/59, 26.01.1996.

⁴⁰ For other harmonisation measures taken in the mobile communications sector, see the analysis in the Chapter "EU Radio Spectrum Policy in the Converging Environment".

2.6. The Rulings of the European Court of Justice on the Commission's Use of Article 86 (ex 90) of the EC Treaty

Directives are usually issued by the Council of Ministers of the European Union under Article 95 (ex Article 100a) of the Treaty.

Nevertheless, Directives may also be issued by the Commission of the European Communities under Article 86(3) (ex Article 90(3)) of the Treaty which entitles the Commission to take measures in order to ensure that the special rights granted to certain national companies or administrations by their governments do not obstruct the full completion of the European Common Market.

However, several Member States would have preferred to liberalise the European terminal equipment market on the basis of a Council Directive under Article 95 of the Treaty because there was the impression that the Commission, by issuing its own Directives, was establishing a regulatory power far exceeding its traditional supervisory competencies. Indeed, a number of Member States were not very enthusiastic about this procedure being used in a way that prevented their involvement and ability to influence the content of the Terminal Equipment Directive⁴¹ through the Council. It was considered to be an attempt to create a new law rather than merely enforcement of existing Treaty obligations.

This was therefore the basic reason why the Terminal Equipment Directive – although based on the Green Paper recommendations and approved by the Council – was challenged by an appeal to the European Court of Justice by France (supported by Germany, Italy, Greece and Belgium), contesting the capacity of the Commission to issue its own Directives.⁴² France's appeal was especially remarkable, as it was considered to be one of the most liberal markets for telecommunications equipment. The apparent eagerness of an individual Member State to challenge the Commission at this early stage is an indication of the controversial environment surrounding the Commission's ultimate goal in this area. In the Commission's view, however, the market for telecommunications equipment is an ordinary market for goods in which free

⁴¹ Commission Directive of 16 May 1988 on competition in the markets in telecommunications equipment (hereafter the Terminal Equipment Directive), 88/301/EEC, OJ L131/73, 27.05.1988.

⁴² Case C-202/88 *France v. Commission* [1991] ECR I-1223.

competition has been impeded by monopolies. This means, the argument goes, that Article 86(3) is a sufficient basis for imposing the Directive.

In sum, the Court upheld the Commission's power to require that all exclusive rights should be withdrawn, but held that the provision requiring the abolition of special rights was invalid as the Commission had failed to define what such rights consisted of. In addition, the inclusion in the Terminal Equipment Directive of an obligation on telecommunications authorities to finish leasing or maintenance contracts on no more than one year's notice was held to fall outside the powers of the Commission. This provision was annulled by the Court of Justice on the ground that Article 86(3) is only an appropriate legal base when addressed to State measures, whereas this provision concerned the independent commercial behaviour of the telecommunications authorities themselves.

The basic point, nevertheless, is that the substantial content of the Directive remained intact. The fact that the Commission's Directive was not dismissed by the ECJ decision in March 1991 strengthened the position of the Commission to a significant degree and broadened the way in which the Commission could avoid the inter-governmental level in forming the European telecommunications policy.

As in the case of the Equipment Directive, the Services Directive⁴³ was challenged by Spain, Belgium and Italy, with France intervening.⁴⁴ In the light of the judgment in Case C-202/88, the Spanish and Italian challenges were adjusted to focus on the Commission's application of Article 90 to special rights and undertakings, and succeeded. Indeed, confirming its reasoning in Case C-202/88 Terminal Directive, the Court ruled that the provisions relating to special rights were annulled. Again, this was based on the grounds that the Commission had not explained what special rights were nor in what respect the existence of such rights was contrary to the Treaty. Similarly, however, the Court of Justice confirmed the power of the Commission under Article 86(3) to issue Directives specifying obligations resulting from the Treaty, and that the Commission's authority is consequently not restricted to inspecting existing Community regulations.

The basic point of the story is that the Commission, having passed the most

⁴³ Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (hereafter the Services Directive), 90/388/EEC, OJ L192/10, 24.07.1990.

important issues, namely the principles of services liberalisation and separation of operating and regulatory functions, was without any doubt the winner.

The Decisions of the Court of Justice in the “Terminal Equipment and Services Directives” cases cleared the way for the already mentioned reforms which were proposed in the 1992 Review.

3. OPENING UP OF THE MARKETS: LEGISLATIVE MEASURES

3.1. Opening the Market for Radio Equipment and Telecommunications Terminal Equipment

3.1.1. The Terminal Equipment Directive

It should be remembered that, in the 1987 Green Paper, the Commission had declared its intention to open the market for telecommunications terminal equipment to full competition. So, a double approach was adopted with the objective, first, to loosen the grip of national incumbents on the market for telecommunications terminal equipment and, second, to ensure the adoption of measures concerning the mutual recognition of type approval procedures and the harmonisation of technical standards.

The first part of this approach, the abolition of national monopolies, was covered by the 1988 Commission’s Terminal Equipment Directive.⁴⁵ The

⁴⁴ Joined Cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy v. Commission* [1992] ECR I-5833.

⁴⁵ Commission Directive of 16 May 1988 on competition in the markets in telecommunications equipment (hereafter the Terminal Equipment Directive), 88/301/EEC, OJ L131/73, 27.05.1988.

Directive applied to “terminal equipment”, which includes, inter alia, telephone sets, telex terminals, mobile telephones, receive-only satellite stations not reconnected to the public network, data-transmission terminals, PABXs and modems.⁴⁶ The Directive defined terminal equipment as

“equipment directly or indirectly connected to the termination of a public telecommunications network to send, process or receive information. A connection is indirect if equipment is placed between the terminal and the termination of the network. In either case (direct or indirect) the connection may be made by wire, optical fibre or electromagnetically”.⁴⁷

The Directive identified the fact that in most Member States only the national TOs had the right to supply equipment to the user and to connect it to the network. Moreover, the common tactics of these monopoly organizations was to order all their equipment from national suppliers. However, these monopoly rights held by network operators to import, market, connect or service terminal equipment “often go beyond the provision of network utilisation services and extend to the supply of user terminal equipment for connection to the network”.⁴⁸ Also, the increase of types of terminal equipment and the expectation of the various use of terminals “means that users must be allowed a free choice between the various types of equipment available if they are to benefit fully from the technological advances made in the sector”.⁴⁹

Therefore, in order to open up the market for terminal equipment to competition and to abolish the monopoly positions of national TOs, the Directive required the Member States:

- to remove special and exclusive rights in relation to the supply, marketing, connection, bringing into service, and maintenance of telecommunications terminal equipment existing at that time in the Member States;⁵⁰
- to ensure that private suppliers have the right to import, market, connect,

⁴⁶ PABXs are Private Automatic Branch Exchanges which permit a customer to interconnect terminals at his own premises, for example, switchboard systems on business premises. Modems allow the connection of data terminals, including computers, to the telephone network.

⁴⁷ Terminal Equipment Directive, Article 1.

⁴⁸ *ibid.*, at Recital 1.

⁴⁹ *ibid.*, at Recital 2.

⁵⁰ *ibid.*, Article 2.

bring into service and maintain terminal equipment;⁵¹ and

– to ensure that users have access to new public network termination points.⁵²

Also, the Directive required that the type approval rules and procedures are written by a body independent of the public operators. Indeed, the Directive obliged the Member States to assign, by July 1989, the responsibility for drawing up technical specifications, monitoring their application and granting type-approval, to bodies “independent of the public or private undertakings, offering goods and/or services in the telecommunications sector”.⁵³ This measure attempted to obstruct the existing national monopolies from defending their controlling positions by imposing technical requirements which prefer their own equipment or prohibit competitors’ equipment.

3.1.2. The internal market for radio and telecommunications terminal equipment

For companies operating in the late 1980s, the removal of monopolies over the supply of equipment was not enough, given the need to have equipment approved and tested in order to place it onto the market in other Member States. Liberalisation measures therefore had to be accompanied by harmonisation measures in order to ensure the adoption of common technical standards and that the results of testing and type approval carried out in each Member State will be recognised throughout the Community.

Council Directive 86/361/EEC on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment⁵⁴ was the first step in this process of establishing the principle of mutual recognition of test results concerning terminal equipment. This Directive requested CEPT (European Conference of Postal and Telecommunications Administrations) to distinguish

⁵¹ *ibid.*, Article 3.

⁵² *ibid.*, Article 4.

⁵³ *ibid.*, Article 6.

⁵⁴ Council Directive of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, 86/361/EEC, OJ L217/21, 05.08.1986.

those type approval specifications which are used in all of the Member States; and required Member States to accept test results from any other Member State on those common issues in the approval process.

However, because only a limited number of common specifications had been identified, the Directive had little direct impact upon harmonising the type approval process itself. Also, although the results of testing in a Member State could be recognised when applying a national procedure of type approval in another Member State, the actual administrative procedure of type approval should still take place in every Member State where the manufacturer wished to commercialise his product. Thus, because of the fact that the national standards varied between Member States, a product would have to undergo testing in each country where it is to be commercialised to the extent that those standards vary.

As already mentioned, Directive 86/361 was only the first stage for the introduction of the principle of mutual recognition for terminal equipment. Indeed, it was repealed on 6 November 1992, which was the implementation date for Council Directive 91/263 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity.⁵⁵

Directive 91/263 applied the single market concept in that it harmonised only the essential rules and provides for the mutual recognition of national licensing and supervisory procedures which ensure that those rules are complied with. It canceled the obligation for multiple testing and provided that terminal equipment which is authorised in one Member State may be sold and utilised throughout the Community, without having to undergo additional testing and approval procedures.

The mutual recognition procedure starts where the terminal equipment in question fulfills a number of so-called “essential requirements” specified in Article 4 of the Directive. The Directive defines the “essential requirements” (which differ in some respects from the essential requirements in the Terminal Equipment Directive) which must be satisfied before terminal equipment can be placed on the market, such as user safety, the safety of telecom network employees, electromagnetic compatibility, protection of the public network from

⁵⁵ Council Directive of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, 91/263/EEC, OJ L128/1, 23.05.1991.

harm, and inter-working of the terminal equipment with the public network.

So, once the terminal equipment product has been certified as complying with the relevant essential requirements, the manufacturer may fasten the EC mark to it which will allow the product to travel throughout the Community without any limitations, namely without being subject to additional scrutiny. Where terminal equipment has been produced in accordance with harmonised E.C. standards, there is a presupposition of obedience to the above essential requirements.

A producer has the option of selecting between one of two conformity procedures which will have as a result the designation of a CE label for the equipment. Firstly, he can choose to proceed by way of an approved system of full quality guaranty for design, manufacture and final product examination. The system will be subject to inspection by a notified body, which has the authorization to perform unexpected visits. The alternative to this examination proceeding is the EC "declaration of conformity procedure" under which a sample of the terminal equipment concerned is tested and approved, and an EC type examination certificate is issued to the manufacturer.

Directive 91/263 was supplemented by another Council Directive which was adopted in October 1993 and introduced mutual recognition for type approval of satellite earth-station equipment.⁵⁶ In the framework of that Directive, appropriate type-approval arrangements were put in place for television receive-only equipment, Very Small Aperture Terminals (VSAT), and satellite personal communications services. Since 1998, Directive 91/263/EEC has been consolidated with Directive 93/97/EEC in Directive 98/13/EC.⁵⁷

On 9 March 1999 the Council and the European Parliament adopted the Radio Equipment & Telecommunications Terminal Equipment (R&TTE) Directive.⁵⁸ This new Directive replaced Directive 98/13/EC as well as hundreds of national approval regulations in this field. The R&TTE Directive came into force in 8 April 2000.

The new Directive will complete the internal market for R&TTE. Indeed, its

⁵⁶ Council Directive of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment, 93/97/EEC, OJ L290/01, 24.11.1993.

⁵⁷ Directive 98/13/EC of the European Parliament and of the Council of 12 February 1998 relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity, OJ L 074, 12.03.1998.

⁵⁸ Directive 99/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (hereafter R&TTE Directive), OJ L91/10, 07.04.1999.

scope is substantially enlarged to cover not just telecommunications terminal equipment but also (for the first time) radio equipment. The Directive will substantially deregulate approval procedures, reduce the regulatory requirements on equipment, and no longer permit co-existing national approval regulations. In particular, the Directive removes the requirement for conformity with a harmonised standard as the condition of free movement. Moreover, it replaces the current system (which relied on mutual recognition of approvals based on third party testing and certification) with a more liberal system which will require only a declaration by the manufacturer that the product met the requirements in Community legislation. Finally, it will put more emphasis on market surveillance and manufacturers liability.

3.2. The Liberalisation of Telecommunications Services and Infrastructure

3.2.1. Services other than public voice telephony

The Commission's attempt to open the telecommunications services market to competition started with the so-called Services Directive adopted in 1990.⁵⁹ The Services Directive required the abolition of special and exclusive rights granted by Member States to Telecommunications Organisations (TOs) for the supply of value-added services by the end of 1990 and data services by 1 January 1993. The Directive did not apply to voice telephony, telex, mobile radiotelephony, paging and satellite services.⁶⁰ However, by defining very narrowly the scope of the monopoly over voice telephony, the Directive liberalised voice telephony services other than those provided for the general public, e.g. voice service for corporate communications or so-called closed user groups.

The fact that basic voice telephony was left as a reserved service was a very significant concession, bearing in mind that voice telephony accounted for

⁵⁹ Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (hereafter the Services Directive), 90/388/EEC, OJ L192/10, 24.07.1990.

⁶⁰ Services Directive, Articles 1.2 and 2.

some 90 per cent of the EC telecommunications market. The Services Directive defined voice telephony 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”.⁶¹

The fact that the Directive did not require the abolition of the national monopolies over voice telephony was justified as the only way to secure the provision of a telecommunications network on a universal basis. The Directive noted that opening voice services to competition would threaten the financial stability of the incumbent TOs, given their infrastructural duties.⁶²

In view of the introduction of competition, and given the fact that at the time both operational and regulatory functions were accumulated by the TOs, the Services Directive required the Member States to ensure that regulatory functions are entrusted to a body independent of the national telecommunications organisations.⁶³ Supplemented by the committee procedures of the open network provision legislation, this created a network of national regulators and, in effect, a new regulatory regime for the sector.

As will be seen below, subsequent liberalisation has been introduced by amending the Services Directive to expand the scope of the activities in the liberalised area.

3.2.2. The Satellites Directive

On 13 October 1994 the Commission adopted the Satellites Directive⁶⁴ which abolished special and exclusive rights for the provision of satellite services and equipment by the end of 1994. The Directive amended the Services and Terminal Equipment Directives and extended them in order to require Member States to liberalised satellite earth stations and satellite network and

⁶¹ *ibid.*, Article 1.

⁶² *ibid.*, at Recital 18.

⁶³ *ibid.*, at Article 7.

communications services (save voice telephony). In addition to being required to abolish such special and exclusive rights, Member States had also to take the necessary measures to ensure that any operator is entitled to supply any telecommunication service except voice telephony.⁶⁵

It is important to note that the Satellites Directive reinserted a full definition of 'special rights' into Directives 88/301 and 90/388. This step was taken following two already mentioned judgments of the European Court of Justice,⁶⁶ which annulled the provisions of Directives 88/301 and 90/388 insofar as they required the withdrawal of special rights, on the grounds that the Commission had not explained what special rights were nor in what respect the existence of such rights was contrary to the Treaty. The result of those judgments was that, although Member States were required to abolish exclusive (namely, monopoly) rights granted to telecommunications operators, Member States could limit the number of telecommunications operators authorised to provide a service or could grant special privileges to selected telecommunications operators, giving them an unfair advantage over others.

In order to circumvent the effects of those judgments, and to give the broadest possible scope to the liberalisation of the telecommunications services sector, the Satellites Directive gave a very broad definition to 'special rights'. Indeed, the concept of special rights turned effectively on the discretionary nature of the procedure by which they are granted. Thus an undertaking is to be considered to have special rights if it is designated as one of a limited number authorised to undertake a particular activity or is given a legal or regulatory advantage over its competitors, otherwise than in accordance with objective, proportional and non-discriminatory criteria.⁶⁷

In addition, the failure of the Terminal Equipment and Services Directives to indicate in what respect the existence of special rights was contrary to the Treaty was remedied. Indeed, the preamble to the Satellites Directive stated that when the number of undertakings authorised to provide satellite telecommunications services is limited by a Member State through special rights, this constitutes a restriction that could be incompatible with Article 59

⁶⁴ Commission Directive of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications (hereafter the Satellites Directive), 94/46/EEC, OJ L268/15, 19.10.1994.

⁶⁵ See Article 2 of the Services Directive as replaced by Article 2.2(a) of the Satellites Directive.

⁶⁶ Case C-202/88 *France v. Commission* [1991] ECR I-1223, Joined Cases C-271/90, C-281/90 and C-289/90 *Spain and Others v. Commission* [1992] ECR I-5833.

[now Article 49] of the Treaty (free circulation of services).⁶⁸ This is the case whenever such a limitation is not justified by essential requirements because these rights prevent other undertakings from supplying (or obtaining) the services concerned to (or from) other Member States. Such requirements could be the effective use of the frequency spectrum and the avoidance of harmful interference. Consequently, provided that a satellite service satisfies the essential requirements applicable to satellite communications, any undertaking should be authorised to provide such a service and Member States cannot limit the number of operators authorised to provide satellite services.

3.2.3. Cable Television Networks

On 18 October 1995 the Commission took the first step to liberalise networks and adopted a Directive concerning the opening of cable television networks for the provision of telecommunications services.⁶⁹ The Cable-TV Directive amended the Services Directive so as to require Member States to withdraw restrictions on the supply of transmission capacity via cable TV networks and to allow operators to offer all telecommunications services (save voice telephony which will not be liberalised until 1998) over cable TV networks from 1 January 1996.

The recitals of the Directive were lengthy and comprehensive, trying to explain how the Commission hoped the Cable TV Directive was going to work in practice as well as the role of alternative networks in promoting competition. It was pointed out that Member States were placing regulatory restrictions on use of alternative infrastructure for the provision of liberalised services. These restrictions were considered to be the main cause of a continuing bottleneck. This meant that in every Member State there was one telecommunications organisation holding a dominant position and, therefore, competitive service

⁶⁷ Article 2.1(a)(ii) of the Satellites Directive, inserted in Article 1 of the Services Directive.

⁶⁸ See Recital 12 of the Satellites Directive.

operators were dependent on the facilities of these dominant telecommunications organisations. The results of these barriers were high prices (both for leased lines and ultimately to the consumer) and discouragement of investment for the establishment of hybrid multimedia networks.

The Cable-TV Directive tackled the aforementioned problem by opening up an alternative transmission media in competition with the traditional TO networks. This aimed to bring down the cost of leased lines for the provision of value-added telecommunications services as operators would no longer have to rely solely on the TO's networks. It would also enable cable TV companies to compete directly with the TOs and strengthen their position on the future converging multi-media/telecommunications markets. Moreover, the Directive hoped to provide incentives for the accelerated development and distribution of multimedia telecommunications services, such as video on demand, home-shopping, home-banking and interactive video games.

The Directive was structured as an amendment to the Services Directive and its operative part started by replacing the definition of 'telecommunications services' with "services whose provision consists wholly or partly in the transmission and/or routing of signals on a telecommunications network".⁷⁰ This change was necessitated by the possible confusion resulting from the original Services Directive definition as excluding radio-broadcasting. If radio-broadcasting was excluded then it could be possibly argued that cable TV networks carrying such services might likewise not qualify as telecommunications networks. There was also a new definition of 'cable TV networks' as consisting of "any wire-based infrastructure approved by a Member State for the delivery or distribution of radio or television signals to the public".⁷¹

The focal point of the Directive was its amendment of Article 4 of the Services Directive by obliging 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

⁶⁹ Commission Directive of 18 October 1995 amending Directive 90/388/EC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services (hereafter the Cable TV Directive), 95/51/EC, OJ L 256/49, 26.10.1995.

⁷⁰ Article 1.1(a) of the Cable TV Directive, inserted in Article 1 of the Services Directive.

⁷¹ Article 1.1(b) of the Cable TV Directive, inserted in Article 1 of the Services Directive.

voice telephony”.⁷² This clarified that the Directive was not to be used to liberalise voice telephony prior to 1998.

The Directive also required Member States to ensure that interconnection of cable TV networks with the public telecommunications network, leased lines and other cable TV networks is made possible.⁷³

Furthermore, there was an obligation for Member States to take the necessary measures to “ensure accounting transparency and to prevent discriminatory behaviour”, by undertakings having exclusive rights in telecommunications also providing cable TV infrastructure. Separation of financial accounts of the activities was required. Reciprocally, in cases where cable TV companies were owned by TOs, the Directive required accounting transparency and separation between the two businesses where the turnover of the TOs exceeds 50 million ECU.⁷⁴

Finally, it was stated that the Commission would review the situation in the light of the Directive’s objectives before 1 January 1998, in order to assess whether accounting separation (between TOs and their cable TV businesses) was sufficient to avoid abuse of dominant position.⁷⁵

The results of this review were contained in a Commission Communication adopted on 17 December 1997.⁷⁶ The Communication concluded that ownership of both telecommunications and cable TV networks could be a major brake on the future development of multimedia markets. The Commission expressed dissatisfaction with the limitations of accounting separation – characterised as “an insufficient measure”⁷⁷ – and concluded that the legal separation of cable interests and the incumbents’ telephone networks where there is cross-ownership had a “walling off effect between the two operations”⁷⁸ and, therefore, should be implemented.⁷⁹

As a result of the Communication on the Cable Review, the Commission

⁷² Article 1.2 of the Cable TV Directive, inserted in Article 4 of the Services Directive.

⁷³ *ibid.*

⁷⁴ Article 2 of the Cable TV Directive.

⁷⁵ *ibid.* See also Article 9 of the Services Directive as inserted by Article 1.9 of the Full Competition Directive.

⁷⁶ 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, 98/C71/EC, OJ C 71/4, 7.3.1998.

⁷⁷ *ibid.*, at para. 55.

⁷⁸ *ibid.*, at para. 77.

⁷⁹ *ibid.*, at para. 56.

adopted on 23 June 1999 a Directive⁸⁰ which required the legal separation (but not divestiture) of telephone and cable interests. As the Cable Ownership Directive stated:

“Each Member State shall ensure that no 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 public telecommunications networks and public voice telephony services; and (c) operates a cable TV network established under special or exclusive right in the same geographic area”.⁸¹

3.2.4. The Mobile Directive

In January 1996 the Commission adopted a Directive to liberalise the mobile and personal communications market. The Mobile Directive⁸² amended further the Services Directive to include mobile communications which had so far been specifically excluded from its scope.

The objective of the Directive was to help level the competitive playing field between the incumbent fixed-line providers and wireless operators. The Commission also believed that the Directive would result in greater numbers of providers and a variety of services offered. Thus the Mobile Directive required the removal of any remaining special and exclusive rights in the mobile sector by February 1996.

The Commission regarded the restrictions on use of and access to infrastructure as one of the most important constraints on the provision of mobile telephony. Indeed, incumbents can effectively control the availability

⁸⁰ Commission Directive 1999/64/EC of 23 June 1999 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, (hereafter the Cable Ownership Directive), OJ L 175/39, 10/07/1999.

⁸¹ Cable Ownership Directive, at Article 1.

⁸² Commission Directive of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communication (hereafter the Mobile Directive), 96/2/EC, OJ L20/59, 26.01.1996.

and price of wireless service if the mobile providers must lease lines from the incumbent. This happens not only because a mobile network may include fixed links but also because the mobile network must be connected to the national fixed network to allow calls from the mobile network to be routed to the fixed network (and vice versa). Since infrastructure in Member States was provided under an exclusive privilege granted by national legislation to one national operator, that operator had had vital control over the cost structure of the mobile operator.

The Mobile Directive dealt with this issue by requiring Member States to lift all restrictions on wireless operators providing their own infrastructure, obtaining infrastructure from other sources, or sharing infrastructure, facilities, and sites.⁸³ So, mobile operators were allowed (within the framework of their licences) to build and use their own infrastructure or microwave links or to turn to existing alternative network providers, rather than relying on the networks provided by the national fixed network operator. Furthermore, the Mobile Directive required Member States to lift any restrictions on interconnection.⁸⁴ This means that mobile operators could have the right to interconnect directly with mobile or fixed networks in other Member States, rather than having to interconnect via the incumbent operator in their home State. Interconnection conditions had to follow the standard Community principles of objectivity, transparency, non-discrimination, and proportionality.

Moreover, the Directive noted that frequencies are a crucial bottleneck resource and that Member States have used the lack of available frequencies as an excuse for their refusal to issue mobile licences. It required, therefore, the licence allocation process to be based on objective, transparent, and non-discriminatory criteria, and made clear that technical restrictions are not to be used as an excuse to prevent operators from combining licensed services or frequencies. The number of licences may be limited only on the basis of essential requirements, on lack of radio spectrum, and if the measure is proportionally justified. 'Essential requirements' include availability of frequency, security of the network and maintenance of its integrity and interoperability, protection of data, including private personal data, as well as environmental and town planning considerations.⁸⁵

⁸³ Article 1.3 of the Mobile Directive, inserted as Article 3c in the Services Directive.

⁸⁴ Article 1.3 of the Mobile Directive, inserted as Article 3d in the Services Directive.

⁸⁵ Article 1.1(b) of the Mobile Directive, inserted in Article 1 of the Services Directive.

Finally, the Mobile Directive required Member States to issue licences for DCS 1800 service (nowadays called GSM-1800) when the European Radiocommunications Committee adopts a decision on allocation of DCS 1800 frequencies or at the latest by 1 January 1998.⁸⁶

3.2.5. The Full Competition Directive

Following the political agreement amongst Member States to liberalise all telecommunications services (including voice telephony) and telecommunications infrastructure by 1 January 1998 (with transition periods for certain Member States with less developed or very small networks), the Commission adopted in February 1996 the Full Competition Directive.⁸⁷

The Directive provided for the early liberalisation of alternative telecommunications networks from July 1996,⁸⁸ and set the deadline of 1 January 1998 for full liberalisation⁸⁹ as well as a mechanism for requesting additional transitional periods.⁹⁰ In addition, it set out a range of provisions addressing licensing, universal service, interconnection, and numbering, which established basic regulatory principles. These principles have now been complemented by the detailed harmonised framework.

In particular, the Directive required interconnection to the voice telephony service and public switched telecommunications networks to be granted on non-discriminatory, proportional and transparent terms, and based on objective criteria. It provided that the parties should first attempt to negotiate commercially terms of interconnection agreements, but if they are unable to reach agreement, the Member States are to adopt a decision setting the individual terms of interconnection. And it required Member States to publish, by 1 July 1997, the terms and conditions for interconnection to the basic

⁸⁶ Article 2.1 of the Mobile Directive.

⁸⁷ Commission Directive of 13 March 1996 amending Commission Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (hereafter the Full Competition Directive), 96/19/EC, OJ L74/13, 22.03.1996.

⁸⁸ Article 1.2 of the Full Competition Directive, inserted as Article 2.2 in the Services Directive.

⁸⁹ *ibid.*

⁹⁰ *ibid.*

functional components.⁹¹

As far as the licensing regime is concerned, it was underlined that licensing conditions must be in accordance with the principle of proportionality. In particular, the number of licences issued may only be limited on the basis of a restricted number of essential requirements. The Directive required Member States to notify the relevant licensing procedures to the Commission by January 1997, and to publish the licensing conditions and declaration procedures by July 1997.⁹² Any telecommunications services falling outside of the definition of voice service, public networks or networks using radio frequencies must only be subject to a general authorisation or declaration process instead of individual licences.⁹³ There was nothing in the Directive setting up a one-stop shop for Community telecommunications licensing. The Commission was satisfied at that stage merely to set the broad outlines of what an acceptable Member State licensing regime might look like. Harmonisation aspects of licensing were covered by the Licensing Directive.⁹⁴

With regard to universal service, instead of continuing the subsidy system of high prices for business service and low prices for residential service, the Commission envisaged its replacement by one of two methods. A type of subsidy could be continued through the rates of the dominant providers, with a supplementary charge being paid by all telecommunications providers in proportion to markets share. A universal service fund could also be established, presumably directly to subsidise low-income or rural telephone customers. Whichever universal service scheme was selected by the Member States, it would have to be notified to the Commission so that it could be reviewed for compatibility with Treaty principles. As a part of universal service provision, the existing telecommunications organisations were to be allowed to rebalance their tariffs to reflect more accurately the cost of providing the service. In doing so, they should take account of specific market conditions and the need to ensure the affordability of universal service. As the Commission stated, Member States must allow TOs to

⁹¹ Article 1.6 of the Full Competition Directive, inserted as Article 4a in the Services Directive.

⁹² Article 1.3 of the Full Competition Directive, replacing Article 3 of the Services Directive.

⁹³ Article 1.2 of the Full Competition Directive, inserted as Article 2.3 in the Services Directive.

⁹⁴ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (hereafter the Licensing Directive), OJ L117/15, 7.5.1997.

“adapt current rates which are not in line with costs and which increase the burden of universal service provision, in order to achieve tariffs based on real costs. Where such rebalancing cannot be completed before 1 January 1998 the Member States concerned shall report to the Commission on the future phasing out of the remaining tariff imbalances. This shall include a detailed timetable for implementation”.⁹⁵

The purpose of the Directive was to create early certainty with regard to national legislation and the rights and obligations of market players in the liberalised telecommunications environment. Although the Directive did not call for immediate competition in basic voice telephone services, the Commission was convinced that other actions such as the allowance of use of alternative infrastructure would reduce telecommunications prices and smooth the transition to complete telecommunications competition in 1998.

4. THE FRAMEWORK FOR HARMONISED REGULATORY PRINCIPLES: LEGISLATIVE MEASURES

4.1.1. The ONP Framework Directive

Alongside the Article 86 Directives, a series of Council and European Parliament Directives, adopted under Articles 95 (internal market) and 47 and 55 (freedom to provide services), have put in place detailed harmonised regulation to ensure that the aims and principles set out in the Article 86 Directives are upheld.

The main principle behind these harmonisation Directives is the concept of Open Network Provision (ONP). This concept – introduced with the 1990 ONP Framework Directive⁹⁶ – seeks to promote the single market in

⁹⁵ Article 1.6 of the Full Competition Directive, inserted as Article 4c in the Services Directive.

⁹⁶ Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (hereafter the 1990 ONP Framework Directive), 90/387/EEC, OJ L192/1, 24.7.1990.

telecommunications by harmonising the conditions for access to and use of publicly available networks and services. The aim of these ONP conditions is to ensure a minimum set of services, to secure access and interconnection, to harmonise standards for technical interfaces of networks, and to ensure universal service. The harmonised ONP conditions must comply with a number of basic principles, namely that they must be based on objective criteria, be transparent and published adequately, must guarantee equality of access and be non-discriminatory. These principles apply to the actions of both regulators and market players and set the basis for fair and even-handed regulation and commercial conduct in a liberalised telecommunications market.

Being a Framework Directive, the 1990 ONP Directive provided the general basis for the adoption of further Directives dealing specifically with different types of services. Thus Annex I of the Directive listed a number of the areas for which ONP conditions will be developed, and set a timetable for the Commission's future proposals and legislative action. The areas listed were: leased lines, packet switched data services, integrated services digital network (ISDN), voice telephony, telex, and mobile services.

The revised version of the ONP Framework Directive⁹⁷ took account of the fact that the initial programme has been achieved. It adapted the ONP concept to address the issues of open access to publicly available telecommunications networks and services in a competitive environment. It recognised that a voluntary approach to harmonisation is in general appropriate in a competitive context, whilst emphasising the key importance of maintaining and developing universal service and the need for mandatory requirements in those areas where market forces alone are not sufficient to meet European policy goals.

In particular, the revised Directive established the independence of the NRAs in those cases where a Member State continues to retain ownership or a significant degree of control of organisations providing telecommunications networks and/or services. This is achieved by requiring effective structural separation between NRAs and activities associated with ownership or control of organisations providing telecommunications networks, equipment or services.

ONP measures apply to organisations providing public telecommunications

⁹⁷ Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, OJ L295/23, 29.10.1997.

networks and/or services in a way that reflects an organisation's position in the relevant market. The entities covered are set in the specific ONP Directives (Leased Lines, Voice Telephony, and Interconnection). The revised ONP framework laid down sector-specific *ex ante* rules which provide predictability for market players and complement the more general competition rules of the Treaty.

4.1.2. The Leased Lines Directive

The ONP Framework Directive provided the basis for Directive 92/44/EEC,⁹⁸ which extended the principles of objectivity, transparency and non-discrimination to leased lines. The provision of high capacity leased lines is particularly significant for the progress of technically advanced competitive services.

The leased lines Directive aimed to ensure the availability throughout the Union of a minimum set of analogue and digital leased lines up to 2 Mbit/s with harmonised technical characteristics. It also aimed at eliminating technical restrictions for the interconnection between leased lines and public telecommunications networks.

Further measures concerned the establishment of "one-stop" procedures for ordering and billing. Under those procedures, a user who wants to use leased-lines which cover more than one Member State will have to deal only with one telecommunications authority. In addition, it required the availability of information on technical characteristics, tariffs, supply and usage conditions, licensing and declaration requirements, and conditions for the attachment of terminal equipment. Moreover, there was a requirement for implementation of cost accounting systems by TOs in order to assess compliance with the basic principle of cost orientation of tariffs. Finally, Article 8 of the Directive required Member States to set up a dispute settlement procedure by a working group of the ONP committee. It provided for non-binding arbitration for those disputes which cannot be resolved at the national level or involve operators in more than

⁹⁸ Council Directive of 5 June 1992 on the application of open network provision to leased lines, 92/44/EEC, OJ L165/27, 19.6.1992.

one Member State.

In 1997 the leased lines Directive was revised⁹⁹ to ensure that, in a competitive market, at least one operator is responsible for offering a minimum set of leased lines at any particular location within a Member State, and that leased lines (whether within the minimum set or not) are supplied on the basis of certain defined conditions. In order to avoid over-regulation, this obligation-to-provide was placed only on organisations with significant market power, unless there was no SMP organisation in the area concerned. Moreover, the revised Directive provided for tariff regulation to be set aside by NRAs once no organisation has significant market power in a specific market. The Directive had to be transposed into national law by 1 January 1998.

4.1.3. The Voice Telephony Directive

The original Directive on the application of ONP to voice telephony services was adopted by the European Parliament and Council in December 1995.¹⁰⁰ A new Directive¹⁰¹ on Voice Telephony was adopted on 26 February 1998 and has replaced the 1995 Directive.

In the revised Voice Telephony Directive universal service was defined as a “minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price”.¹⁰²

The Directive required Member States to ensure that at least one organisation is responsible for meeting all reasonable requests for connection to the fixed public telephone network at a fixed location and access to fixed

⁹⁹ Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purposes of adaptation to a competitive environment in telecommunications, OJ L295/23, 29.10.1997.

¹⁰⁰ European Parliament and Council Directive of 13 December 1995 on the application of open network provision (ONP) to voice telephony, 95/62/EC, OJ L321/6, 30/12/1995.

¹⁰¹ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (replacing European Parliament and Council Directive 95/62/EC) (hereafter the Revised Voice Telephony Directive), OJ L101/24, 01.04.1998.

¹⁰² The Revised Voice Telephony Directive, Article 2.2(f).

public telephone services. However, Member States were entitled, if necessary, to designate one or more operators so that the universal service is delivered throughout the national territory.¹⁰³

The Directive contained the precise elements to be included in the universal service. In particular, designated providers must provide a connection to the public fixed telephone network that is capable of allowing users to make and receive national and international calls and supporting voice telephony, facsimile and data transmission via modems.¹⁰⁴ Member States must also ensure the provision of public pay telephones¹⁰⁵ and may, where appropriate, take specific measures for customers with disabilities or with special social needs.¹⁰⁶

In addition to the package of universal services to be provided to consumers, the Directive specified a range of obligations which fall on different categories of operators. In particular, the Directive distinguished between fixed and mobile operators and placed on the latter only five obligations. Thus mobile operators are required to provide: directory and enquiry services;¹⁰⁷ access to operator assistance and enquiry services;¹⁰⁸ free access to emergency services;¹⁰⁹ a contract which specifies the service to be provided;¹¹⁰ and publication of adequate and up-to-date information on standard terms and conditions.¹¹¹

Designated universal service providers and fixed operators with significant market power are subject to additional obligations. These include: keeping and publishing records of their performance levels (performance is measured against the quality parameters set out in Annex III of the Directive);¹¹² itemised billing, tone dialling and selective call barring;¹¹³ the provision of additional facilities (calling line identification, direct dialling-in and call forwarding);¹¹⁴ cost-

¹⁰³ *ibid.*, Article 5(1).

¹⁰⁴ *ibid.*, Article 5(2).

¹⁰⁵ *ibid.*, Article 7.

¹⁰⁶ *ibid.*, Article 8.

¹⁰⁷ *ibid.*, Article 6.

¹⁰⁸ *ibid.*, Article 9(b).

¹⁰⁹ *ibid.*, Article 9(c).

¹¹⁰ *ibid.*, Article 10(1).

¹¹¹ *ibid.*, Article 11(1).

¹¹² *ibid.*, Article 12(2) and (3).

¹¹³ *ibid.*, Article 14(1).

¹¹⁴ *ibid.*, Article 15(1).

oriented pricing and unbundling of services;¹¹⁵ and cost-accounting principles.¹¹⁶ It should be noted that the Directive categorises the fixed operators in such a way that only providers of voice telephony services, who either have significant market power or have been designated universal service providers with significant market power, are required to provide the additional facilities set out in Article 15 of the Directive.

The Directive did not attempt to specify in detail what is meant by 'affordable' in the universal service definition. Instead, due to the different economic and social conditions which apply across the EU, it was decided that it should be a matter of national competence in order to ensure that specific local policy and priorities are efficiently addressed. But NRAs are required to publish the rules and criteria for ensuring affordability,¹¹⁷ and the Commission examines the evolution of universal service, in terms of scope, level, quality and affordability, by publishing regular reports.¹¹⁸

In order to ensure affordability, the Directive required Member States to have special regard to prices in rural or high cost areas¹¹⁹ and to allow the offer of special price schemes¹²⁰ (e.g. packages which can offer security and alternatives to customers without a phone and to those on low incomes who are careful at budgeting). However, where such schemes are offered, they must be in accordance with the principles of transparency and non-discrimination.¹²¹

Finally, the Directive adopted a flexible approach by moving to a policy of no disconnections for customers with temporary payment difficulties.¹²² As an alternative to a fully disconnected service, it required Member States to introduce packages which, for instance, will offer an outgoing calls barred service with an agreed repayment plan. The scheme will remain in place until any outstanding debt has been paid back over an agreed reasonable period. After the debt has been repaid, the customer can revert to the full service package. Operators will be entitled to proceed with complete disconnection

¹¹⁵ *ibid.*, Article 17(2) and (4).

¹¹⁶ *ibid.*, Article 18.

¹¹⁷ *ibid.*, Article 3(1)(d).

¹¹⁸ See for instance the 1st Monitoring Report on Universal Service in Telecommunications in the European Union, COM(98) 101, 25.2.1998.

¹¹⁹ The Revised Voice Telephony Directive, Article 3(1)(b).

¹²⁰ *ibid.*, Article 3(1)(c).

¹²¹ *ibid.*, Article 3(1)(d).

only in specific cases (e.g. fraud) and only after due warning is given to the subscriber beforehand.¹²³

4.1.4. The Interconnection Directive

Interconnection is essential to a competitive market and the terms on which is granted are key to the economics of a TO's operation. In addition, interconnection allows new market entrants access to existing end-users on a basis which will encourage increased investment and market growth in the telecommunications services sector.

The Interconnection Directive¹²⁴ was adopted in 30 June 1997 with the aim to ensure 'any-to-any communication' and to strike an appropriate balance between the rights and obligations of players in accordance with their relative positions in the market. For this reason, it provides that certain operators (Annex II operators) have rights and obligations to negotiate interconnection with each other.¹²⁵ Those operators who fall into Annex I, i.e. operators with significant market power (SMP) having basically 25 % or more of a relevant market, must offer interconnection to a licensed operator when requested to do so.¹²⁶

Member States are obliged to impose specific obligations on those TOs who are notified as having SMP, requiring them to comply with the principles of non-discrimination, transparency and cost-orientation. Such TOs must apply, for example, similar interconnection conditions in similar circumstances to all organisations providing similar services¹²⁷ and to publish all necessary information that an organisation pursuing interconnection may require to

¹²² *ibid.*, Article 21(a).

¹²³ *ibid.*, Article 21(b).

¹²⁴ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (hereafter the Interconnection Directive), OJ L199/32, 26.7.1997, as amended by Directive 98/61/EC (OJ L268/37, 3.10.1998).

¹²⁵ Interconnection Directive, Article 4(1).

¹²⁶ *ibid.*, Article 4(2).

facilitate conclusion of an interconnection agreement.¹²⁸ In addition, they must publish a Reference Interconnection Offer (RIO) setting out the operator's interconnection services and respective tariffs.¹²⁹ Charges for interconnection must also respect the principles of transparency and cost orientation, which means, inter alia, that interconnection tariffs have to be "sufficiently unbundled, so that the applicant is not required to pay for anything not strictly related to the service requested".¹³⁰

When telecommunications operators have a vertically integrated character – e.g. when they are dominant in the supply of network services and at the same time they are enhanced services providers – regulation is needed to deliver the requisite checks and balances. One of those regulatory controls is the obligation for accounting separation.¹³¹ This requirement refers to the preparation of separate accounts for the company's different units so that the costs and revenues associated with each business (and transfers between them) can be separately identified and properly allocated, so ensuring that there are no unfair cross subsidies.

Moreover, the Directive stipulates that NRAs have certain powers and duties in relation to interconnection and may, where justified:

- impose changes to the reference interconnection offer (these may be retrospective in effect);
- set conditions for interconnection;
- intervene in negotiations about interconnection on their own initiative at any time, and must do so if requested by either party, in order to specify issues which must be covered in an interconnection agreement; and
- set time limits for negotiations on interconnection.¹³²

In the event of a dispute in which a party requests NRA intervention, the NRA must take steps to resolve the dispute within six months of the request.¹³³ NRAs exercising their responsibilities must, amongst other things, take into account the need to give the maximum benefit to end-users by stimulating a

¹²⁷ *ibid.*, Article 6(a).

¹²⁸ *ibid.*, Article 6(b).

¹²⁹ *ibid.*, Article 7(3).

¹³⁰ *ibid.*, Article 7(4).

¹³¹ *ibid.*, Article 8.

¹³² *ibid.*, Article 9.

¹³³ *ibid.*, Article 9(5).

competitive market and ensuring satisfactory end-to-end communications for end-users.

In addition to the Directive, the Commission has adopted a Recommendation on Interconnection in a liberalised telecommunications market. Part 1 of the Recommendation, dealing with Interconnection pricing, was adopted on 8 January 1998.¹³⁴ It recommended the use of forward-looking long run incremental costs as the most appropriate model for interconnection pricing in a newly liberalised market and for meeting the requirement in the Interconnection Directive for cost oriented interconnection charges. The Recommendation was updated in 29 July 1998¹³⁵ to provide the latest figures on interconnection charges throughout the European Union.

4.1.5. The Licensing Directive

The licensing regime in the telecommunications sector is covered by the Licensing Directive¹³⁶ which provides the legal basis for supervising access to the market and for monitoring compliance with the requirements imposed on operators.

The most important issues of the Directive are three in number. First, the prohibition of any constraint in the number of new entrants. The only justifying restrictions are limited, *inter alia*, to security of network operations, maintenance of network integrity, interoperability, protection of data, and scarce resources – the last linked mainly with the efficient use of the frequency spectrum.¹³⁷ However, the reasons for these restrictions must be made public, be objectively justified, and based on non-discriminatory, proportionate and transparent criteria. Second, there is clearly a preference for moving away from individual licences and detailed licence provisions – “the introduction of

¹³⁴ Commission Recommendation of 8 January 1998 on Interconnection in a liberalised market – Part I: Interconnection Pricing, 98/195/EC.

¹³⁵ Commission Recommendation 98/511/EC of 29 July 1998 amending Commission Recommendation 98/195/EC. OJ L228/30, 15.08.1998.

¹³⁶ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (hereafter the Licensing Directive), OJ L117/15, 7.5.1997.

¹³⁷ Licensing Directive, at Article 2(1)(d).

individual licensing systems should be restricted to limited, pre-defined situations”¹³⁸ – and heading instead towards general authorisations (which are associated with the absence of an explicit decision and a prior approval by the national regulatory authority).¹³⁹ Third, the Directive provides security for new entrants by setting up time limits and other procedural demands and by establishing harmonised principles which Member States have to implement through their national regulatory authorities. So, for instance, the Directive refers to the conditions which are allowed to be attached to general authorisations and individual licences,¹⁴⁰ it requires that those conditions are objectively justified and based on the principles of non-discrimination, proportionality and transparency,¹⁴¹ and it states that licence fees should cover only the administrative costs, be published and proportionate to the work entailed.¹⁴²

5. CONCLUSIONS

This chapter dealt with the **first phase** of the transition from a regime of a State-run monopoly to an effectively competitive market. This phase was associated with an attempt to introduce competition in the telecommunications market (namely the opportunity granted to new market players to compete against the incumbent operators), combined with a higher degree of harmonisation in order to maximise the opportunities offered by a single EU market. Thus, the first target, i.e. lifting regulatory restrictions and abolishing legal monopolies, has been achieved. In 1 January 1998, most of the EU countries have liberalised their telecommunications markets and opened the gates for new companies to enter the playing field and challenge the incumbents.

¹³⁸ *ibid.*, at Recital 13.

¹³⁹ *ibid.*, at Article 2(1)(a).

¹⁴⁰ *ibid.*, at Articles 3(2), 8(1), and Annex.

¹⁴¹ *ibid.*, at Articles 3, 4 and 8.

¹⁴² *ibid.*, at Articles 6 and 11.

The first phase, therefore, was completed: a network of national regulators and, in effect, a new regulatory regime for the sector was created. At the same time, however, it was realised that the market power which is enjoyed by the former State undertakings must be circumscribed by regulation. Therefore, this is not the end of the process. On the contrary, it is the beginning of crucial and difficult tasks which lie ahead for competition and regulatory authorities alike. It would be naive to argue that competition will automatically emerge following liberalisation. Indeed, liberalisation should not be equated with competition; it is in fact a necessary but not a sufficient condition for competition.

The introduction of real competition implies much more than the translation into national law of Directives abolishing legal monopolies in the Member States. Full liberalisation would be meaningless without the vigorous enforcement of the rules of competition. Alongside the measures taken by the national regulatory authorities, therefore, the application of competition law comes to the forefront in order to ensure that, once removed, the legal barriers will not be replaced by new anti-competitive market structures and de facto monopolies.

This is exactly the aim of Part II of this thesis. In particular, Chapter 2 focuses on specific abusive behaviour of the incumbents aimed at preserving their position against newcomers, and examines how competition law can deal with such cases. Chapter 3 analyses the EU competition policy on the strategic alliances and mergers which are spurred on by the accelerating change of markets with the convergence of the telecommunications, media and information technology sectors.

PART II

THE APPLICATION OF EU COMPETITION POLICY AND LAW TO THE COMMUNICATIONS SECTOR

Chapter 2

Access Agreements in the Telecommunications Sector

*Refusal to Supply and the Essential Facilities Doctrine under
EU Competition Law*

Access is becoming the central issue in the telecommunications, media and information technology market and the way in which competition law applies to the players within it. This is why, in August 1998, the Commission published a Notice on the application of the competition rules to access agreements in the telecommunications sector.¹

This Chapter is concerned with the competition issues which can emerge in the telecommunications sector due to the incumbents' desire to retain their key bottleneck positions. It is divided into three sections. The introductory section tries to identify and outline the Commission's objectives in the telecommunications sector. The second and third sections discuss the jurisprudence of the ECJ involving cases of refusal to supply and the Commission's essential facilities cases respectively and attempt to define to what extent Article 82 (ex 86) of the Treaty is applicable to the control of bottlenecks.

The purpose of this Chapter is to examine whether or not the 1998 Access Notice reflects the Commission's policy in the telecommunications sector and in particular whether it succeeds in promoting the Commission's objectives, namely a policy fostering both infrastructure-based and services-based competition, encouragement of new entry and promotion of innovation as well as legal certainty and predictability.

¹ Commission's Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (hereafter the Access Notice), [1998] O.J. C265/2, 22.08.1998.

1. INTRODUCTION

The Services Directive² (which provided for the removal of special and exclusive rights granted by Member States to TOs for the supply of value-added and data services), the Satellite Directive³ (which abolished special and exclusive rights for the provision of satellite services and equipment), the Cable Directive⁴ (which lifted restrictions on cable TV network usage and allowed new multi-media telecommunications services to be offered over cable TV networks), the Mobile Directive⁵ (which abolished special and exclusive rights in the mobile sector) and the Full Competition Directive⁶ (which asked the Member States to take the necessary steps in order to make sure that markets are fully open by 1 January 1998) clearly show the Commission's determination to promote services competition in the EU telecommunications industry.

At the same time, the recognition of the significance of infrastructure liberalisation – which equates with a policy favouring the promotion of alternative infrastructure – is a common theme in Part II of the Infrastructure Green Paper of 1995.⁷ For instance, the Commission does not leave any doubt when it emphasises that “liberalisation of communications infrastructure is the single most important step to be taken in the context of European Telecommunications policy”.⁸ Moreover it argues that a restrictive regulatory approach on infrastructure could “hold back the cost effective development of

² Commission Directive of 28 June 1990 on competition in the markets for telecommunications services, 90/388/EEC; OJ L 192/10, 24.07.1990.

³ Commission Directive of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, 94/46/EEC; OJ L 268/15, 19.10.1994.

⁴ Commission Directive of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services, 95/51/EC; OJ L 256/49, 26.10.1995.

⁵ Commission Directive of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications, 96/2/EC; OJ L 20/59, 26.01.1996.

⁶ Commission Directive of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, 96/19/EC; OJ L 74/13, 22.03.1996.

⁷ Green Paper on the liberalisation of telecommunications infrastructure and cable TV networks – Part II: A common approach to the provision of infrastructure for telecommunications in the European Union, COM(94) 682, 25.01.1995.

⁸ *ibid.*, at section I, p. 4.

panEuropean networks and services in Europe” and “impede the development and distribution of multimedia products and services”.⁹

Therefore one could safely argue that one of the Commission’s central objectives is to follow a balanced approach fostering both infrastructure-based and services-based competition.

The Commission wants to ensure that, after the liberalisation process has been concluded, the legal monopolies will not be replaced by de-facto ones. Indeed, there is the danger that a small number of powerful TOs retain bottleneck positions which give them the chance to control market developments. So the Commission is determined to fight the abusive behaviour of the incumbents against newcomers and to ensure that market foreclosure is avoided.

One of the major reasons why the Commission favours a policy which encourages new entry is that much of the growth in the telecommunications industry is due to the expansion of value-added (or enhanced) services (such as Internet access, electronic mail, voice mail and on-line databases) offered by the so-called independent service providers. However, the Commission must be cautious in drawing the right balance: to encourage new entry and promote the rapid dissemination of technology and innovation while, at the same time, ensuring that the incentive to invest in alternative infrastructure is not affected.

The Commission has repeatedly underlined the vital role of the competition rules for driving the industry forward and ensuring effective and sustainable competition at all levels of the market. For example, in Part II of the Infrastructure Green Paper, it is stated that

“In a market which will be for many years characterised by the presence of dominant operators controlling bottleneck facilities, a level playing field will only be possible by reinforced scrutiny of compliance with the competition rules. Otherwise the emergence of competition will be stifled”.¹⁰

The Commission also aims to reduce the uncertainties for firms considering investing in new infrastructure and services. Legal certainty and predictability is indispensable in order to allow a sound basis for long term planning in the

⁹ *ibid.*, at section III.4.

¹⁰ *ibid.*, at section VII.8.

industry and set the environment for massive investment. As the Commission stresses,

“the Commission will take into account the calls for more predictability, in particular as regards access and interconnection. In this respect, the appropriate measures to give further effect to the principles set out in Articles 85 and 86 [now 81 and 82] will have to be assessed, in order to establish a more predictable environment if required”.¹¹

The Commission’s aforementioned objectives of ensuring the full application of the competition rules and creating a clear and stable policy are restated in the Commission’s Access Notice when it is pointed out that one of the purposes of the Notice is

“to set out access principles stemming from EU competition law as shown in a large number of Commission decisions in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors”.¹²

2. ARTICLE 82 AND REFUSAL TO DEAL — THE CASE LAW OF THE ECJ

2.1. DESCRIPTION OF CASES

2.1.1. Commercial Solvents v. Commission¹³

Commercial Solvents Corporation (CSC) had a world monopoly position for the production and sale of certain raw materials to manufacturers of processed goods. As regards Italy, until 1970 this raw material (aminobutanol) had been supplied through Istituto Chemioterapico Italiano (Istituto) – acting as a

¹¹ Communication to the Council and European Parliament on the consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, COM(95) 158 final, 03.05.1995, at section V.5.

¹² Access Notice, at the preface.

reseller of the raw material produced by CSC in the US – to Laboratorio Chimico Farmaceutico Giorgio Zoja (Zoja) for the manufacture of ethambutol. The CSC, no longer wishing to be confined to the manufacture of raw materials, decided to start producing the downstream product itself. At the same time, it refused to supply Zoja with aminobutanol. So, since this raw material was necessary for the production of ethambutol, the CSC's refusal to supply would have as a result the elimination of competition in the downstream market.

The Court held that when an undertaking uses its dominant position in order to extend its activity to a derivative market and, at the same time, it refuses to supply a raw material to a competitor in that downstream market with the aim of facilitating its own access and thus eliminating competition in the market on which the derivatives of the raw material are sold, such a refusal to supply would amount to an abuse of dominant position under the meaning of Article 82. As the Court stated:

“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 Articles 85 and 86 [now 81 and 82], it follows that an undertaking which has a dominant position in the 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”.¹⁴

It must be noted that, by stating that a dominant undertaking cannot – just because it took the decision to start producing the downstream product itself – act in such a way that restricts competition, the Court made a clear reference to an unjustified refusal to supply.

¹³ *Commercial Solvents v. Commission*, Case 7/73, [1974] ECR 223.

¹⁴ *ibid.*, ground 25.

2.1.2. United Brands¹⁵

United Brands Company (UBC) refused to continue supplying Chiquita bananas (from October of 1973 to February of 1975) to Olesen, one of UBC's distributors in Denmark. It must be noted that in 1969 Olesen became the exclusive Danish distributor of the "Dole" brand, supplied by the Standard Fruit Company, a UBC competitor, and in 1973 Olesen took part in an advertising campaign for Dole bananas. It should be also stressed that a clause incorporated in the contracts of the UBC's distributors/ripeners prevented them, amongst other things, from selling bananas other than those supplied by UBC while they were distributors of UBC's bananas.

UBC argued that Olesen was deliberately pushing Dole bananas while was selling fewer and fewer Chiquita bananas and claimed that the ECJ should set aside the Commission's decision which held that UBC's refusal to supply Olesen infringed Article 82.

The ECJ upheld the Commission's decision and made clear that the refusal to supply an existing customer who decides to market a competing product amounts to an abuse of a dominant position when the refusal is not objectively justified. In particular, the ECJ stated that

"... it is advisable to assert positively from the outset 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 consumers - cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary".¹⁶

The Court went on to point out that such conduct is not consistent with objectives laid down in paragraphs (b) and (c) of Article 82, "since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the

¹⁵ *United Brands v. Commission*, Case 27/76, [1978] ECR 207.

¹⁶ *ibid.*, ground 182.

relevant market”.¹⁷ It should be underlined that, although the Court acknowledged the right of a dominant undertaking to protect its own commercial interests (when under attack) and to take measures which are necessary in order to protect those interests,¹⁸ it also held that a refusal to supply, in order to be justified, must be “proportionate to the threat taking into account the economic strength of the undertakings confronting each other”.¹⁹ The Court ruled that this was not the case because UBC’s conduct would have serious anti-competitive effects on its competitors and on the structure of the bananas market in general. In particular, this could happen because “by acting in this way, it [UBC] would discourage its 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 that much more effective”.²⁰ UBC’s behaviour could have exclusionary effects on competition since only undertakings dependent upon the dominant firm would be allowed to stay in business.²¹

2.1.3. Telemarketing²²

Compagnie Luxembourgeoise de Telediffusion SA (CLT) is the owner of RTL television station. Information Publicite Benelux SA (IPB) is its subsidiary and RTL’s exclusive agent for television advertising aimed at the Benelux countries. An agreement reached between Centre Belge d’Etudes de Marche – Telemarketing SA (Centre Belge) and IPB gave Centre Belge the right to conduct telemarketing activities, which are mainly carried out by advertising products on television and showing a telephone number which viewers can call in order to obtain more information or to buy the product offered. On the expiry of that agreement, CLT refused any longer to provide Telemarketing with the right to conduct telemarketing operations on the RTL station. In addition, it decided to reserve the service for an undertaking (RTL) belonging to the same group.

¹⁷ *ibid.*, ground 183.

¹⁸ *ibid.*, ground 189.

¹⁹ *ibid.*, ground 190.

²⁰ *ibid.*, ground 192.

²¹ *ibid.*, ground 194.

²² *Telemarketing v. CLT*, Case 311/84, [1985] ECR 3261.

CLT and IPB were found to be dominant due to the fact that in Belgium there was no commercial advertising on national television stations, while other French-language television broadcasters were only rarely aiming at Belgian viewers. So the case involved the monopoly position of an undertaking in one market (television broadcasting) which was attempting to use its power in order to eliminate competition in a separate market (telemarketing) “which is extremely open and ... competition is possible”.²³ Centre Belge considered that such a conduct constituted an abuse of dominant position within the meaning of Article 82.

The ECJ, after making a reference to the judgment in *Commercial Solvents* (and thus indicating that it was following that decision)²⁴ and underlining the fact that the refusal to supply the services to Telemarketing was not justified,²⁵ held that

“an abuse within the meaning of Article 86 [now 82] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking”.²⁶

2.1.4. RTT v. GB-Inno-BM²⁷

Under Belgian law, RTT (the Belgian public telecommunications operator) was given a monopoly for the establishment and operation of the public telecommunications network. At the same time, RTT was entrusted by the Belgian legislation with the task of determining specifications for terminal equipment and assessing whether those standards had been met by other economic operators. The case was complicated still further by the fact that RTT was also selling equipment intended for connection to its network.

²³ *ibid.*, ground 7.

²⁴ *ibid.*, ground 25.

²⁵ *ibid.*, ground 26.

²⁶ *ibid.*, at ground 27 and the operative part.

²⁷ *RTT v. GB-Inno-BM*, Case 18/88, [1991] ECR 5941.

So there was a situation where the only equipment allowed to be connected to the network was produced and supplied by the RTT or approved by it. The problem became clear when RTT brought an action against GB-Inno-BM (GB) - an RTT competitor in the market of selling telephone equipment - on the grounds that GB did not inform the customers that the telephones it was selling were not approved, something which could have effected the integrity of the network.

In the end, the Court found that RTT had abused its dominant position. In particular, after reproducing a paragraph from the judgment in the *Telemarketing* case²⁸ and using it as a general rule,²⁹ it held that

“the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a neighbouring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 [now 82] of the Treaty”.³⁰

And further below, in another part of the judgment, it stressed the point that “it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86 [now Article 82]”.³¹

2.1.5. Magill³²

The British Broadcasting Corporation (BBC), Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) - a subsidiary of ITV - published guides containing exclusively their own weekly schedule of programmes. In

²⁸ *Telemarketing*, ground 27.

²⁹ *RTT v. GB-Inno-BM*, ground 18.

³⁰ *ibid.*, ground 19.

³¹ *ibid.*, ground 24.

³² *Joined Cases C-241/91 P and C-242/91 P, Radio Telefis Eireann and Independent Television Publications Limited v. Commission, (Magill)* [1995] ECR I-743.

general, those enterprises did not grant licences for the publication of their respective weekly listings; their television guides were protected under United Kingdom and Irish copyright law. So, although daily and periodical newspapers were given licences free of charge to reproduce details of the day's programmes, none was allowed to publish a combination of those programming listings on a weekly basis. Magill TV Guide Ltd (Magill) sought to fill the gap in the market by attempting to publish a comprehensive weekly television guide (comprising the programme listings of all television stations) but this was prevented by these television companies when they refused to grant it a licence.

Magill lodged a complaint with the Commission, which found that the TV companies had abused their dominant position within the meaning of Article 82 by refusing to supply Magill with listings of their weekly schedules. Thus the Commission ordered the broadcasters to stop breaching Article 82, in particular "by supplying ... third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties" in return for a reasonable royalty.³³

The broadcasters challenged the Commission decision in the Court of First Instance (CFI) which dismissed their applications and upheld the Commission decision on all grounds.

Specifically, the CFI held that the applicants had prevented the emergence of a new product for which there existed a potential consumer demand³⁴ and they did so by "using their copyright in the programme listings ... in order to secure a monopoly in the derivative market of weekly television guides".³⁵ The court concluded that this kind of conduct "clearly went beyond what was necessary to fulfil the essential function of the copyright as permitted in Community law"³⁶ and that the applicants had exercised their copyright "in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86 [now 82]".³⁷

Two of the parties (RTE and ITP) appealed to the Court of Justice, which however did not set aside the judgment of the CFI; on the contrary, it

³³ *Magill*, ground 12.

³⁴ *ibid.*, ground 30.

³⁵ *ibid.*, ground 29.

³⁶ *ibid.*, ground 30.

confirmed the findings of both the Commission and the CFI. More analytically, although it referred to the judgment in the earlier case of Volvo³⁸ by stating that a refusal to grant a licence cannot in itself amount to abuse of a dominant position,³⁹ it went on to identify three circumstances (underlined in the findings of the CFI) under which such a refusal can constitute abuse of a dominant position. First, there was a lack of substitutes for a weekly comprehensive television guide despite a “specific, constant and regular” consumer demand.⁴⁰ Second, there was no justification for such refusal.⁴¹ And third, referring to the *Commercial Solvents* case, and thus being in line with the case law on monopoly leveraging, that by their conduct the broadcasters “reserved to themselves the secondary market of weekly television guides by excluding all competition on that market since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide”.⁴²

It should be pointed out that the key fact in the case is that the broadcasters were found to have a monopoly over program information – “the appellants were the only sources of the basic information on programme scheduling”⁴³ – and that this information was considered to be an “indispensable raw material for compiling a weekly television guide”.⁴⁴ Of the same importance was the fact that the broadcasters’ refusal to provide this indispensable information prevented the emergence of a new product (which was not offered by the broadcasters although consumer demand existed) and thus the Court concluded that such a refusal amounted to a finding of abuse of dominant position under Article 82(b) of the Treaty.⁴⁵ This must be kept in mind as it will facilitate the later discussion about the essential facilities doctrine.

³⁷ *ibid.*, ground 28.

³⁸ *Volvo/Veng*, Case 238/87, [1988] ECR 6211.

³⁹ *Magill*, ground 49.

⁴⁰ *ibid.*, ground 52.

⁴¹ *ibid.*, ground 55.

⁴² *ibid.*, ground 56.

⁴³ *ibid.*, ground 53.

⁴⁴ *ibid.*, ground 53.

⁴⁵ *ibid.*, ground 54.

2.2. DISCUSSION

In the *Commercial Solvents*, *United Brands* and *Telemarketing* cases, the ECJ made clear that the refusal to supply an already *existing* customer who decides to market a competing product amounts to an abuse of a dominant position when the refusal is not objectively justified.⁴⁶ Another common point in these cases is that they involve practices by which a dominant company in one market is using its power in such a way in order to strengthen its position and, at the same time, to eliminate competition in a related market⁴⁷ – a practice which is known as monopoly leverage.

Following this line of case law, the *Magill* and *GB-Inno-BM* cases concern a refusal to supply and deal with the monopoly leverage practice⁴⁸ as well as referring to the notion of an objectively justified refusal to supply.⁴⁹ However, their difference from the cases which dealt with the termination of supplies to an existing customer is that they addressed a dispute which involved a form of refusal to supply a new customer and prevented the emergence on the market of a new product.

So, based on well-established case law of the Court, a number of principles have been introduced which provide us with reliable and adequate guidance. Those principles are fully recognised and followed by the Commission when it states that

“a refusal to supply a new customer in circumstances where a dominant facilities owner is already supplying one or more customers operating in the same downstream market would constitute discriminatory treatment which, *if it would restrict competition on that downstream market*, would be an abuse ... There may, of course, be justifications for such refusal ... In the absence of any objective justifications, a refusal would usually be an abuse of the dominant position on the access market”.⁵⁰

⁴⁶ See *Commercial Solvents* at ground 25, *United Brands* at 182 and 190, *Telemarketing* at 25 and 26.

⁴⁷ See *Commercial Solvents* at ground 25, *United Brands* at 183, *Telemarketing* at 27.

⁴⁸ See *Magill* at grounds 54 and 56, *GB-Inno-BM* at 18 and 19.

⁴⁹ See *Magill* at ground 55, *GB-Inno-BM* at 19 and 24.

⁵⁰ Access Notice, para. 85.

It must be noted from the above statement in the 1998 Access Notice that such a form of discrimination will constitute an abuse under Article 82 only if, as a consequence, competition on the downstream market is being restricted. However, the precise meaning of this condition appears to be vague and the Access Notice does not provide us with a reliable and clear explanation regarding its scope. Of course, there would be no difficulty if the existing case law of the Court could provide adequate answers to these problems. So the question is what kind of practices can lead to a suppression of competition and thus be regarded as an infringement of Article 82.

Originally it was believed that the only purpose of Article 82 was to prohibit the exploitation of market power by monopolies in order to protect consumers.⁵¹ This limited concept of abuse, criticised as being contrary to the liberal spirit of the EC Treaty,⁵² was rejected by the Court's judgment in *Continental Can*.⁵³ In that case the Court criticised the Commission for absence of any reasoning on the question of supply substitutability.⁵⁴ Accordingly, it became clear that Article 82 could be concerned not only with performance but also with conduct that affects the market structure. Thus the role of Article 82 is to protect competition by condemning anti-competitive abuses alongside exploitative ones.⁵⁵ As the Court stated, the purpose of Article 82

“is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(f) of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached

⁵¹ See Rene Joliet, “Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power”, 1970.

⁵² Valentine Korah, “EC Competition Law and Practice”, Fifth Edition, 1994, at p. 5.

⁵³ *Europemballage Corporation and Continental Can Co. Inc. v. Commission*, Case 6/72, [1973] ECR 215.

⁵⁴ *ibid.*, at ground 33: “In order to be regarded as constituting a distinct market, the products in question must be individualised, not only by the mere fact that they are used for packing certain products, but by particular characteristics of production which make them specifically suitable for this purpose. Consequently, a dominant position on the market for light metal containers for meat and fish cannot be decisive, as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by a simple adaptation, with sufficient strength to create a serious counterweight.”

⁵⁵ See John Temple Lang, “Monopolisation and the Definition of Abuse of a Dominant Position under Article 86 EEC Treaty”, [1979] 16 C.M.L.Rev. 345, at pp. 345-357.

substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one".⁵⁶

In *Hoffmann-La Roche*⁵⁷ abuse was defined as

"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, 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".⁵⁸

Moreover the Court held that

"since the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of application of Article 86 [now Article 82] any further weakening of the structure of competition may constitute an abuse of a dominant position".⁵⁹

Thus contrary to the judgment in *Continental Can* – where it was decided that Article 82 prohibits conduct which leads to a substantial reduction of competition only when it is detrimental to consumers – the Court found in *Hoffmann-La Roche* that even a minimal reduction of competition can be caught within the net of Article 82. Furthermore, it is interesting to note that, in all cases dealing with a refusal to supply, no consideration of consumer welfare was taken into account. On the contrary, the Court rested primarily on considerations of fairness and the preservation of small and medium-sized

⁵⁶ *Continental Can*, at ground 26.

⁵⁷ *Hoffmann-La Roche v. Commission (Vitamins)*, Case 85/76, [1979] ECR 461.

⁵⁸ *ibid.*, at ground 91. An identical definition was given in *Michelin v. Commission*, Case 322/81, [1983] ECR 3461, at ground 70.

enterprises. Such a view implies that every suppression of competitors per se is unlawful under Article 82 whatever its economic repercussions on the market and the strength of the remaining competition. As Professor Kauper points out “these decisions come very close to condemning the use of a particular means without regard to its ends... The Court of Justice comes close to holding it prima facie unlawful because it was a refusal to deal”.⁶⁰

It should be stressed that the competition which Article 82 protects is not necessarily synonymous with the freedom of action of the potential or current competitors. This means that it is possible to conceive conduct (e.g. a refusal to supply) which is likely to eliminate a competitor and which nevertheless cannot be regarded as producing a significant reduction of competition, at least from the point of view of consumers, or having a significant anti-competitive effect on the market. This is for example the case in *Hugin-Liptons*⁶¹ where it appears that the conduct had promoted rather than suppressed competition in efficiency terms.⁶²

Therefore the main criticism is that “the Court of Justice concludes too quickly that refusals to deal harm consumers”,⁶³ as “it is far from clear that it is generally contrary to the public interest for a monopolist to cut off supplies in order to eliminate a competitor downstream”.⁶⁴ Moreover it is true that those cases reflect concerns - like fairness and preservation of small and medium-sized enterprises - which were common to American antitrust theory in the past but have now given way to economic efficiency in the consumer welfare sense.⁶⁵ It is interesting to underline the fact that Professor Korah - who by no means can be regarded as a proponent of the Chicago School theory -

⁵⁹ *Hoffmann-La Roche*, at ground 123.

⁶⁰ Thomas E. Kauper, “Whither Article 86? Observations on Excessive Prices and Refusals to Deal”, in the Annual Proceedings of the Fordham Corporate Law Institute - 1992 and EEC/U.S. Competition and Trade Law, 1989, at pp. 675 and 676.

⁶¹ *Hugin v. Commission*, Case 22/78, [1979] ECR 1869.

⁶² Thomas E. Kauper, “Whither Article 86? Observations on Excessive Prices and Refusals to Deal”, in the Annual Proceedings of the Fordham Corporate Law Institute - 1992 and EEC/U.S. Competition and Trade Law, 1989, at p. 673.

⁶³ Eleonor M. Fox, “Abuse of a Dominant Position under the Treaty of Rome - A Comparison with U.S. Law”, in the Annual Proceedings of the Fordham Corporate Law Institute - Antitrust and Trade Policies of the European Economic Community, 1983, at p. 404.

⁶⁴ Valentine Korah, “*Instituto Chemioterapico Italiano S.P.A. and Commercial Solvents Corporation v. Commission of the European Communities*”, [1974] 11 C.M.L.Rev. 248, at p. 271.

⁶⁵ Thomas E. Kauper, “Whither Article 86? Observations on Excessive Prices and Refusals to Deal”, in the Annual Proceedings of the Fordham Corporate Law Institute - 1992 and EEC/U.S. Competition and Trade Law, 1989, at p. 686.

reaches the same conclusion. Indeed, she is concerned that

“the competition rules are not being used to enable efficient firms to expand at the expense of the less efficient, but to protect smaller and medium sized firms at the expense of efficient or larger firms... The interests of consumers, and the economy as a whole, in the encouragement of efficiency by firms of any size is being subordinated to the interests of smaller traders”.⁶⁶

2.3. CONCLUSIONS

What therefore is needed is, not decisions on restraint of competition in the abstract (*per se*), but only on a case-by-case analysis after taking into account the economic repercussions on the market. Unfortunately, the Access Notice echoes faithfully the considerations on which the Court rule about refusal to deal has been developed and hence fails to provide sufficient guidelines in order to limit the areas of legal uncertainty. Thus the precondition, “if it would restrict competition on that downstream market”,⁶⁷ appears to have no substantial role at all, since it is simply stated that a refusal to give access will generally affect competition⁶⁸ and therefore will usually constitute an abuse of the dominant position on the access market under the meaning of Article 82.⁶⁹ Insisting on a *per se* assumption that a refusal to supply amounts to an abuse is disappointing, and the remark that “the precise scope of this condition [i.e. what and when constitutes a restriction of competition] is not entirely clear”⁷⁰ – coming from someone who influenced the construction of the Access Notice⁷¹ –

⁶⁶ Valentine Korah, “EC Competition Law and Practice”, Fifth Edition, 1994, at p. 106.

⁶⁷ Access Notice, para. 85.

⁶⁸ *ibid.*, para. 83.

⁶⁹ *ibid.*, para. 85.

⁷⁰ Dirk Van Liedekerke, “European Commission’s Draft Notice on Access in the Telecommunications Sector”, I.B.L. 25 (7), July/August 1997, at p. 325.

⁷¹ He is co-author of the “Competition Aspects of Interconnection Agreements in the Telecommunications Sector”, 1995, a study conducted for the Commission and mentioned as one of those on which the Access Notice was based. See Access Notice at para. 6 and end-note number 7.

is an understatement.

The fact that the Access Notice chooses to identify an unjustified refusal to supply with an extreme form of discrimination⁷² gives the Commission a powerful tool which can be used as an aid to market liberalisation. However, an over-zealous and uncritical application of the above approach can undermine the incentive to innovate and invest and thus be detrimental to consumers in the long-term.

So if, contrary to Advocate General Warner's statement in *Commercial Solvents*, we support the notion that the Court case law does not suggest that a refusal to supply constitutes an extreme example of discrimination,⁷³ the fact that the Commission equates an unjustifiable refusal to supply with discriminatory treatment and, therefore, with an abuse of dominant position, represents an arbitrary extension of the existing case law. This is regardless of the fact that the Court and the Commission reach the same conclusion, namely that a refusal to supply constitutes an abuse per se.

It must also not be forgotten that all those cases handled by the Court are associated with a refusal to supply an existing customer, i.e. with a refusal to continue to supply. None of these cases dealt with companies seeking to enter the market. So, if *Magill* is regarded as an essential facility case and not as a duty to supply case, the Commission extends the application of the case law of the Court into cases which involve a refusal to supply an entirely new customer. It is obvious that this extension of the scope of Article 82 beyond its meaning – as it was interpreted by the Court – contradicts the Treaty, since an additional burden is placed on undertakings, namely that dominant undertakings are required to provide access to a new customer when one or more customers have already been given access. Imposing additional obligations on undertakings equates with extending the use of the competition rules, something which is not allowed by Article 83 (formerly Article 87) of the Treaty. Indeed, Article 83 enables the Council to “define the scope of the competition rules”. However, it appears that Article 83 allows the Council and the Commission to set aside or to limit the application of the competition rules

⁷² Access Notice, para. 85.

but not to extend their scope.⁷⁴

What differentiates paragraph 85 of the Access Notice from paragraph 86 is that, in the latter, the problem of whether or not to treat a refusal to grant access as discrimination does not arise at all, simply because access has already been granted. The aim of this provision is to prevent the dominant operator-provider from discriminating between the parties on the terms their access is given.⁷⁵ The application of the principle of the text of paragraph 86 – the principle of non-discrimination and in particular the dominant operator’s duty not to favour its own operations – is linked with the first scenario listed in the Access Notice⁷⁶ where access is refused to the requesting party while it has already been given to one or more operators.

Moreover it has been accepted⁷⁷ that the case where the dominant operator has only given access to its own downstream operations, and not to any other operator, is classified under the second scenario, according to which a refusal to provide access takes place while no other operator has been granted access by the access provider.⁷⁸

Thus there can be a situation according to which the dominant network operator is active on a neighbouring market (retail services), by granting access to its own downstream operations, but has refused to give access to other service providers in that downstream market. In other words, access is refused to the dominant operator’s competitors but is made available to its own service business. In a situation like this, the immediate question is whether the principle laid down in paragraph 86, namely the dominant operator’s duty not to favour its own operations, is also applicable in cases where the dominant operator decides to grant access not only to its own service business but also

⁷³ “Until this case [*Commercial Solvents*] it was thought that paragraph (c) of Article 86 was of comparatively narrow application, it restrains a dominant firm from making different charges to different customers, who compete with one another at another level of trade, where these are not cost justified, rather than from refusing to supply at all”, see Valentine Korah, “Istituto Chemioterapico Italiano S.P.A. and Commercial Solvents Corporation v. Commission of the European Communities”, [1974] 11 C.M.L.Rev. 248, at p. 258.

⁷⁴ See the opinion of Advocate General Darmon in *Verband der Sachversicher v. Commission*, Case 45/85, [1987] ECR 405.

⁷⁵ Paragraph 86 of the Access Notice reflects the principles derived from ERT (*ERT*, Case C-260/89, [1991], ECR I-2925, at ground 38) and GB-Inno-BM (*RTT v. GB-Inno-BM*, Case 18/88, [1991] ECR 5941, at ground 25).

⁷⁶ Access Notice, para. 84(a).

⁷⁷ See for example Dirk Van Liedekerke, “European Commission’s Draft Notice on Access in the Telecommunications Sector”, I.B.L. 25 (7), July/August 1997, at p. 325.

⁷⁸ Access Notice, para. 84(b).

to another service provider.

Unfortunately, the answer is no. This appears to be a logical conclusion, since it derives from the structure of the Access Notice. Indeed, as already mentioned, paragraph 86 is set out under the first scenario and nothing in its wording indicates that the Access Notice attempts to extend the application of the paragraph into the second scenario. Undoubtedly, this constitutes a problematic situation. Indeed, one can expect that the dominant operator, instead of granting access, would have the incentive and would prefer to provide access to no other operator (except to its own downstream operations). In that case, the essential facilities test will apply and the dominant operator will escape completely from the duty to provide access if he proves that the facility to which access is refused is not regarded as essential. However, the striking point is that, even if the facility in question is found to be essential, the dominant operator will be entitled to treat its own downstream services operations more favourably than other operators who were given access. The principle of non-discrimination (concerning the terms on which access is given) will not apply.

Since the problem could be easily solved – by the insertion of a statement that the meaning of the term “another operator” in paragraph 84(a) includes the dominant network operator’s own downstream services – it is difficult to accept that the Commission made such an obvious mistake. Moreover, it is strange that the Commission gave incumbents the chance to exploit this lacuna, especially if we bear in mind the fact that most (if not all) telecommunications operators are vertically integrated, and the potential anti-competitive effect such a structure could have on the market.

However, I believe that this is clearly a mistake, or an omission regarding the way the Access Notice was constructed. Otherwise it is impossible to explain the fact that, at this particular point, the Access Notice is not only inconsistent but contradicts completely the principles introduced in the Commission’s decisions in the essential facilities cases (as will be seen below), particularly the requirement that the essential facilities owner cannot treat the activities of other undertakings less favourably than those given to its own operations.

3. THE ESSENTIAL FACILITIES DOCTRINE IN EU LAW

Some of the aforementioned Court judgments regarding refusal to supply can also be associated with the essential facilities doctrine. Indeed, despite the fact that those judgments do not introduce in clear words and do not refer explicitly to the term “essential facilities”, one could safely argue that, by implication, they involve traces of the doctrine. In *Telemarketing*, for instance, the Court held that that case’s finding will also apply “to the case of an undertaking holding a dominant position on the market in a service which is *indispensable* for the activities of another undertaking on another market”.⁷⁹ Furthermore, in the *Port of Genoa* case,⁸⁰ the Court implicitly applied the essential facilities doctrine and qualified the port of Genoa as an essential facility.⁸¹ And in *Magill* - so far the clearest example of an essential facility case in the Court jurisprudence - information on programme scheduling was considered to be an “indispensable raw material for compiling a weekly television guide”.⁸²

However, it is a line of cases decided by the Commission under Article 82 which makes explicit reference to the essential facilities doctrine and illustrates its introduction and evolution.

⁷⁹ See *Telemarketing*, ground 26.

⁸⁰ *Port of Genoa*, Case C-179/90, [1991] ECR I-5889.

⁸¹ *ibid.*, at ground 15. The Court relied on the volume of traffic and the significance of that port regarding maritime import and export operations in order to decide that the port constituted a substantial part of the common market.

⁸² *Magill*, ground 53.

3.1. DISCUSSION OF THE COMMISSION'S ESSENTIAL FACILITIES CASES

3.1.1. B&I Line plc v. Sealink⁸³

B&I is an Irish ferry operator and the Stena Sealink group is both the owner and operator of the port of Holyhead in Wales (through its Stena Sealink Ports company) and a ferry operator (through its Stena Sealink Line company). Sealink, acting as the port authority, introduced changes to its own ferry sailing times which operated to the favour of Sealink's own services but had harmful effects on B&I's operations. In particular, every time a Sealink vessel was passing a berthed B&I vessel it was causing significant movements of the latter – due to channel depth limitations – and, therefore, B&I was forced to interrupt its loading and unloading of vehicles and passengers.

The *B & I Line v. Sealink* case is the first case in which the Commission expressly made reference to the notion of “essential facilities”. In particular, an essential facility was described as “a facility or infrastructure without access to which competitors cannot provide services to their customers”.⁸⁴ Moreover, in this case the Commission introduced the requirement that a dominant company which both owns or controls and uses an essential facility should not “refuse its competitors access to that facility or grant access to competitors only on terms less favourable than those which it gives its own services”.⁸⁵ Acting contrary to that requirement would amount to an infringement of Article 82.

Furthermore, it is interesting to note that the Commission, although recognising that the port of Holyhead did not constitute a substantial part of the common market, regarded a port, an airport or any other facility as such (i.e. as a substantial part of the common market) “in so far as reasonable access to the facility is indispensable for the exploitation of a transport route which is substantial for the purposes of the application of Article 86 [now 82] of the EEC Treaty”.⁸⁶ Based on that statement one could safely argue that the essential

⁸³ *B&I Line plc v. Sealink*, Commission Decision IV/34.174, [1992] 5 CMLR 255.

⁸⁴ *ibid.*, para. 41.

⁸⁵ *ibid.*

⁸⁶ See at XXII Report on Competition Policy - 1992, at point 219.

facilities doctrine is a strong weapon used by the Commission in its attempt to move on to market liberalisation. Besides, this is admitted by the Commission when it stresses that “this consequence of Article 82 [i.e. the requirement introduced by the Commission at paragraph 41 of the *B & I Line v. Sealink*] is of essential importance in the context of deregulation, which regularly raises the problem of market access for new entrants”.⁸⁷

3.1.2. Sea Containers v. Stena Sealink⁸⁸

Among its activities, Sea Containers Ltd operates passenger, car and freight ferry services. The Stena Sealink group, as already mentioned, is both the owner and operator of the port of Holyhead in Wales (through its Stena Sealink Ports company) and a ferry operator (through its Stena Sealink Line company). Sea Containers argued that it was refused access to an essential facility (i.e. the port of Holyhead) and that Stena Sealink, by not granting access under reasonable conditions and without objective justification, had abused its dominant position as the port authority at Holyhead in an attempt to protect its own ferry services from competition.

The Commission found Stena Sealink to occupy a dominant position on the grounds that the relevant market – i.e. the market for the provision of maritime transport services for passengers and vehicle ferries – was the central corridor route which accounted for between 50 and 60% of the traffic between the United Kingdom and Ireland;⁸⁹ that Holyhead is the only available British port since the Liverpool port cannot be regarded as a substitutable and viable alternative (the journey from Dublin to Liverpool is twice the length of that from Dublin to Holyhead);⁹⁰ and that it would be seriously uneconomic or physically unrealistic for Sea Containers to build its own port.⁹¹

After defining an essential facility as “a facility or infrastructure without

⁸⁷ *ibid.*

⁸⁸ *Sea Containers v. Stena Sealink*, Commission Decision of 21 December 1993, IV/34.689, 94/19/EC, OJ 1994 L 15/8.

⁸⁹ *ibid.*, paras 14 and 62.

⁹⁰ *ibid.*, para. 63.

access to which competitors cannot provide services to their customers”⁹² – a definition identical with that given in the *B & I Line v. Sealink* case⁹³ – and after making a reference to the principle of monopoly leverage,⁹⁴ the Commission held that Sealink had committed an abuse within the meaning of Article 82. In particular, the Commission stated that the situation where a company is both the owner and operator of an essential facility (in this case the port of Holyhead) and refuses the requesting companies access to that facility without objective justification, or provides access on terms less favourable than those given to its own operations, amounts to an abuse of a dominant position.⁹⁵

3.1.3. Port of Roedby⁹⁶

DCB is a Danish public undertaking to which the State granted an exclusive right associated with the management and organisation of the port of Roedby. It also operates ferry services – jointly with Deutsche Bundesbahn (DB), a German public undertaking – on the Roedby-Puttgarden route.

The Commission noticed the importance of the Roedby-Puttgarden route and the difficulty of having it substituted by the other existing forms of transport and by the other passenger sea routes between Sweden and Germany.⁹⁷ Based on the methodology followed in the *Port of Genoa* case – where the Court relied on the volume of traffic and the significance of that port regarding maritime import and export operations⁹⁸ – the Commission found that the port of Roedby constituted a substantial part of the common market.⁹⁹ Since DCB and DB were the only ferry companies operating on this route, they were found

⁹¹ *ibid.*, para. 64. The same analysis has been carried out in the *B & I Line v. Sealink* case, at paras 36-40.

⁹² *ibid.*, para. 66.

⁹³ *B & I Line v. Sealink*, para. 41.

⁹⁴ *Sea Containers v. Stena Sealink*, para. 66.

⁹⁵ *ibid.*

⁹⁶ *Port of Roedby*, Commission Decision of 21 December 1993, 94/119/EC, OJ 1994 L 55/52.

⁹⁷ *ibid.*, para. 5.

⁹⁸ *Port of Genoa*, ground 15.

⁹⁹ *Port of Roedby*, para. 8.

to hold a joint dominant position.¹⁰⁰

In 1990 the Danish Transport Minister refused to permit Stena, a Swedish shipping group, to build a new private commercial port in the immediate vicinity of the port of Roedby and to operate ferry services from Roedby. The Commission found that the double refusal by the Danish Transport Minister had strengthened DCB's and DB's joint dominant position. Thus subsequent to espousing an identical definition of the concept of essential facilities with that found in a number of previous decisions – i.e. that an essential facility is “a facility or infrastructure without which its competitors are unable to offer their services to customers”¹⁰¹ – the Commission stated that

“an undertaking that owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant a shipowner wishing to operate on the same maritime route access to that facility without infringing Article 86 [now 82]”.¹⁰²

However, the refusal to grant access to Stena resulted from a State measure and not from DCB's own initiative. Since only Article 86 (formerly 90) of the Treaty applies to measures adopted by States, the Commission, wishing to ensure the application of Article 82 on the DCB, rested on the judgment of the Court of Justice in the *RTT/GB-Inno-BM* case¹⁰³ and concluded that the State measure in question constituted an infringement of Article 86(1) read in conjunction with Article 82.¹⁰⁴

¹⁰⁰ *ibid.*, para. 11.

¹⁰¹ *ibid.*, para. 12.

¹⁰² *ibid.*

¹⁰³ In that case the Court stated that “where the extension of the dominant position of a public undertaking or undertaking to which the State has granted special or exclusive rights results from a State measure, such a measure constitutes an infringement of Article 90 in conjunction with Article 86 of the Treaty”, *RTT/GB-Inno-BM*, at ground 21.

¹⁰⁴ *Port of Roedby*, para. 13.

3.1.4. London European v. Sabena¹⁰⁵

London European Airways is a private British airline company which operates – among others – a service between Luton and Brussels. Sabena is an airline company whose activities, apart from providing air transport services, include the aircraft ground handling service and the Saphir computerised reservation service. What the Saphir system does is to provide up-dated information, immediate reservation and issue of tickets without the need for travel agents to contact the company concerned for each booking. The significance of the system was illustrated by a Sabena representative when he stated that “in order to penetrate the Belgian market, it is virtually essential that they [London European] be included in Saphir”.¹⁰⁶ The Commission recognised the truth of that statement by pointing out that “the ability to offer customers a computerised reservation service is an important feature of a marketing policy”,¹⁰⁷ and that “the success of the Brussels-Luton flights depend on London European having access to the Saphir system”.¹⁰⁸ Moreover, the Commission was clear that computer reservation systems are essential facilities since they are indispensable for new entrants wishing to compete effectively.¹⁰⁹ This notion is facilitated by the fact that, although other non-computerised reservation services still exist, they cannot be regarded as substitutable and viable alternatives to computerised systems.¹¹⁰

Sabena refused to grant London European access to its Saphir computer reservation system on the grounds that London European’s tariff on the Brussels-Luton route was too low and that London European did not agree to give the ground handling contract to Sabena.¹¹¹ After finding that Sabena held a dominant position in the Belgian market for the provision of computerised reservation services,¹¹² the Commission concluded that Sabena’s refusal to grant London European access to its Saphir computer reservation system

¹⁰⁵ *London European v. Sabena*, Commission Decision of 4 November 1988, 88/589/EEC, IV/32.318, OJ 1988 L 317/47.

¹⁰⁶ *ibid.*, para. 9.

¹⁰⁷ *ibid.*, para. 14.

¹⁰⁸ *ibid.*, para. 25.

¹⁰⁹ *ibid.*, para. 14.

¹¹⁰ *ibid.*

¹¹¹ For details about the reasons given by Sabena’s representatives, see paras 9-12.

¹¹² *ibid.*, para. 27.

amounted to an abuse of dominant position.¹¹³

It is interesting to note that the Commission interpreted Sabena's refusal of access as being contrary to Article 82(b), i.e. that it intended to limit production, markets or technical development to the prejudice of consumers.¹¹⁴ In particular, the Commission stated that Sabena intended to "deter it [London European] from operating on a given route, to impede its actual operation and marketing of the service and to dissuade it from thus introducing an element of competition".¹¹⁵ Once again, this is a clear indication of the role that the essential facilities doctrine can play in the context of the Commission's determination to move towards liberalisation of the markets.

3.1.5. British Midland v. Aer Lingus¹¹⁶

"Interlining" is a co-operation agreement according to which airlines are authorised to sell each other's services. This practice allows passengers to buy a single ticket which comprises segments to be performed by different airlines; for instance, they can change flights on to the other airline's services or use a ticket issued by one airline for a return journey on another which serves the same route. The significance of interlining can be demonstrated from the fact that business travellers – who are lucrative business for airline companies since they generate approximately 60% of an airline's revenue – travel to several destinations and use different airlines and it would be convenient and helpful for them if they are offered a single "interlinable" ticket which would save them valuable time.¹¹⁷

When British Midland announced its intention to commence services on the Dublin-London route, Air Lingus – the national airline of Ireland – refused to interline with British Midland. The Commission found that Aer Lingus was

¹¹³ *ibid.*, para. 34.

¹¹⁴ *ibid.*, para. 30.

¹¹⁵ *ibid.*, para. 37. See also at para. 30.

¹¹⁶ *British Midland v. Aer Lingus*, Commission Decision of 26 February 1992, 92/213/EEC, IV/33.544, OJ 1992 L 96/34.

¹¹⁷ *ibid.*, para. 6.

dominant on the Dublin-London route¹¹⁸ and held that its refusal to interline with British Midland constituted an infringement of Article 82.

It is interesting to note that the Commission makes a clear reference to an unjustified refusal to supply when it states that a refusal to interline for reasons such as doubts about the creditworthiness of the beneficiary airline can be considered acceptable and justifiable.¹¹⁹ However Aer Lingus refused to interline on the grounds that this would lead to a loss of revenue and a fall in its share of the market.¹²⁰ Those arguments cited by Aer Lingus were rejected by the Commission as not sufficient to justify the refusal¹²¹ – besides, interlining is a widely accepted industry practice.

One could find a great similarity between this approach and the Court's judgment in *United Brands*, which shows that the Commission applies the already established principles of the Court. Indeed, one would remember that, although the Court in that case acknowledged the right of a dominant undertaking to protect its own commercial interests (when under attack) and to take measures which are necessary in order to protect those interests,¹²² it held that a refusal to supply, in order to be justified, must be "proportionate to the threat taking into account the economic strength of the undertakings confronting each other".¹²³

The Commission follows suit when it implies that the Aer Lingus refusal is not proportionate since it "would impose a significant handicap on British Midland".¹²⁴ New entrants will always face difficulties and they will be glad to receive low margins initially – normally they have to accept losses. This happens because a great deal of investment is needed as well as the ability to bring costs down to a level which is competitive to the already established companies. However, it takes a long time to expand their financing and to increase their efficiency and the Commission shows clearly its aim to intervene by artificially protecting new entrants (in this case British Midland) and providing them with at least a fair chance to compete. This is the reason why

¹¹⁸ *ibid.*, paras 18-23.

¹¹⁹ *ibid.*, para. 25.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *United Brands*, ground 189.

¹²³ *ibid.*, ground 190.

the Commission points out that the aforementioned difficulties faced by new entrants due to denying interline facilities are likely to be severe:¹²⁵ it wants to emphasise that it is committed to opening the market to competition. This is illustrated in the XXII Report on Competition Policy - 1992 where it is stated that

“this decision [*British Midland/Aer Lingus*] is evidence of the Commission’s determination to act against airlines holding dominant positions, if they attempt to prevent the development or maintenance of competition. At a time when the European air transport industry is being liberalized, airlines making use of the new opportunities for competition should be given a fair chance to develop and sustain their challenge to established carriers”.¹²⁶

However, this protectionist intervention of the Commission – i.e. providing new entrants with the means (essential facilities doctrine) and the time to become established – cannot go on indefinitely. Moreover the Commission acknowledges that undertakings in dominant positions cannot be always obliged to share essential facilities – there is no such general duty to share. This is recognised by the Commission because, although it stated that “if British Midland wants to obtain a comparable position to Aer Lingus ... it would need sufficient time to built up commercial strength and an adequate schedule”, it held that “new entrants should not be able to rely forever on their competitors’ frequencies and networks”.¹²⁷ Thus it decided that the duty to interline should be limited to a two-year period, which was regarded as sufficient enough for British Midland “to develop its service without suffering from an undue handicap imposed by its dominant competitor”.¹²⁸

Finally, it is interesting to note that, according to John Temple Lang, the key point of the case was that interlining is a common industry arrangement and, therefore, he believes that temporary duties to provide access to an essential facility – i.e. duties similar to that imposed on Aer Lingus – could be expected to apply only when a dominant company has selectively denied an active

¹²⁴ *British Midland v. Aer Lingus*, para. 25. For the reasons brought forward by the Commission to justify this argument, see paras 27-30.

¹²⁵ *ibid.*, para. 27.

¹²⁶ XXII Report on Competition Policy - 1992, point 216.

¹²⁷ *British Midland v. Aer Lingus*, para. 44.

¹²⁸ *ibid.*

competitor a normal and widely accepted industry practice with the aim to handicap or discourage him.¹²⁹ The significant role that the notion of the common industry practice can play in determining whether or not there is an obligation on a dominant company to co-operate is well illustrated by Lang when he states that “normal industry practice may make what would otherwise be a mere competitive handicap into a serious and even insuperable barrier to entry for a normal competitor”.¹³⁰ And he concludes:

“If normal industry practice is to deal, a dominant company cannot refuse to deal merely on the grounds that if there were no such practice it would have no duty to help its competitor overcome the disadvantage of, e.g., small size, which the industry practice in fact offsets”.¹³¹

3.2. SUMMARY OF THE PRINCIPLES EMANATING FROM THE ESSENTIAL FACILITIES CASES

It is obvious that a number of principles have been introduced by the aforementioned essential facilities cases. In particular, it should be noted that those cases share the same definition of essential facilities, since an essential facility is described as “a facility or infrastructure without access to which competitors cannot provide services to their customers”.¹³² Alongside the essential facilities definition, a general prohibition has been introduced, according to which the owner of an essential facility cannot refuse the requesting companies access to that facility without objective justification.

¹²⁹ John Temple Lang, “Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at p. 298.

¹³⁰ *ibid.*, p. 287.

¹³¹ *ibid.*

¹³² See *B&I Line plc v. Sealink* at para. 41, *Sea Containers v. Stena Sealink* at 66, *Port of Roedby* at 12. In *London European v. Sabena*, the Commission was clear that computer reservation systems are essential facilities since they are indispensable for new entrants wishing to compete effectively and since other non-computerised reservation services cannot be regarded as substitutable and viable alternatives (at para. 14).

Acting contrary to that prohibition would amount to an infringement of Article 82. This prohibition is accompanied by the requirement that the essential facilities owner cannot treat the activities of other undertakings less favourably than those given to its own operations.¹³³

3.3. THE RATIONALE FOR AN ESSENTIAL FACILITIES DOCTRINE

Despite the progress which has been made during the liberalisation process in the telecommunications market, the Commission admits in the Access Notice that “the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time”,¹³⁴ and that these parallel networks cannot be regarded as “satisfactory alternatives to the facilities of the incumbent operator”.¹³⁵ One of the most important reasons for this is that lots of capital is required in order to build a network which can provide the same extensive geographic coverage as that of the TO’s network. As Dr Herbert Ungerer, a Commission official in the Directorate General for Competition (DG IV) involved in telecommunications competition law, has pointed out,

“in the fixed network field the new entrants are faced with a situation where the incumbents hold fixed network assets built over one hundred years of monopoly. None of the new entrants can, in the short term, build parallel networks in the local loop which could rival these assets worth 200 - 300 billions of EUROS of investment”.¹³⁶

¹³³ See *B&I Line plc v. Sealink* at para. 41, *Sea Containers v. Stena Sealink* at 66, *Port of Roedby* at 12, *London European v. Sabena* at 34, *British Midland v. Aer Lingus* at 25.

¹³⁴ Access Notice, para. 64.

¹³⁵ *ibid.*, para. 91(a).

¹³⁶ H. Ungerer, “The arrival of competition in European telecommunications”, at pp. 7-8, 3rd European Forum on the Law of Telecommunications, Information Technologies and Multimedia: Towards a Common Framework, Luxembourg, 19th June 1998.

It is therefore a fact that the TOs' network cannot be feasibly and economically substituted, at least in the short term. As a result, service providers who want to enter the market do not have any choice but to interconnect with the TOs since the latter are the only ones who can reach the entire population of each country. So it is clear that a TO's network is indispensable for all those companies willing to develop viable economic operations, since they will not be able to operate on the service market if they are refused access. There is therefore a situation in which the TOs hold "gatekeeper" positions (the telecommunications networks) while new entrants depend on gaining access to bottleneck facilities. So the central problem is that, if the TOs are allowed not to grant access, they will be able to control market developments by closing the gates and re-erecting the barriers which had been removed by the liberalisation process. Hence access to the incumbents' networks is a *conditio sine qua non* for efficient market entry of competitors, and one can realise the enormous impact that granting or refusing access can have on the future competitive structures of the EU telecommunications sector.

3.4. DEFINITION OF ESSENTIAL FACILITIES IN THE ACCESS NOTICE

This inability of new entrants to compete against the TOs if they are refused access, and the massive investment needed in order to build alternative networks, are two factors which fall into the scope of the definition of the essential facilities concept and the interpretation of that definition. Indeed, according to the Commission, the term "essential facilities" describes "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".¹³⁷ A facility will be considered essential if a refusal of access to the facility in question leads to the proposed services being made

¹³⁷ Access Notice, para. 68.

either “impossible” or “seriously and unavoidably uneconomic”¹³⁸ – which clearly shows that the Access Notice followed the decisions in the transport cases. Therefore the Commission is right when it states that the essential facility doctrine – found in the aforementioned transport cases – can also apply in the telecommunications sector.¹³⁹

3.5. ACCESS TO ESSENTIAL FACILITIES – OBJECTIVE JUSTIFICATION FOR REFUSING ACCESS

The Access Notice presupposes that, in order to determine whether the network operator (the access provider in general) should be obliged under the competition rules to allow access, four other conditions, alongside the recognition of a facility as essential, must be taken cumulatively into account. These conditions are the following:

- availability of sufficient capacity to provide access;
- the facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market;
- the requesting party is prepared to pay a reasonable and non-discriminatory price for the access;
- there is no objective justification for refusing access.¹⁴⁰

Clearly there is the danger that an unconstrained use of the “objective justification” argument by the TOs could lead the essential facilities doctrine to wither into insignificance. Thus guidelines are needed to clarify the situations where refusals to give access can be justified and, therefore, to provide a clear interpretation of the general and abstract concept of “objective justification”.

It has already been seen that in all the cases decided under Article 82 the Court and the Commission referred to the notion of an objectively justified

¹³⁸ *ibid.*, para. 91(a).

¹³⁹ Access Notice, para. 88.

refusal to supply. Following this line of cases, the Access Notice uses the term “objective justification” as one of those conditions under which an operator is able to escape from the obligation to grant access and, since the existing case law does not provide a clear meaning of the term, it attempts to clarify its scope. Thus non-exhaustive examples are laid down in order to determine when a justification can be regarded as objective. One example of such an objectively justified refusal to provide access is “an overriding difficulty of providing access to the requesting company”.¹⁴¹

It is a safe assumption that the term “overriding difficulty” includes the essential requirements¹⁴² which are laid down in the Interconnection Directive, i.e. security of network operations, maintenance of network integrity, interoperability of services and protection of data.¹⁴³ Besides, the Access Notice’s reference to “technical feasibility”¹⁴⁴ as a potential objective justification strengthens this argument.

Continuous technical innovation, which presupposes massive investment, in conjunction with the short life span of new products¹⁴⁵ create the necessity of providing companies with the chance to recoup their production costs and with the time to launch a new product. This is recognised by the Commission when it cites as an example of a possible justification “the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market”.¹⁴⁶

The Commission clearly shows that, although its main target is to prevent foreclosure of the market by facilitating the entry of new competitors, it does not forget that it is also important for industry and consumers not to undermine the incentive for firms to innovate and invest. This could be taken as an

¹⁴⁰ *ibid.*, paras 91(b) - 91(e).

¹⁴¹ *ibid.*, para. 91(e).

¹⁴² The essential requirements are defined as the “non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services”, see Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, 90/387/EEC, at Article 2(6).

¹⁴³ Directive 97/33/EC of the European Parliament and of the Council of June 30, 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principals of Open Network Provision (ONP), OJ L199/32, July 26, 1997, at Article 10.

¹⁴⁴ Access Notice, para. 96.

¹⁴⁵ See, for instance, in the Access Notice, at para. 29.

indication of the Commission's attempt to confine the application of the essential facility doctrine to the minimum. However, the Commission implies that it prefers a narrow interpretation of the notion of objective justification, and it therefore adopts an over-liberal application of the essential facilities doctrine. By this I mean that there will be acceptance of a justification as objective only under exceptional circumstances. This argument finds support from the fact that, although it is admitted that the question of objective justification will require close scrutiny on a case-by-case basis, it is stated that

“it is particularly important in the telecommunications sector that the benefits to end-users which will arise from a competitive environment are not undermined by the actions of the former state monopolists in preventing competition from emerging and developing”.¹⁴⁷

Finally, it is interesting to note that the principle of proportionality – found in many judgments of the Court¹⁴⁸ – can be used as a safety net in order to ensure that the justifications offered have not been uncritically accepted and are not excessive in relation to the target pursued, namely the maintenance and promotion of competition. This is recognised by the Commission when it states that

“in addition to determining whether difficulties cited in any particular case are serious enough to justify the refusal to grant access, the relevant authorities must also decide whether these difficulties are sufficient to outweigh the damage done to competition if access is refused or made more difficult and the downstream service markets are thus limited”.¹⁴⁹

¹⁴⁶ *ibid.*, para. 91(e).

¹⁴⁷ *ibid.*

¹⁴⁸ See for instance in *United Brands*, ground 190.

¹⁴⁹ Access Notice, para. 93.

3.6. THE DUAL-ROLE SITUATION AND THE SIGNIFICANCE OF A COMPETITIVE MARKET DOWNSTREAM OF THE ESSENTIAL FACILITY

In *Alaska Airlines*,¹⁵⁰ it was held that, even if an airline was dominant in the computerised reservation systems (CRS) market, it would be obliged to provide access to its CRS under the essential facility doctrine only if its refusal to supply would lead that airline to create or hold a dominant position in a downstream market (i.e. the market for airline services). Thus it seems that the essential facility doctrine, as it emerged in U.S. law, applies only if the downstream market cannot be considered competitive.

James Venit and John Kallaugher argue that the essential facilities cases entail a “dual-role” situation, under which the essential facility is owned or controlled by a company which has market power on the market downstream of the facility. As they put it, in that kind of situation the company in question has a “dual role as both an administrator of an infrastructure and an operator on a market utilizing that infrastructure”.¹⁵¹ It is interesting to note that Venit and Kallaugher perceive the essential facility doctrine, as developed in the United States, as not associated with a real relevant market for provision of the essential facility, i.e. that infrastructure may not constitute a market.¹⁵² However, this is not the case as the Access Notice identifies at least two types of product markets relevant to access agreements, namely services markets and access to facilities markets.¹⁵³ Interconnection to the public telecommunications network constitutes a typical example of access to facilities markets, while the provision of public voice telephony services is linked with the services market.¹⁵⁴

On the other hand, it should be stressed that the Venit and Kallaugher idea (i.e. that the essential facilities doctrine is associated with the fact that the operator of the essential facility is also dominant on the market downstream of the facility) could prove helpful in distinguishing the essential facilities cases

¹⁵⁰ *Alaska Airlines v. United Airlines* 948 F.2d 536 (9th Cir. 1991), cert. denied, 112 5.Ct. 1603 (1992).

¹⁵¹ James S. Venit and John J. Kallaugher, “Essential Facilities: A Comparative Law Approach”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at p. 331.

¹⁵² *ibid.*, p. 340.

¹⁵³ Access Notice, paras 45, 48 and 49.

¹⁵⁴ *ibid.*, para. 45.

from monopoly leveraging cases. Indeed, the first cases deal with a company which is already dominant in the market downstream of the facility while the second ones involve a company in a dominant position in one market which attempts to extend its dominance into a related market. As Venit and Kallaugher have put it, “in contrast to the monopoly leveraging cases, the essential facility rule comes into play only where denial of access to the facility has its effects in a market where the defendant has market power”.¹⁵⁵

Temple Lang agrees with the Venit and Kallaugher notion that the essential facilities cases entail a “dual-role” situation, something that he calls “a conflict of interests” situation.¹⁵⁶ However, contrary to the idea that the essential facility cannot be regarded as a market, he argues that the essential facilities cases concern enterprises which are dominant in the upstream market and which are also active in the downstream market.¹⁵⁷ But what greatly differentiates Venit and Kallaugher from Temple Lang is that, according to the latter, it is not necessary to prove that the owner or operator of the essential facility is also dominant on the market downstream of the facility. It is sufficient that “there is little significant competition in the downstream market”.¹⁵⁸

Arguably the fact that a company will usually enjoy its dominant position because it controls the essential facility,¹⁵⁹ in conjunction with the finding in *Tetra Pak*¹⁶⁰ – where due to the extremely high market share on the dominated market and the close links between the dominated and non-dominated market Tetra Pak was found “in a situation comparable to that of holding a dominant position on the markets in question as a whole”¹⁶¹ – is sufficient to convince about the validity of the above argument. Besides, the Access Notice seems to agree with this view. Indeed, it points out that in most cases in the

¹⁵⁵ James S. Venit and John J. Kallaugher, “Essential Facilities: A Comparative Law Approach”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at p. 319.

¹⁵⁶ John Temple Lang, “Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at pp. 276-277.

¹⁵⁷ *ibid.*, p. 275.

¹⁵⁸ “Licensing Block Exemptions and Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at pp. 363-364.

¹⁵⁹ John Temple Lang, “Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at p. 276.

¹⁶⁰ *Tetra Pak International SA v. Commission*, Case C-333/94 P, [1996] ECR I-5951.

¹⁶¹ *ibid.*, ground 31.

telecommunications industry “a particular operator has an extremely strong position on infrastructure markets and on markets downstream of that infrastructure”¹⁶² and, based on the judgment of the Court in *Tetra Pak*, it indicates that, even if an operator has significant market power in only one of those closely related markets,¹⁶³ the particular operator will be found “in a situation comparable to that of holding a dominant position on the markets in question as a whole”.¹⁶⁴ And its analysis is concluded by making clear that dominance originates from control of facilities. As it states characteristically, “a company controlling the access to an essential facility enjoys a dominant position within the meaning of Article 86 [now Article 82]”.¹⁶⁵

Thus it is not a precondition for the application of the essential facilities doctrine that the company in question is also dominant in the downstream market. It is enough that it is dominant in the upstream market (i.e. when it controls the essential facility) and, at the same time, there is no effective competition on the market downstream of the facility. Of course, if it is also dominant in the downstream market it will be harder to justify the refusal to provide access to the essential facility.¹⁶⁶

It is obvious that the above argument reflects primarily considerations of economic efficiency in the consumer welfare sense – as against concerns such as fairness. So Professor Fox argues that the application of the essential facility doctrine is linked with the efficiency principle “from the point of view of whether the consumer is going to be better off or not”, and emphasises that a company should be obliged to provide access only if that would lead to “a better deal for the consumers”.¹⁶⁷

¹⁶² Access Notice, para. 65.

¹⁶³ *ibid.*, para. 66.

¹⁶⁴ *ibid.*, para. 67.

¹⁶⁵ *ibid.*, para. 69.

¹⁶⁶ John Temple Lang, “Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at p. 276.

¹⁶⁷ “Licensing Block Exemptions and Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at p. 361.

3.7. THE SIGNIFICANCE OF NEW ENTRANTS AND NEW PRODUCTS OR SERVICES

So we reach the conclusion that there is a duty to provide access to essential facilities only if there is no effective competition in the downstream market (or if the refusal to provide access will significantly affect competition in the downstream market). As a result one could safely argue that there is no obligation to grant a competitor access to an essential facility (e.g. to the public telecommunications network) if there is a number of already established companies which compete effectively with the incumbent in the downstream market (i.e. in the telecommunications services market). It is interesting to note that this should be the case even if there is sufficient capacity available – which normally makes it harder to justify the refusal. However the situation changes if the potential entrant proves that he is willing and able to provide a new product or launch a service not provided by any of the existing competitors.¹⁶⁸

Moreover, there will be a duty to provide access to a new entrant who intends to provide a new product or commence a new service even if there is not sufficient capacity available and even if the downstream market is effectively competitive.¹⁶⁹ In that case, the fact that the new product or service offered by the new entrant could be regarded as contributing to the growth of competition – and thus not being contrary to the principle of proportionality – can justify an equal and non-discriminatory reduction of the operations of the existing competitors in order to facilitate the entrance of the new competitor and the emergence of the new product or service.¹⁷⁰

The Access Notice demonstrates the importance the Commission attaches to new market entrants who can introduce new products and services when it uses as an example of abuse of dominant position the attempt by a dominant company to prevent the emergence of a new product or service.¹⁷¹ Moreover, it should be remembered that one of the cumulative conditions which must be taken into account in order to determine whether the access provider is obliged to allow access is that “the facility owner ... blocks the emergence of a potential

¹⁶⁸ John Temple Lang, “Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at p. 288.

¹⁶⁹ *ibid.*, p. 292.

¹⁷⁰ *ibid.*, pp. 288-289.

¹⁷¹ Access Notice, para. 90.

new service or product”.¹⁷²

It is worth stressing the argument that the assessment of whether or not access should be given to a new competitor will need to take account of how significantly new a product or service is.¹⁷³ This kind of precondition is clearly problematic since it is not possible to specify in detail the meaning of the term “significantly new” – especially in the dynamic and fast-moving telecommunications sector. Moreover, it should be stressed that the Commission should proceed with extreme caution and treat frequent usage of that term with scepticism. Otherwise, an extensive application could create uncertainties for firms considering investing in new infrastructure and services and jeopardise the efficient development of new services over the network.

Of course it is understandable that whilst the Commission wants to encourage new entrants who can provide new products or services to compete in as many services as possible, it does not wish this to lead to inefficiencies which would be harmful to the market in the long term. By this I mean that the Commission is careful not to encourage services competition at the expense of infrastructure-based competition. On the other hand, however, it is obvious that the opportunity to remove the obligation to provide access, if a new product or service is not regarded as significantly new, could be used as a means to exclude from the market those who can make a valuable contribution to the telecommunications industry, in terms of the innovation and imaginative applications which are vital for meeting the needs of a rapidly evolving market.

3.8. SPECIAL DUTIES IMPOSED ON THE OPERATORS OF ESSENTIAL FACILITIES

It should be remembered that the Court has acknowledged the right of a dominant undertaking to protect its own commercial interests (when under attack) and to take reasonable measures which are necessary in order to protect those interests.¹⁷⁴ So a principle has been developed according to

¹⁷² *ibid.*, para. 91(c).

¹⁷³ John Temple Lang, “Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities”, in the Annual Proceedings of the Fordham Corporate Law Institute - International Antitrust Law and Policy 1994, at pp. 288 and 292.

¹⁷⁴ *United Brands*, ground 189.

which firms which refuse to deal with competitors are not liable if they have legitimate business reasons for refusing such co-operation.

However, the essential facilities cases appear to differ from the approach taken in the refusal to supply cases. First, the Commission has adopted a test which consists of imposing an obligation on the facility owner to act as if it was an independent company, i.e. a company which is not active on the downstream market.¹⁷⁵ And second, it seems that the Commission has placed an additional burden on the owners and operators of the essential facility compared with the obligation to deal imposed on dominant firms in cases associated with a refusal to supply under Article 82. Indeed, in the essential facilities cases the Commission does not pay any attention at all to the fact that a refusal to provide access to an essential facility could be justified if it can be proved that it was protecting the legitimate commercial interests of the facility owners. This approach represents an extension of the existing case law of the Court, since the only legitimate justification for a refusal to grant access to an essential facility appears to be the lack of sufficient capacity.¹⁷⁶ Of course, as already pointed out, even the lack of sufficient capacity cannot be regarded as an objective justification if the potential entrant can offer a new product or service.

From the above it could be submitted that the strict test of the independent company and the additional obligation imposed on the operator of the facility – in terms of not having the chance to refuse access on the grounds of protecting its legitimate commercial interests – are linked with the so-called dual role or conflict of interest situation, i.e. when the dominant operator of the facility is also active and has significant market power in the downstream market.

¹⁷⁵ *Sea Containers v. Stena Sealink*, para. 75.

¹⁷⁶ At it is stated in the Access Notice, “where capacity constraints are not an issue and where the company refusing to provide access to its facility has not provided access to that facility ..., then it is not clear what other objective justification there could be”, para. 87.

3.9. CONCLUSIONS

It must be mentioned that, after privatisation, BT remained intact as an integrated nation-wide firm, despite the fact that a vertically integrated dominant firm can use its dominance to deter entry into other sectors of the business. However, despite the chance of watching how the British model has worked – which in general terms did not succeed in restraining the exercise of BT's monopoly power – the Commission followed the same approach. For instance, the Commission has stated that “effective competition in the markets for telecommunications equipment and services has evolved without rigid structural safeguards, such as those developed in the mid-eighties in North American markets”.¹⁷⁷ And also that “the sector can evolve without a priori structural separation, but subject to the application of Community law, in particular, the competition rules”.¹⁷⁸

The problem is that such an approach would leave national operators completely free to engage in abusive behaviour aimed at maintaining their position. This could result in situations where the opportunities for their competitors would be seriously damaged and thus effective competition would be distorted.

So the introduction of the essential facilities doctrine is particularly important in the run-up to the complete liberalisation of the telecommunications sector. In particular, it has a significant role to play since it has been asked to deal with the problems created after the Commission's decision not to separate operation of the infrastructure from downstream use. Thus the doctrine demonstrates the Commission's concern to prevent national operators from gaining a competitive advantage over new market entrants. However, the Commission seems to recognise that its practice of providing new entrants with the means (essential facilities doctrine) and the time to become established – cannot go on indefinitely. The compromise reached in the *British Midland v. Aer Lingus* case¹⁷⁹ – i.e. the obligation of an essential facilities owner to grant access on the one hand but for only a limited period of time on the other – is a

¹⁷⁷ Green Paper on the liberalisation of telecommunications infrastructure and cable TV networks - Part II: A common approach to the provision of infrastructure for telecommunications in the European Union, COM(94) 682, 25.01.1995, at section VIII. V.5.

¹⁷⁸ Communication to the Council and European Parliament on the consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, COM(95) 158 final, 03.05.1995, at section V.9.2.

clear indication of the Commission's attempt to draw the balance needed in order to facilitate the entry of new competitors while not seriously undermining the incentive for firms to invest and innovate.

The doctrine also illustrates the importance the Commission attaches to the introduction of new products and services and to the rapid dissemination of technology and innovation. Thus the Commission rightly attempts to ensure that the application of the essential facilities doctrine will lead to competitive and growth-oriented market structures. Yet its efforts to fight the abusive behaviour of the incumbents against newcomers and to ensure that market foreclosure is avoided would serve little purpose if an uncritical and over-interventionist approach was chosen. Indeed, the application of the doctrine is vital to facilitate the transition to complete liberalisation, but it must be accompanied by certain conditions designed to reduce or minimise the negative effects on the essential facilities operators. The Access Notice succeeds in that by identifying those situations where companies which control essential facilities can be ordered under the competition rules to provide access.¹⁸⁰

Despite the significance of preventing national operators from gaining a competitive advantage over new market entrants, the Commission recognises that an over-liberal application of the essential facilities doctrine could undermine the incentive to invest in alternative infrastructure. The Access Notice reflects the Commission's approach in balancing these two important considerations and so it attempts to take a step towards the creation of a legal environment that will facilitate entry and will promote technical innovation while, at the same time, ensuring that the incentive to invest in alternative networks is not affected.

Arguably, however, the assessment of whether or not the aforementioned balance has been drawn successfully must be made in the light of the extent to which competition is safeguarded in the downstream market. By this I mean that it is imperative that the doctrine applies only in circumstances where there is no effective competition in the downstream market since, in that case, the refusal to provide access will have a significantly negative effect on the downstream competition – provided, of course, that the operator of the facility is also active (and possibly dominant) on the market downstream of that

¹⁷⁹ See *British Midland v. Aer Lingus*, para. 44.

¹⁸⁰ Access Notice, paras 91(a) - 91(e).

facility. It is submitted that the above point should be used as a strict rule alongside the qualified criteria identified by the Access Notice in paragraph 91.

It is unfortunate that nothing in the Access Notice under the title “essential facilities” indicates or even implies that the Commission is willing to take into account, in order to determine whether or not the doctrine should apply, how competitive the downstream market is and what restrictive effect on the downstream competition a refusal to provide access would cause. The aforementioned argument could also find support in the Commission’s decisions in *London European Airways v. Sabena* and in *Sea Containers v. Stena Sealink*. In both cases there was no consideration of whether the essential facilities owners had a dominant position in the downstream markets (i.e. in the airline market and the high-speed ferry services market respectively). It was enough in the Commission’s analysis that the companies in question held dominant positions due to their control over the essential facilities (i.e. the computerised reservation systems and the harbour respectively). If that is the case, the Access Notice expresses a Commission view that favours an over-zealous and over-interventionist approach concerning the application of the essential facilities doctrine in the telecommunications sector. The enormous damage that such a policy can cause in terms of undermining the incentive to invest in alternative infrastructure has already been illustrated.

Despite the inadequacies found in the Commission’s analysis, the Access Notice is a welcome approach since it is the first focused attempt in examining and analysing competition problems, actual and potential, in the telecommunications sector.

It should not be forgotten that the case law of the Court of Justice has not yet developed well-established principles and practices regarding access issues in the telecommunications sector – mainly because there are no clear precedents in the case law of the Court in the field of telecommunications.

So we are still in the process of trying to clarify the scope of competition rules in the sector, and this is exactly the role that the Access Notice has to play. Indeed, the Access Notice attempts to establish a framework which is transparent and which avoids uncertainty while, at the same time, also being flexible and without jeopardising its effectiveness. However, as has already been underlined, the Commission must be careful about the scope of its

powers under the competition rules to limit foreclosure effects by ensuring access to facilities. This means primarily that it must be cautious not to impose additional obligations on undertakings. Yet the Commission's approach in the application of the essential facilities doctrine does not help towards that direction; a less interventionist role is needed. Furthermore the fact that the Access Notice is a non-binding legal instrument does not help in decreasing legal uncertainty. However it is believed that, due to the liberalisation and the economic and technical developments in the telecommunications markets, a number of competition issues will arise concerning access and thus a more extensive case law will be developed. Meanwhile, in the months following publication of the Access Notice, comments will be received from industry players, European and national organisations as well as individuals active in the telecommunications and related sectors.

The responses to the Access Notice and subsequent discussions will generate calls for change (where that is needed) and will help to pull together all the issues. This will give the Commission the chance to proceed to modifications in order to take its next step – possibly a legally binding Regulation adopted under Article 83 of the Treaty.

It is expected that the Commission will consider the changes which will best contribute to the achievement of a greater legal and market certainty while not forgetting its objective of encouraging both infrastructure-based and services-based competition.

GENERAL CONCLUSIONS OF CHAPTER 2

This chapter examined the **second phase** of the transition from a regime of a State-run monopoly to an effectively competitive market.

It has already been illustrated that, given the extent of the accrued advantages conferred upon the incumbent operators, it is certain that there would be a difficult transition period before these privatised companies could become competitive, and during this time they could use their substantial power to charge customers monopoly prices as well as engage in strategic games to deter new entrants.

It was realised therefore that, in the context of this second phase, the access

issues are of major significance due to the opportunity for new market players to enter the market and, at the same time, the incumbents' desire to retain their key bottleneck positions. For this reason – following the establishment of an *ex ante* regulatory framework – the application of the regulatory regime and the complementary application of competition law are equally important in order to ensure that the already removed legal barriers will not be replaced by a de facto monopolistic market structure.

Thus the jurisprudence of the ECJ (involving cases of refusal to supply) and the European Commission's essential facilities cases, alongside the European Commission's Notice on the application of the competition rules to access agreements in the telecommunications sector, can play a vital role for driving the industry forward, ensuring a level playing field, and reducing the uncertainties for firms considering investing in new infrastructure and services. Indeed, creating a clear and stable policy and rules in relation to access and interconnection is indispensable in order to allow a sound basis for long term planning in the industry and set the environment for massive investment.

Chapter 3

Strategic Alliances and Mergers in the Converging Environment

The Commission's objective to prevent market foreclosure

SECTION A: HORIZONTAL STRATEGIC ALLIANCES

1. INTRODUCTION

Big multinational enterprises are the main users of long-distance and international services and they are increasingly demanding high-quality and reliable services on a worldwide basis. This is a basic precondition for them, if they want to have a successful involvement in international financial transactions. Therefore, due to the growing use of multimedia, the idea of a 'one-stop-shop' – that is the ability to access the full range of telecommunications services through a single group of operators – has built up very rapidly.

However, as already illustrated, telecommunications operators (TOs) had been almost entirely national and, hence, they could not respond to the requirements asked by multinational enterprises. It is therefore clear to TOs that, due to the lack of know-how and sometimes the necessary technical capabilities as well as because of the opportunities created by liberalisation and deregulation processes, they should go global and link up their networks in order to create dedicated worldwide superhighways. In addition, the fact that the required investments are so large that they cannot be met by national suppliers on an individual basis is another factor which makes the telecommunications companies realise that the best way to respond to the 'new age' and to protect future profitability is to form new worldwide strategic alliances and mergers.

This section focuses on some of the most important telecommunications cases to emerge over the last years and attempts to illustrate the Commission's policy in the sector.

2. DISCUSSION OF CASES

2.1. BT-MCI¹

British Telecommunications plc (BT) and MCI of the United States launched a strategic alliance, Concert Communications Company, in June 1994. The strength of Concert stems from the fact that it owns its network – it plans to have a single backbone network linking 55 countries – through which it should be able to offer a wider range and better quality of services to its customers (especially to multinational and large regional companies).² In addition to virtual private network (VPN) services, Concert provides global managed data services, messaging, videoconferencing, network managed services and global calling card services for traveling employees. The advantage of such services is that multinational corporations will be able to use a single phone system world-wide, having one-stop shopping and one-stop billing facilities. BT and MCI contributed to Concert their existing non-correspondent international network facilities, including Syncordia, BT's existing outsourcing business. BT will hold 75.1% of Concert's capital and MCI will hold 24.9%; however, all major decisions require the agreement of both parties.

The creation of Concert was held to infringe Article 81(1) because it eliminated the potential competition between the parties as BT and MCI were at least potential competitors of the joint venture and of each other. Indeed, although neither BT nor MCI could offer such global services as Concert could, it was considered that, given their size and resources, they had the ability and chance to enter this market individually.

However, an exemption was granted for seven years for the following

¹ Case IV/34.857 – *BT/MCI* [1994] O.J. L223/36.

reasons:

– The joint venture was found to improve telecommunications services and economic progress in the EU as it would offer new networks and technological superior services “more quickly, cheaply and of a more advanced nature than either BT or MCI would have been capable of providing alone”.³

– Consumers would benefit from these new services and cost savings.⁴

– It was also pointed out that Concert would create an alternative to the already established alliances as well as to the new alliances which were to be concluded in the short future (such as AT&T’s Worldsource, Unisource, IPSP, Atlas etc). Therefore competition could not be hindered.⁵

2.2. Atlas⁶ and GlobalOne⁷ cases

In 16 December 1994 Deutsche Telecom (DT) and France Telecom (FT) notified the preliminary *Atlas* agreement to the Commission. The purpose of this European telecommunications alliance was the provision of data and other value-added corporate communications services.

The *Atlas* agreement raised a number of concerns from a competition point of view. In particular, the Commission was concerned that the dominant position of DT and FT in their domestic markets could allow them to exclude new competitors. Indeed, the German and French markets were not liberalised as those of U.K. and U.S. (this was one of the reasons why no conditions were

² Another factor which indicates the strength of the Concert is that “BT and MCI are the fourth and fifth largest telecommunications companies in the world in terms of traffic. BT, as the former monopolist in the United Kingdom, still keeps a very substantial amount of market power in that Member State as reflected by BT’s overall market share (around 90% of the UK market). MCI is the second largest long-distance carrier in the United States of America, although significantly behind AT&T”, see para. 41 of the decision.

³ *ibid.*, at para. 53.

⁴ In particular, “the incorporation of Newco will mean that consumers in general will benefit more rapidly from a set of new advanced services than Newco’s parent companies would have been capable of providing separately. In addition, consumers, big companies in this case, will benefit directly through the provision of: i) a greater product portfolio of developed and new services allowing them to operate more effectively on a global scale and to better compete with their global as well as with their Community and EEA competitors; and ii) lower pricing resulting from the cost savings to be made by Newco as a result of operational efficiencies or pressure on local Tos”, see para. 55 of the decision.

⁵ *ibid.*, at para. 56.

⁶ Case No IV/35.337 – *Atlas* [1996] O.J. L239/23.

attached to the exemption granted to the *BT/MCI* alliance). Moreover, the *Atlas* project provided for the elimination of a competitor of DT in Germany, namely FT's local subsidiary, Info AG. The size of the parties is also relevant as these dominant undertakings are amongst the world's largest telecommunications carriers and are owned by the EU's largest nation states. Moreover, the Commission was concerned that *Atlas* could not offer satisfactory results since it was not able to have enough capacity to carry expected international traffic and, therefore, could not provide truly global services.

So the Commission demanded various modifications and only agreed to begin the formal exemption procedure in 17 October 1995 when FT and DT as well as the French and German Governments agreed to a number of changes and offered a number of undertakings in order to address the aforementioned concerns.

Two of the most important commitments made by the French and German Governments and the *Atlas* parties were as follows:

- France and Germany were to grant the first two alternative infrastructure licences before *Atlas*' European services were allowed to begin. This was probably the most important point of the negotiations as the two countries had to liberalise the so-called alternative infrastructure networks by 1 July 1996. This political commitment would permit owners of alternative networks, such as those operated by railways, utility companies or cable TV companies, to offer liberalised telecommunications services, such as data services, value added voice services and services to corporate networks and closed user groups.

- Transpac and Datex P, the public switched data networks in France and Germany respectively, were to remain outside the *Atlas* joint venture until 1 January 1998. In other words, FT and DT would include Transpac and Datex P networks within the *Atlas* venture only when France and Germany fully liberalised all telecommunications services, including public voice, and all network infrastructure. Moreover, even after their integration into *Atlas*, FT and DT were required to grant open access to these networks, – on a non-discriminatory and transparent basis – for competing service providers offering low level data services, and to provide a standardised interconnection protocol.

- Finally, FT undertook to sell Info AG.

⁷ Case No IV/35.617 – *Phoenix/GlobalOne* [1996] O.J. L239/57.

The above clearance procedure and the conditions attached to *Atlas* covered also the *Phoenix* alliance, a global telecommunications alliance between Atlas and US Sprint Corporation. This alliance, which was renamed *Global One*, addressed the same markets (as *Atlas*) for value-added telecommunications network services and also the market for traveller services and the market for so-called carrier's carrier services. The final *Atlas* and *Global One* agreements were signed on 22 January 1996 and notified to the Commission on 28 February 1996. They were finally approved by the Commission on 17 July 1996, with the approval lasting for five years (in the case of *Atlas*) and seven years (in the case of *Global One*). So the *Atlas* alliance will be reviewed in 2001 along with the *Concert* alliance between BT and MCI.

A significant conclusion derived from the above case is that, apart from the commitments and amendments undertaken for the clearance of the *Atlas* alliance, a key element of the Commission's satisfaction over *Atlas* was the Sprint involvement through *Global One*. Indeed, as the Commission commented:

"Phoenix makes it possible that consumers benefit from a considerably wider range of new services that DT, FT and Sprint would not be capable of providing separately within the same period of time ... Only a truly global dimension would make the cooperation between DT and FT in the framework of *Atlas* sufficiently important to consider an exemption from the prohibition of Articles 85(1) of the EC Treaty and 53(1) of the EEA Agreement ... The creation of a global venture committed to undertaking the investment needed to be present worldwide is therefore crucial for the choice and quality of communications available to MNCs and eventually SMEs. Adding global 'connectivity' to Europe-wide services, *Phoenix* is a substantial step forward in relation to *Atlas*".⁸ ... "At this point in time the Commission regards entry of a competitor to *Concert* into this immature market as being dependent on the participation of an established United States provider with wide geographic coverage".⁹

This case (as well as the *BT/MCI* case) makes it obvious that the Commission can take greater account of trade with non-Member States and of the

⁸ Case No IV/35.617 – *Phoenix/GlobalOne* [1996] O.J. L239/57, para. 60.

⁹ *ibid.*, para. 67.

worldwide competition existed in the telecommunications industry. Therefore the question whether the Commission should try to increase competition between TOs in order to promote smaller but 'clean' European operators instead of allowing them to cooperate with non-EU carriers is non-existent. The answer is simple: the Commission has to follow the latest technological and market developments and, therefore – under the scrutiny of competition law – must promote global alliances. The process of globalization of the economy is accelerating and the Commission's competition policy cannot disregard this new dimension. As the then Commissioner Karel Van Miert pointed out,

"the telecoms market is more and more no longer essentially a European Union one, it becomes a global one; the most important alliances notified to me are fundamentally international not just European; the customers and companies served by this market want direct access to increasingly global services – whether this may be a web site in Australia, or a corporate communications network for a multinational".¹⁰

Another important element brought out after considering the Commission's view in this case is that the attempt by a number of dominant TOs to establish global telecommunications alliances will likely speed up the pace of liberalisation in Europe. Indeed, it was showed that the Commission made the progress of the parties' cooperation dependent on French and German progress towards telecommunications liberalisation. So the linkage between the approval of Atlas/Global One alliances and liberalisation demonstrates that the Commission has the power and the willingness to open up the European market for telecommunications services to more competition. As Karel Van Miert put it,

"I am determined to use the full potential of the Competition Rules of the Treaty to maintain a tough stance in this area ... and luckily we have the legal tools to impose this. We are taking full advantage of the strong and effective link between implementation of government commitments to liberalisation and our conditions for allowing alliances involving dominant

¹⁰ Karel Van Miert, "Preparing for 1998 and Beyond", European Access 1996 No 5, October, 8-12, at p. 11.

telecom operators".¹¹

A relevant case is the Commission's decision of 4 October 1995 in the Italian GSM case,¹² that the Italian Government had infringed EC law in requiring Omnitel Pronto, Italy's second mobile operator, to pay Lit.750 billion (some US\$500 million) for a mobile licence, while Telecom Italia, the state-owned operator, was not required to pay for its own licence. The Commission negotiated with the Italian Government over the mechanism by which the payment by Omnitel Pronto could be offset and, in the end, a compensation package was granted.

Those compensatory measures included the Italian Government's commitment to implement the Mobile and the Full Competition Directives: in other words, a commitment to liberalize alternative infrastructure as soon as possible. Omnitel could also have non-discriminatory access (including a 25 per cent reduction of tariff conditions for interconnection) to the GSM network run by Telecom Italia Mobile.

The above measures show once again the link between competition cases and implementation of the liberalisation timetable and illustrate how the Commission can impose conditions not only on governments but also on the parties of the agreement in the form of non-discriminatory treatment of their competitors regarding access to the network. In addition, the settlement of this case can be seen as a vehicle to redress the asymmetry of market conditions between the new entrants and the TOs, as, despite the existence of liberalisation measures, incumbents will continue to enjoy significant advantages over new entrants for the foreseeable future.

¹¹ *ibid*, at p. 8.

¹² Commission Decision 1995/489/EC of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy, [1995] O.J. L280/49.

2.3. Unisource¹³ and Uniworld¹⁴ cases

The Commission's approach adopted in the *Atlas/GlobalOne* decisions was also followed in two other cases. As a result, the creation of two telecommunications alliances, Unisource and Uniworld, was approved in 29 October 1997.

Unisource is a joint venture between the national operators Telia of Sweden, PTT Telecom of the Netherlands and Swiss Telecom. The Unisource joint venture attracted the interest of AT&T with the purpose of creating a transatlantic alliance to be known as Uniworld. The aim of the Uniworld alliance is to provide the European business market with pan-European telecommunications services, following a line of transatlantic telecommunications alliances like the 'Concert' and 'Global One'.

Following its investigation, the Commission found that the agreements fell within the scope of Article 81 of the EC Treaty. However, after discussions with the governments of the European countries involved in *Unisource* and subject to changes to the agreements and behavioural conditions imposed on the parties, the creation of the two companies was approved. With regard to the Unisource alliance in particular, the Commission found that the existing dominant positions of the three Unisource shareholders on many of their home markets would not be strengthened. The most important commitments which the Commission regarded as necessary to let the deal go through were as follows:

- The Netherlands and Switzerland had to commit themselves to the July 1996 deadline for the liberalisation of the so-called alternative communications network.
- The full liberalisation of telecommunications in Switzerland from 1 January 1998.
- Telefonica of Spain, which was originally a member of the transaction, later announced its withdrawal from the alliance. It is important, however, to emphasise that before Telefonica's withdrawal, Spain had been asked to confirm its decision to open up its telecommunications market without making

¹³ Case No IV/35.830 – *Unisource* [1997] O.J. L318/1.

¹⁴ Case No IV/35.738 – *Uniworld* [1997] O.J. L318/24.

use of the five years derogation which had been granted. This meant that the Spanish government had to comply with the general 1998 deadline. In particular, the full liberalisation of the telecommunications market in Spain was to take place by 30 November 1998, with three licences being granted by 1 January plus limited licences for the cable TV companies to offer telecommunications within their areas.

– Other commitments included: undertakings to prevent discrimination by the parent companies in respect of leased lines and interconnection, to prevent cross subsidies between Unisource and its parent companies and the prevention of tying or bundling of services.

The exemption would last for five years from the date of the liberalisation of alternative networks on 1 July 1996 and would be valid until 30 June 2001.

Similar undertakings were made by the parties in respect of the *Uniworld* transaction on non-discrimination, against misuse of confidential information and for the prevention of cross subsidisation and tying of services. In addition, AT&T offered to the Commission a series of undertakings on interconnection, access and accounting rates that would be no higher than the lowest accounting rate established between AT&T and any Unisource shareholder. The *Uniworld* arrangements were also exempted for five years.

3. CONCLUSIONS

The Commission has assumed a positive attitude and awards those strategic alliances whose parents prefer to adapt to the new environment in order to respond to the requirements asked by multinational enterprises rather than trying to protect themselves artificially against outside competition.

The Commission has recognised that certain restrictions on competition between the parent companies can be justified if the alliances in question are found to contribute to the improvement of telecommunications services. Furthermore, restrictions on competition can be considered to be indispensable, i.e. directly related to the accomplishment of the alliances. In those cases, the non-competition clauses can be regarded as ancillary to the

creation of the projects by protecting them during their crucial launch phase. Their role is to commit the parent companies to ensuring the success of the alliances, and to spread substantially the high costs and risks required for commercialising and developing the projects.

However, the Commission has made it clear that those restrictions on competition must be kept to a minimum in order to ensure that the clearing of the strategic alliances will not lead to re-monopolised market structures. To address the aforementioned concerns, the Commission has imposed on the parent companies a number of necessary undertakings as a pre-condition to let the deals go through. It has already been illustrated that, especially when the strategic alliances involve incumbents, the liberalisation of home markets is an indispensable criterion in order to make the restrictions on competition acceptable.

SECTION B: MERGERS AND JOINT VENTURES BETWEEN PAY-TV SUPPLIERS AND TELECOMMUNICATIONS OPERATORS

1. INTRODUCTION

This section analyses EU competition policy on the strategic alliances and mergers which are spurred on by the accelerating change of markets with the convergence of the telecommunications and media sectors. Companies are now positioning themselves in order to take advantage of the new opportunities. Thus EU competition policy – after its success in liberalising the telecommunications markets and after dealing with those alliances with a more horizontal nature – has a new challenge to confront: potential anti-competitive behaviour generated by this rapid change, and the new possibilities for vertical

integration between market players who try to occupy the key bottleneck positions and control market developments.

Again, the Commission's main concern is how to draw the right balance in order to promote technical innovation and the emergence of new products and services while avoiding market foreclosure which would block market development and discourage investment in the untested multi-media markets.

2. DISCUSSION OF CASES

2.1. MSG Media Service¹⁵

On 6 June 1994 Deutsche Bundespost Telecom (DT), Bertelsmann AG and Taurus Beteiligungs GmbH (which belongs to the Kirch group) notified the Commission of the creation of a joint venture called Media Service GmbH (MSG).

DT is the incumbent telecommunications operator owning most of the cable network in Germany and controlling the return channels which are indispensable for interactive services. Bertelsmann AG is involved in the publication of books and magazines and is also engaged in commercial television. The Kirch group is the main supplier of films and TV programmes in Germany. Bertelsmann and Kirch are active in the audiovisual sector and run, together with Canal Plus, the channel Premiere, which at the moment is the only pay-television channel in Germany.

The object of MSG was to offer both digital programmes and to undertake transfers and transactions for smaller providers of programmes (especially the technical, business and administrative handling of payment-financed television), as well as other communication services (including subscriber customer management), using the existing cable network of Deutsche Telecom.

After four months of investigation and careful examination of the relevant market situation (on economic grounds) the Merger Task Force of the EU

Commission decided on 9 November of 1994 to block the MSG joint venture as incompatible with the Common Market under Article 8.3 of the Merger Regulation and with the functioning of the EEA Agreement under Article 57.1 of that Agreement. The conclusion of the Commission investigation was that, despite the fact that a joint venture like that could encourage the development of multimedia in Europe,¹⁶ the planned operation would create or strengthen a dominant position in three separate markets: a) the market for administrative and technical services supplied to pay-TV operators and operators of other TV services; b) the market for pay-TV; and c) the market for cable networks.

a) The Commission considered it unlikely that competitors would enter MSG's market. MSG would have been able to control its competitors in the pay-TV market through its monopolistic position as a supplier of decoders and administration of the customer base. This is true given the fact, for example, that DT Telecom controls most of the cable network in Germany.

b) Furthermore, the proposed concentration would enable Bertelsmann and Kirch (currently the only suppliers of pay-TV services in Germany via their Premiere channel) to strengthen their dominant position; MSG could help them to control competitor's access to this market and could be used as a vehicle to gain information regarding the activities of competitors.

c) Finally, the dominant position of DT on cable infrastructure would be protected and strengthened by MSG, something that could have serious effects on the liberalisation of this market in 1998.

Even last minute undertakings proposed by the parties (such as non-discriminatory behaviour of MSG towards pay-TV providers and digital development of the cable network sufficiently to avoid any shortage of the transmission capacity)¹⁷ were rejected by the Commission on the grounds that those undertakings were behavioural (which means that they are not easy to monitor from a technical point of view) and only partly conditional and, therefore, they could not modify the initial analysis.¹⁸

¹⁵ Case IV/M.649 – *MSG Media Service Decision* [1994] O.J. L364/1.

¹⁶ *ibid.*, at para. 100: "It is true that the successful spread of digital television presupposes a digital infrastructure and hence that an enterprise with the business object of MSG can contribute to technical and economic progress".

¹⁷ *ibid.*, para. 94.

¹⁸ *ibid.*, paras 95 and 99.

2.2. Nordic Satellite Distribution¹⁹

On 23/2/1995 Norsk Telecom AS (NT), Telemarkt A/A (TD) and Industrieforvaltningen AB Kinnevik (Kinnevik) notified their intention to create a joint venture called Nordic Satellite Distribution (NSD).

As regards the NSD's parents, it involves financially important and dominant players in the Nordic countries. NT is the main cable TV operator in Norway and controls the Norwegian programme distributor Telenor CTV AS and the satellite capacity on the one of the two Nordic satellite positions. TD owns the national broadband distribution network, is the largest cable TV operator in Denmark and controls, in cooperation with Kinnevik, most of the satellite capacity on the second Nordic satellite position. Kinnevik is a Swedish conglomerate and the most important distributor of Nordic Satellite TV programmes; it has also strong interests, among other things, in broadcasting, pay-TV, magazines, newspapers and telecommunications.

The NSD's intention was to establish an attractive satellite position for transmission of TV signals to cable TV operators and households receiving satellite TV on their own dish. This would not be difficult because NSD would be the only operator whose programmes could be received within the whole of the Nordic satellite region.

On 19 July 1995, however, and after a five-month investigation of the case, the Commission declared the NSD joint venture incompatible with the Common Market and the functioning of the EEA Agreement. The Commission concluded that the NSD would have created a highly vertically integrated operation covering a wide range of services. As a result, it would have a competitive advantage which could foreclose the markets to new entrants in the Nordic region,²⁰ especially in the field of satellite TV broadcasting.²¹ As Karel Van Miert, Commissioner responsible for Competition, has put it:

“the Nordic Satellite Distribution agreement in the Nordic Market had to be blocked because (it) involved, amongst other things, networks operators, enjoying essentially gatekeeper functions extending dominance into related

¹⁹ Case IV/M.490 – *Nordic Satellite Distribution* [1996] O.J. L53/20.

²⁰ *ibid.*, paras 161-164.

²¹ *ibid.*, paras 89-91.

broadcasting and content markets”.²²

2.3. HMG Groep SA²³

Another proposed TV joint venture was the Holland Media Groep SA (HMG) between RTL4 S.A. (RTL), Vereniging Veronica Omroeporganisatie (Veronica) and Endemol Entertainment Holding BV (Endemol). The planned operation did not satisfy the turnover thresholds for the application of the Merger Regulation. However the Commission decided in May 1995 to proceed to a careful examination of the above proposed joint venture, after a request from the Dutch government. Indeed, under Article 22 of the Merger Regulation, a Member State is entitled to request the Commission to examine a particular case.

As regards the HMG's parents, Endemol is the largest independent producer of TV programmes in the Netherlands, while RTL and Veronica – involved in broadcasting activities – would participate in the joint venture with three commercial TV channels.

Although the Commission's finding in this case could lack the usual suspension provisions (because the parties did not meet the turnover thresholds set out in the Merger Regulation) and the parties were entitled to complete their operation, the decision reached in October 1995 did not allow the joint venture to take place. The Commission's conclusion was that the parties' activities in HMG could lead to a strong dominant position on the TV advertising market in the Netherlands. In addition, the position of Endemol on the market for independent TV productions could be strengthened.²⁴ So, the joint venture was declared incompatible with the Common Market.

This decision is important as it follows the decisions set in the *MSG* and *NSD* cases which proved to be unacceptable agreements in their notified forms. However, although it seems that there is a trend towards refusing

²² Karel Van Miert, "Preparing for 1998 and Beyond", *European Access* 1996 No 5, October, 8 12, at p.10.

²³ Case IV/M.553 – *RTL-Veronica-Endemol*, 1996/346/EC [1996] O.J. L134/32.

²⁴ For a more analytical reasoning of the Commission's conclusion, see the Decision of 17 July 1996, 96/649/EC, Case IV/M.553 – *RTL/Veronica/Endemol* [1996] O.J. L294/14.

approval for mergers in the converging media/telecommunications area which result in powerful vertically integrated operators, the situation is not completely clear yet and the aforementioned cases do not indicate a negative position of the Commission on media developments. So, for instance, the parties to the HMG joint venture were invited by the Commission to propose alternative and appropriate measures in order to restore conditions of effective competition. After the modification of the HMG venture and subject to full compliance with the conditions and obligations contained in the Parties' commitments, the concentration was declared compatible with the Common Market.²⁵

The following three cases also prove that it is by no means apparent that the Commission has formulated a specific policy regarding this type of alliance.

2.4. Kirch/Richemont/Telepiou²⁶

On 27th June 1994 Compagnie Financiere Richemont AG (Richemont) and Kirch – through their subsidiaries Ichor and Ptb Pay TV Beteiligungs GmbH respectively – entered the Italian pay-TV market by acquiring joint control of Telepiu.

Italy is the only country where Telepiu provides television broadcasting services.²⁷ At the same time, there is no overlap in the geographic areas of activities of the parent companies. Indeed, Kirch's main television interests are in the German market whereas Richemont – through its shareholding in FilmNet – is involved in the broadcasting markets in Belgium, the Netherlands, Denmark, Norway, Sweden and Finland.²⁸

This was exactly the crucial point in the Commission's analysis: the acquisition of joint control of Telepiu would not give rise to co-ordination of the competitive behaviour between the parties since their television activities were taking place on separate geographic markets. In addition, due to the fact that broadcasting is directly related to the language, religious and social needs of

²⁵ Ibid., Article 1 of the decision.

²⁶ Case IV/M.410, *Kirch/Richemont/Telepiou* [1994] O.J. C225/1.

²⁷ Ibid., para. 18.

²⁸ Ibid., para. 4.

each country – the national nature of the television services market²⁹ – Kirch and FilmNet were not considered to be in a position to enter the Italian market successfully on their own.³⁰

These factors were enough to convince the Commission that the transaction would not lead to an increase of the parties' market shares, nor would it result in a restriction of effective competition in the television market in Italy.³¹ As a result, the Commission cleared the notified merger and declared it compatible with the Common Market.³²

2.5. Kirch/Richemont/Multichoice/Telepiou³³

On 28th March 1995 Richemont and MultiChoice Limited (MultiChoice) merged their respective pay-TV interests in PayCo. Since MultiChoice had a 50% interest in Network Holdings (NetHold) – which in turn owned, among others, FilmNet – and Richemont held the other 50%,³⁴ PayCo would replace NetHold as the holding company for the television interest of Richemont and MultiChoice.³⁵ Moreover, as a result of Richemont contributing its interest in Telepiou to PayCo, Telepiou would be jointly controlled by Richemont, the Kirch Group and MultiChoice.³⁶

Again the Commission held that the acquisition of joint control of Telepiou would not give rise to co-ordination of competitive behaviour between the parties since the Telepiou parents' activities were taking place on different geographic markets and none of these were present in the Italian television market.³⁷ Therefore the proposed transaction would not result in an increase of market shares between the parties, effective competition would not be

²⁹ *ibid.*, para. 17. See also *MSG Media service* (para. 46), and *RTL/Veronica/Endemol* (para. 25).

³⁰ *Kirch/Richemont/Telepiou*, para. 20.

³¹ *ibid.*, paras 20 and 23.

³² *ibid.*, para. 23.

³³ Case IV/M.584, *Kirch/Richemont/Multichoice/Telepiou* [1995] O.J. C129/6.

³⁴ *ibid.*, paras 5-6.

³⁵ *ibid.*, para. 10.

³⁶ *ibid.*, para. 12.

impeded and, thus, the notified concentration was declared to be compatible with the Common Market.³⁸

2.6. Bertelsmann/CLT³⁹

Bertelsmann Aktiengesellschaft (Bertelsmann) is a major German media group involved in the publication of books and magazines and also engaged in commercial television. These activities have been conducted by UFA Film und Fernseh GmbH (UFA), Bertelsmann's subsidiary. Audiofina S. A. (Audiofina) – a Luxembourg-based company – holds almost total control (approximately 97%) of Compagnie Luxembourgeoise de Telediffusion (CLT), which is the owner of RTL television station and an important European player in radio and television businesses. On 4 September 1996 Bertelsmann and Audiofina notified the Commission of the creation of a joint venture called CLT/UFA.

The Commission identified those substantial characteristics which must be fulfilled for a joint venture to be concentrative, namely that both parties must have joint control of the joint venture - for example when a unanimous resolution is needed: "no decision can be taken ... without the agreement of both Bertelsmann and Audiofina";⁴⁰ the joint venture must have sufficient resources to operate a business activity independently from its parents for a long period of time:

"CLTUFA will continue the activities performed to date by CLT on the one hand and UFA of the other. It will receive all the television and radio licences currently held by CLT and UFA and will employ its own staff. It will have its own technical and financial resources. [It will be] of an unlimited duration. Therefore, CLTUFA will be a fullfunction entity formed on a lasting basis".⁴¹

³⁷ *ibid.*, paras 12 and 20.

³⁸ *ibid.*, paras 20 and 24.

³⁹ Case IV/M.779 *Bertelsmann/CLT* [1996] O.J. C364/3.

⁴⁰ *ibid.*, para. 7.

⁴¹ *ibid.*, para. 8.

There must also be a lack of co-ordination of competitive behaviour between the parents of the joint venture: “all Bertelsmann and Audiofina’s activities related to radio and television ... will be transferred to the joint venture. Consequently, the parents of the joint venture will be active on these markets only through the joint venture”.⁴² In addition, the joint venture was found to have the required “Community dimension” in order to qualify for review under the EC Merger Regulation.⁴³

With the exception of Germany, there was no overlap in the geographic areas of activities of the parent companies.⁴⁴ Indeed, the only overlap of the television activities of the two parties took place in Germany where CLT and UFA were active in the audiovisual sector and ran together, through a joint venture, the channel RTL.⁴⁵ However, this fact was unlikely to pose competition problems since CLT/UFA was facing strong competition, especially from the channels linked to the Kirch group (a market share in tv advertising of around 50%).⁴⁶ Indeed, with an increase of only 1.8% in market shares for the channels tied to CLT/UFA and a total market share in tv advertising of around 38% (compared to Kirch’s 50%) the Commission took the view that the CLT/UFA concentration would not result in a restriction of effective competition in this market.⁴⁷

Moreover, with regard to the pay-TV market in Germany, UFA controls approximately 38% of the Premiere channel, the only pay-TV supplier in Germany until the launch of DF 1, a digital pay-TV channel linked to the Kirch group. It was believed that the new digital activities of Kirch (the DF 1 channel), in conjunction with the absence of CLT in the pay-TV market in Germany, would not lead to an increase of CLT/UFA’s market share and, therefore, the proposed joint venture would not strengthen the Premiere’s current dominant position.⁴⁸

In clearing the merger, the Commission refused to follow the view of some market players that the synergies occurring from the concentration would offer major competitive advantages to the two companies and that therefore it

⁴² *ibid.*, para. 9.

⁴³ *ibid.*, para. 11.

⁴⁴ *ibid.*, para. 35.

⁴⁵ *ibid.*, para. 23.

⁴⁶ *ibid.*, paras 25 and 26.

⁴⁷ *ibid.*, para. 26.

⁴⁸ *ibid.*, paras 27 and 28.

should be opposed. The Commission's view was that, although the merger would improve the position of CLT and Bertelsmann due to the synergies resulting from the concentration, it would not lead to any negative restrictive effects – i.e. it was in principle pro-competitive – since “the mere combination of resources and possible synergies is not sufficient to establish a dominant position in the foreseeable future”.⁴⁹

What is certain, therefore, is the Commission's concern regarding the effects of foreclosure on third parties, especially in the sectors of rapidly developing industries. The view of Karel Van Miert – then Competition Commissioner – could be indicative of a Commission's decision to adopt a more flexible and relaxed approach however. As he stated:

“It is rather difficult for me to give a clear indication of my attitude to such potentially powerful systems. Let me just say at this point that where ventures draw together content provision and transmission systems we will be keeping a very close eye on the competition implications. On the other hand, to the extent that there are now major projects developing in parallel, their market power may be seen to counterbalance each other”.⁵⁰

The next two cases, due to their importance, are dealt with in detail and provide a certain amount of guidance about the Commission's view on strategic alliances in the pay-TV market. The discussion of these cases is followed by the final conclusions on the Commission's policy.

2.7. Bertelsmann/Kirch/Premiere⁵¹ and Deutsche Telecom/BetaResearch⁵²

It has already been shown how the Commission cleared the plans of Bertelsmann (the common parent company of the leading German media group) and Audiofina (an important European actor in radio and television businesses) to concentrate their television and radio business in a newly

⁴⁹ *ibid.*, para. 40.

⁵⁰ Karel Van Miert, “Preparing for 1998 and Beyond”, *European Access* 1996 No 5, October, 8-12, at p.10.

⁵¹ Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1.

created and jointly controlled entity called CLT/UFA. Kirch is the main supplier of feature films and TV entertainment programmes in Germany and is also involved in commercial television. One of the group's activities in the audiovisual sector includes the digital pay-TV channel DF 1 while it runs (owning 25%), together with UFA – Bertelsmann's subsidiary – and Canal Plus (37.5% each), the German pay-TV channel Premiere.⁵³

CLT-UFA and Kirch notified the Commission of their plans to merge their digital television activities in Germany into the Premiere venture. This operation would lead to the withdrawal of Canal Plus and to the acquisition of joint control of Premiere by CLT-UFA and Kirch (50% each). Moreover, it would result in the termination of the operation of DF 1 as an autonomous pay-TV supplier and in the transfer of its assets (including the sports channel DSF and all the Kirch's digital interests) to Premiere. Therefore, if the concentration was concluded, it would be active on the pay-TV and pay-TV broadcasting rights markets only via their participation in the Premiere channel.⁵⁴

At the same time, CLT-UFA would acquire a 50% interest in BetaDigital, until then a wholly-owned subsidiary of Kirch. BetaDigital operates a playout center for satellite-transmitted digital television and is the only provider on the market in technical services for satellite pay-TV in the German speaking area.⁵⁵

Moreover, CLT-UFA and Beta Technik (owned by Kirch) would acquire joint control of BetaResearch, a company currently wholly-owned by Kirch. BetaResearch holds exclusive licences in Germany, Austria and the German speaking part of Switzerland for the use of the Beta access technology on the basis of the Kirch D-box decoder, developed by Kirch, which the partners intended to use to provide their subscribers and other pay-TV operators. BetaResearch would have further developed the "D-Box" software and licensed the "D-Box" technology to pay-TV broadcasters, suppliers of technical services for digital pay-TV and decoder manufacturers.⁵⁶

In a separate but linked agreement (which would follow the joint control of BetaResearch by CLT-UFA and Beta Technik), Deutsche Telecom (DT) would acquire a stake in BetaResearch, taking therefore joint control of that company alongside Kirch and Bertelsmann. DT's aim with this agreement was to gain

⁵² Case IV/M.1027 *Deutsche Telecom/BetaResearch* [1999] O.J. L53/31.

⁵³ Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, paras 7 and 8.

⁵⁴ *ibid.*, paras 12 and 13.

⁵⁵ *ibid.*, paras 9 and 14.

access to the Beta technology (based on the d-box decoder) in order to obtain the technical platform required for the provision of technical services for programme transmission and for the distribution of pay-tv programmes over its cable network.⁵⁷

Following the *MSG* case, the Commission recognised two markets affected mainly by the planned operation, namely the market for pay-TV and the market for technical services for pay-TV.⁵⁸

2.7.1. Market for pay-TV

Currently Premiere and DF 1 are the only suppliers of pay-TV in Germany, with Premiere holding a dominant position in this market.⁵⁹ If the proposed concentration had been concluded, Premiere would have become the only pay-TV provider, combining the programme resources of both CLT-UFA and Kirch.⁶⁰ In addition, the acquisition of joint control of Premiere by CLT-UFA and Kirch, in conjunction with the termination of the operation of DF 1, would mean that Premiere would become the only pay-TV programme and marketing platform in Germany.⁶¹

The combination of the program resources of CLT-UFA and Kirch gave Premiere a massive programme purchasing power, especially with regard premium films and popular sporting events.⁶² As the Commission put it,

“Premiere will have access to programme resources unparalleled in Germany through its parent companies CLT-UFA and Kirch on account of their positions on the upstream markets for programme rights.⁶³ ... The monopoly in premium films for pay-TV which Premiere will enjoy as a result of the transaction will

⁵⁶ *ibid.*, paras 10 and 15.

⁵⁷ *ibid.*, paras 11 and 15. See also Case IV/M.1027 *Deutsche Telecom/BetaResearch* [1999] O.J. L53/31, para. 11.

⁵⁸ Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, paras 17-21.

⁵⁹ *ibid.*, para. 30.

⁶⁰ *ibid.*

⁶¹ *ibid.*, para. 32.

⁶² *ibid.*, paras 34-37.

⁶³ *ibid.*, para. 35.

continue for the foreseeable future”.⁶⁴

Furthermore, due to the lengthy and exclusive nature of contracts regarding the broadcasting rights for premium content⁶⁵ as well as due to the combination of Kirch’s and CLT-UFA’s subscription base,⁶⁶ Premiere would enjoy considerable advantages (particularly associated with the prospect of securing contracts for pay-TV rights). Thus Premiere’s potential competitors would not be able to hold the programme resources required to create an alternative programme platform. As stated in the decision, “in view of the advantages which Premiere will consequently enjoy over any potential competitor in the negotiation of contracts for premium content, it is unlikely that outsiders will be able to secure adequate access to content of that kind”.⁶⁷

It is interesting to note that the Commission refused to accept the parties’ argument that a strong competitive interrelation between free TV and pay-TV could result in a controlling influence of free TV on pay-TV and in the restriction of pay-TV’s scope for competitive action.⁶⁸ Indeed, although the Commission recognises that there is some interaction between the separate markets of pay-TV and freeTV – “the more varied and attractive the programmes supplied by free TV, the less incentive there is for viewers to subscribe in addition to pay-TV”⁶⁹ –, it believes that there is no indication that the economic success of pay-TV depends on the scale of competitive pressure put on by free TV broadcasters. As the Commission pointed out,

“if ... pay-TV subscribers are prepared, in addition to the existing broadcasting fees of about 30 DM, to pay an extra 50 DM for a pay-TV subscription, although they use this for only 10 per cent of their viewing consumption, this shows that the economic success of pay-TV is not exactly dependent on the audience share. What is decisive is the subscriber base, which exists independently of the actual extent to which pay-TV is used at any one time”.⁷⁰

⁶⁴ *ibid.*, para. 36.

⁶⁵ *ibid.*, paras 48-51.

⁶⁶ *ibid.*, para. 53.

⁶⁷ *ibid.*, para. 51.

⁶⁸ *ibid.*, para. 43.

⁶⁹ *ibid.*, para. 44.

⁷⁰ *ibid.*

Since the development of an alternative decoder infrastructure entails an enormous economic risk, it followed that other programme providers entering the market would have to use the existing decoder infrastructure, i.e. the d-box decoder and the Beta access technology (controlled by CLT-UFA and Kirch).⁷¹ This means that “future competitors of Premiere in pay-TV will be dependent on access to the d-box decoder base for the broadcasting of their bouquet”.⁷² BetaResearch’s ability to prevent – through its licensing policy – other service providers entering the market in competition with Premiere should be also underlined.⁷³ This prospect in conjunction with the control of the decoder infrastructure by CLT-UFA and Kirch (through their stake in BetaResearch) as well as with DT’s commitment to use only the Beta access technology and the d-box decoder, would give Premiere the ability to determine the conditions under which other broadcasters could enter into the pay-tv market. The Commission expressed the fear that

“with their controlling interest in BetaResearch, they [CLT-UFA and Kirch] could ensure that the terms for the use of Beta access technology, and in particular the price structure applied, were advantageous to Premiere and unfavourable to potential competitors’ programmes”.⁷⁴

The private free tv channels linked to CLT-UFA and to the Kirch group together control almost the entire audience of private broadcasting (around 55% out 60% while the public channels control 40% of the market) and have a market share of approximately 90% of all advertising revenue in German television.⁷⁵ At the same time, if the concentration was concluded, Premiere would become the only pay-TV provider in Germany. This would give CLT-UFA and Kirch – being in a leading position and holding the most important broadcasting rights for premium content in both pay-TV and free TV – the opportunity to “control the interaction between free TV and pay-TV”.⁷⁶ “The combined acquisition of pay-TV and free TV rights and the complementary programming⁷⁷ which were

⁷¹ *ibid.*, paras 56 and 66-67.

⁷² *ibid.*, paras 57 and 67.

⁷³ *ibid.*, para. 58.

⁷⁴ *ibid.* See also paras 67-68.

⁷⁵ *ibid.*, paras 77-86.

⁷⁶ *ibid.*, para. 88.

⁷⁷ *ibid.*, paras 95-98.

foreseeable would lead to a further strengthening of Premiere's dominant position on the market in pay-TV".⁷⁸

For all the reasons outlined above, the Commission concluded that the proposed operation would have led to the creation and strengthening (approaching a near-monopoly) of Premiere's dominant position as programme and marketing platform on a lasting basis in the German pay-tv market.⁷⁹

2.7.2. The market in technical services for pay-TV

The inability of private cable operators – due to the structure of the cable networks in Germany – to develop alternative technical infrastructure⁸⁰ in conjunction with the fact that DT – the only company with the ability to install an infrastructure for digital television and to supply the corresponding services – was committed to relying exclusively on the Beta access technology on the basis of the d-box decoder,⁸¹ led the Commission to state that “in the German-speaking area, there will be no alternative technical platform for digital television in the foreseeable future”.⁸² The situation worsens with the Premiere's monopoly position – generated by its programme resources and subscriber base – which would form a long-term obstacle to the installation of an alternative technical platform for digital television.⁸³

The above obstacles linked with the development of an alternative technical infrastructure for the transmission of pay-TV in conjunction with the fact that BetaResearch – i.e. the licensor of the decoder technology – is not independent (since it is jointly controlled by CLT-UFA, Kirch and DT), means that every potential supplier of conditional access services will have to use the d-box decoder developed by BetaResearch. This also means that those potential suppliers of technical services for both satellite and cable tv would have to depend on obtaining a licence from BetaResearch. The Commission's concern is that it would be in BetaResearch's commercial interest – due to its

⁷⁸ *ibid.*, paras 99 and 100.

⁷⁹ *ibid.*, paras 100-101.

⁸⁰ *ibid.*, para. 106.

⁸¹ *ibid.*, para. 107.

⁸² *ibid.*

⁸³ *ibid.*, para. 108.

legal links and shared technology with BetaDigital and DT – not to expose those companies to competition on the market in technical services for pay-tv and to use its licensing policy to prevent other service providers entering the market.⁸⁴

For the reasons described above, the Commission concluded that the proposed concentration would give BetaDigital a lasting dominant position on the market in technical services for satellite pay-TV in the German-speaking area,⁸⁵ that DT would obtain a dominant position on a lasting basis on the market in technical services for cable-TV in Germany,⁸⁶ and that, if the markets in technical services for satellite and cable TV are taken to be a single one, a dominant duopoly would have been produced on this broader market in the German-speaking regions.⁸⁷

2.7.3. The market in cable networks

Transmission of cable TV in Germany takes place on the levels 3 and 4 of the cable network. Level 3 is operated almost entirely by DT since it supplies 16.5 million out of 18.5 million households with cable access.⁸⁸ DT also operates the cable network at level 4 and is the largest supplier of home link-ups. So these data clearly demonstrate that DT “has the preponderant share of the cable network”⁸⁹ and that

“if a television channel is to be successful in Germany, it has to be fed into Telecom’s cable network; that is the only way to reach a sufficient number of viewers. This is borne out by the example of DF 1. Until November 1997 DF 1 was not carried on the cable network. This is generally considered to be one of the reasons why the number of subscribers to DF 1 fell far below

⁸⁴ *ibid.*, paras 110-112 and 118.

⁸⁵ *ibid.*, paras 102, 105 and 118.

⁸⁶ *ibid.*, para. 105. See also Case IV/M.1027 *Deutsche Telecom/BetaResearch* [1999] O.J. L53/31, paras 28-44.

⁸⁷ Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, para. 118; Case IV/M.1027 *Deutsche Telecom/BetaResearch* [1999] O.J. L53/31, para. 44.

⁸⁸ Case IV/M.1027 *Deutsche Telecom/BetaResearch* [1999] O.J. L53/31, para. 26.

⁸⁹ *ibid.*

expectations".⁹⁰

The cable operators' willingness to increase the value added in their cable networks in order to provide a variety of multimedia services requires substantial investment. This means that they have to compete against DT. In order to finance the necessary investments for the development of their networks they should turn to their core business, namely television. However, this is an unrealistic scenario given the present structure of German cable networks (DT's dominant position) and the cable operators' dependency on obtaining a licence from BetaResearch (in order to use the Beta technology). The danger is that BetaResearch could use its position to prevent them – through its licensing policy and due to its legal links with DT – from entering the market in competition with DT.⁹¹

For the above reasons, the Commission concluded that the proposed concentration between DT and BetaResearch would considerably restrict the private cable operators' scope for competition and eliminate competition at network level 3 and, therefore, DT's dominant position on the cable network in Germany will be strengthened on a lasting basis.⁹²

The parties offered undertakings in order to address competition concerns about the proposed concentration. Thus, among other things, they agreed to award third parties 25 per cent of the film and sport television rights held by Kirch, to open up the chance for third parties to take a holding in BetaResearch and to abandon the veto and special rights of the existing shareholders, to disclose the API interface of the d-box network to rival equipment makers, to co-operate with the cable operators as regards sales, and to allow cable operators to market Premiere's programmes. The latter however proved to be the most complicated issue as far as the pay-TV domain is concerned since the cable operators were not allowed to supply programmes for pay-TV nor to market Premiere's pay-per-view services. As a result, they would not be allowed to unbundle programmes within individual packages, while they would not be able to offer pay-TV programmes on the same competitive terms as Premiere and thus would be entirely dependent on Premiere. Although Kirch was prepared to accept formal undertakings to remedy competition problems

⁹⁰ *ibid.*, para. 46.

⁹¹ *ibid.*, paras 49-51.

⁹² *ibid.*, paras 48 and 54.

regarding the above issue so that the deal could go ahead, Bertelsmann did not agree. Consequently, the Commission had no other alternative but to declare the proposed concentration as incompatible with the Common Market under Article 8(3) of the Merger Regulation.

2.8. Re Television Par Satellite⁹³

2.8.1. The facts and the parties⁹⁴

On 18 October 1996 the Commission received from Television Francaise 1 (TF1), France Television Enterprises, France Telecom, Compagnie Luxembourgeoise de Telediffusion (CLT), Metropole Television (M6), and Suex Lyonnaise des Eaux an application for negative clearance and notification for exemption regarding their agreements creating the company Television par satellite (TPS). On 13 March 1998 the parties notified the Commission of the withdrawal of CLT from TPS and the subsequent amendment in the shareholder structure.

TPS was set up with the object to launch and manage a digital platform for the distribution of satellite pay-TV programmes and services in France and in the European French-speaking area.

With regard to the TPS' parent companies, TF1 operates the first French terrestrial television channel and is also distributed via cable in the French-speaking parts of Belgium and in Luxembourg. France Television Enterprises consists of France 2 and France 3, two companies wholly owned by the French State, which operate the second and third French terrestrial television channels and are also distributed by cable networks in Belgium and Luxembourg. France Telecom is the incumbent telecommunications operator in France and is also active in the cable distribution sector where it holds – through its subsidiary France Telecom Cable – a market share of around 30 per cent (in terms of the number of subscribers). In addition, it is the designer and owner of the

⁹³ Case IV/36.237, *Re Television Par Satellite (TPS)*, [1999] O.J. L90/6.

Viaccess conditional access system used by TPS, its rival platform AB-Sat and the cable operator Lyonnaise Communications. M6 operates a national terrestrial television channel. And Suez Lyonnaise des Eaux, in addition to its other activities, is involved in the communications sector, mainly via M6 – it holds 34.45 per cent of its capital – and via its subsidiary Lyonnaise Communications, which operates a cable network in France with a market share of around 26 per cent.

2.8.2. The relevant product markets

In its decision the Commission recognised four markets affected by the planned operation, namely the pay-TV market, the market in technical services for pay-TV, the market in the acquisition of broadcasting rights, and the market in the distribution and operation of special interest channels.⁹⁵

2.8.2.1. The pay-TV market

Following its decisions in a line of previous cases,⁹⁶ the Commission stated that pay-TV constitutes a relevant product market separate from that for free-access television.⁹⁷ This is justified by the fact that, in the case of free television (i.e. fee- and advertising-financed television), the trade relationship is established only between the programme supplier (the broadcaster) and the advertising industry; while, in the case of pay-TV, there is a trade relationship only between the programme supplier and the viewer as subscriber. Consequently, the conditions of competition and the objectives are different for the two types of television: pay-TV requires programmes which cover the interests of the target groups in order to convince potential subscribers to pay for receiving television services; whereas in the case of free television the

⁹⁴ *TPS*, paras 1-22.

⁹⁵ *ibid.*, paras 23-24.

⁹⁶ See Case IV/M.410, *Kirch/Richemont/Telepiou* [1994] O.J. C225/1, paras 15-16; Case IV/M.649, *MSG Media Service Decision* [1994] O.J. L364/1, paras 32-33; Case IV/M.584, *Kirch/Richemont/Multichoice/Telepiou* [1995] O.J. C129/6, paras 15-16; Case IV/M.779 *Bertelsmann/CLT* [1996] O.J. C364/3, para. 16; Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, paras 18 and 44-45.

audience share, the advertising rates and the subsequent revenues are the key parameters.⁹⁸

In addition, the Commission confirmed its position in previous cases⁹⁹ that digital pay-TV does not constitute a relevant product market separate from that for analogue pay-TV. Digital pay-TV constitutes only a further development of analogue pay-TV. This argument is strengthened by the fact that analogue pay-TV is expected in the next few years to be completely superseded by digital pay-TV.¹⁰⁰

The Commission for the first time stated clearly that there is no reason to distinguish between pay-TV markets in terms of their means of transmission (i.e. digital terrestrial, satellite and cable). With regard to the relationship between cable and satellite, in particular, data and end-user behaviour show that cable pay-TV and satellite pay-TV can be regarded as substitutes. There is, therefore, a single market for pay-TV services irrespective of their modes of transmission.¹⁰¹

2.8.2.2. The market in technical services for pay-TV

The operation of pay-TV requires a special technical infrastructure in order to encrypt the television signals and to enable the authorised viewer to decode them. This is done by the installation of a terminal (decoder or set-top box) in the home of each pay-TV subscriber. In addition to that terminal, the pay-TV operator must have a conditional access system which comprises the transmission of encrypted data containing information on the programmes or packages of programmes subscribed to and on the entitlement of the pay-TV subscribers to receive those programmes, together with the television signals. The system usually also includes smart cards which are made available to the subscribers and which are able to decipher the encrypted authorisation data

⁹⁷ *TPS*, para. 25.

⁹⁸ *ibid.*

⁹⁹ See e.g., Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, para. 18.

¹⁰⁰ *TPS*, para. 26.

¹⁰¹ *ibid.*, paras 27-31.

and transfer them to the decoder.¹⁰²

2.8.2.3. *The market in the acquisition of broadcasting rights, in particular for films and sporting events*

Experience has shown that, in order to convince potential subscribers to pay for receiving television services, certain types of content are required. Indeed, premium films and sporting events have been the two most popular pay-TV products. Hence a pay-TV operator, in order to be sufficiently attractive, must include a combination of film and sport channels as part of the service.¹⁰³

It must be stressed that the *TPS* case, by recognising that movies and sports are the key drivers of pay-TV, and by identifying the existence of a market in the acquisition of broadcasting rights for films and sporting events, paved the way for the *BiB* case which decided, for the first time, on a separate market for the wholesale supply of film and sports channels for pay-TV.¹⁰⁴

2.8.2.4. *The market in the distribution and operation of special interest channels*

Since pay-TV requires programmes which cover the interests of the target groups, the operation of special interest channels – as opposed to the general interest (terrestrial) channels – is considered to be indispensable. This market is enjoying an extremely rapid growth, especially since the introduction of digital technology, and this can be seen by the emergence of more than 140 special interest channels transmitted via cable and satellite in France.¹⁰⁵

¹⁰² *ibid.*, paras 32 and 33. See also Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, paras 19-21.

¹⁰³ *TPS*, paras 34-36. See also Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, paras 34 and 38.

¹⁰⁴ Case IV/36.539, *British Interactive Broadcasting (BiB)/Open* [1999] O.J. L312/1, paras 28-29.

¹⁰⁵ *TPS*, paras 37-39.

2.8.3. Structure of the markets

TPS's main competitor in the French pay-TV market is the Canal+ group, which enjoys a particularly strong position. Indeed, the Canal+ group controls the premium channel Canal+, the CanalSatellite Numerique, the NumeriCable cable network. As a result, by 30 June 1998 it held a 70 per cent share of the French pay-TV market (in terms of the number of subscribers) and had a total of 10.3 million subscribers in Europe.¹⁰⁶ As far as TPS is concerned, it was expected to attract 600,000 subscribers by the end of 1998.¹⁰⁷

With regard to the market in technical services for pay-TV, it has been already mentioned that France Telecom is the designer and owner of the Viaccess conditional access system used by TPS, its rival platform AB-Sat and the cable operator Lyonnaise Communications. France Telecom's competitor is the Canal+ group which is active in this market as the owner and developer of the Mediaguard conditional access system and the Mediasat digital terminal respectively.¹⁰⁸

Through its two subsidiaries – TPS Cinema and Multivision – TPS is also active on the market in the acquisition of television rights, particularly for films and sporting events.¹⁰⁹ However, TPS is in a weak position compared to that of its main rival, the Canal+ group. Indeed, in dealing with the American film industry, TPS has succeeded in concluding agreements with five large American studios for the acquisition of pay-TV rights for its movie channels. However, in three of these cases, the rights acquired are for second window pay-TV, i.e. they can be exercised only when the films have already been broadcast on Canal+.¹¹⁰ In contrast, Canal+ has concluded exclusive output deals for pay-TV rights – referred to also as 'first run' or 'first release' rights – with five of the seven major Hollywood studios and with Polygram and has thereby acquired a commanding position in this market. It is stated that Canal+ holds rights representing around 87 per cent of Hollywood's output, in terms of box office receipts.¹¹¹ What worsens the situation even more for TPS is the fact that rightholders want to see their products distributed widely, and this is the

¹⁰⁶ *ibid.*, paras 44-47.

¹⁰⁷ *ibid.*, para. 50.

¹⁰⁸ *ibid.*, paras 52-54.

¹⁰⁹ *ibid.*, paras 55 and 56.

¹¹⁰ *ibid.*, paras 57 and 125.

¹¹¹ *ibid.*, para. 58.

reason why the prices of pay-TV rights are determined by reference to the number of subscribers.¹¹² Thus the price paid by Canal+, because of its 4.3 million subscribers in France, constitutes the floor price, whereas new entrants – such as TPS – have to pay much more higher prices due to their lack of an established subscriber base.¹¹³ As regards sporting events, the Canal+ group again enjoys a significant advantage since it has secured, amongst others, exclusive encrypted transmission and pay-per-view rights to Formula 1 racing as well as to the French football championship matches and to other European football championships.¹¹⁴

Finally, with regard to the market in the distribution and operation of special interest channels, the Commission states that the holdings in these special interest channels of all the companies involved in pay-TV are evenly distributed; however, Canal+ remains a major player.¹¹⁵

2.8.4. Legal assessment

2.8.4.1. Application of Article 81(1) to the contractual clauses

The Commission considered that the creation of TPS does not in itself constitute a restriction of competition and does not therefore fall under the meaning of Article 81(1) of the EC Treaty.¹¹⁶ In addition, it concluded that there was no danger of collusion between the parties to the TPS agreements.¹¹⁷ A clause which committed the two cable operators associated with TPS, i.e. France Telecom and Suez Lyonnaise des Eaux, to giving the chains broadcast on TPS priority access to their cable networks and co-ordinating their offer with that of TPS was deleted by the parties at the Commission's request.¹¹⁸ As the

¹¹² *ibid.*, para. 126. See also Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1, para. 51.

¹¹³ *TPS*, paras 58 and 126.

¹¹⁴ *ibid.*, paras 60 and 128.

¹¹⁵ *ibid.*, paras 65-68.

¹¹⁶ *ibid.*, para. 91.

¹¹⁷ *ibid.*, paras 92-96.

¹¹⁸ *ibid.*, paras 83 and 85.

decision states: “Given the small size of the cable sector in France and the position of the two cable operators who are shareholders in TPS and together hold 56 per cent of the cable market, restricting the access of independent channels to their network would seriously threaten their validity”.¹¹⁹ Moreover, the Commission considered that a non-competition clause in the shareholders’ agreement was not caught by Article 81(1). However, the Commission noted that two clauses included in the contract did restrict competition, in particular by limiting competitors’ access to certain type of contents.

More analytically:

a) According to a non-competition clause in the shareholders’ agreement, the parties, for so long as they hold shares in TPS, cannot become involved in any company engaged in the distribution and marketing of a range of pay-TV programmes and services which are broadcast in digital mode by satellite to French-speaking homes in Europe.¹²⁰ The Commission takes into account the market uncertainty, the technical risks and the vast investment associated with entering a new market - and especially a high-risk market such as pay-TV - and considers that the non-competition clause is justified and indispensable to TPS’s penetration in the French pay-TV market, since its role is to commit the parent companies to ensuring the success of the project and thus to protect it for the period of launching the platform.¹²¹ As the Commission puts it, “the non-competition clause can therefore be regarded as ancillary to the creation of TPS during the platform’s crucial launch phase and can therefore be deemed pro-competitive in that it contributes to the creation of a new entrant on the French pay-TV market during that period”.¹²² However, the Commission – taking into account the data and forecasts supplied by the parties and the company’s performance over the first 18 months of operations – came to the conclusion that the minimum period during which the non-competition clause is considered essential to TPS – i.e. during the launch phase – was three years (contrary to the parties’ initial agreement which made reference to a non-competition clause being active for 10 years).¹²³ Consequently, the non-

¹¹⁹ *ibid.*, para. 84.

¹²⁰ *ibid.*, para. 77.

¹²¹ *ibid.*, para. 98.

¹²² *ibid.*, para. 99.

¹²³ *ibid.* The two other clauses which will be examined below and which also had originally been envisaged to remain in place for ten years were exempted under Article 81(1) for three years as well, see paras 122 and 134.

competition clause (the scope of which was limited to TPS's core activity by two amendments dated 17 September 1998) cannot be caught by Article 81(1) of the EC Treaty during the first three years of its application.¹²⁴

b) Another clause grants priority to TPS and the right of last refusal to broadcast channels and television services edited and controlled by its parent companies.¹²⁵ As in the case of the non-competition clause, the obligation imposed upon the parties to give TPS first refusal in respect of all their special interest channels could also be considered indispensable to the launch and penetration of TPS in the French pay-TV market. However, because this contractual agreement results in a restriction of the supply of special interest channels and television services, it is caught by Article 81(1).¹²⁶

c) A third clause grants to TPS exclusive rights to distribute digitally the four general content channels, i.e. TF1, France 2, France 3 and M6.¹²⁷ The Commission cites a study conducted by Audicabsat-Mediametrie, according to which pay-TV subscribers in France devote on average 90 per cent of their daily viewing time to general interest (terrestrial) channels.¹²⁸ However, reception of these programmes which are transmitted via terrestrial frequencies is often poor or even impossible in a large number of homes in France (estimated at over 8 million).¹²⁹ Hence the reception problems with terrestrial broadcasts in certain areas of France, in conjunction with the fact that general interest channels attract the largest audience shares, could result in a great demand from the viewers for receiving these channels in digital mode. Consequently, the Commission takes the view that the TPS's exclusive right to distribute digitally the four general interest channels is anti-competitive and caught by Article 81(1) since it restricts TPS's competitors access to attractive and popular programmes and thus eliminates competition in favour of TPS.¹³⁰

¹²⁴ *ibid.*, para. 99.

¹²⁵ *ibid.*, para. 78.

¹²⁶ *ibid.*, paras 100-101.

¹²⁷ *ibid.*, para. 81.

¹²⁸ *ibid.*, paras 88 and 103.

¹²⁹ *ibid.*, paras 88 and 104.

¹³⁰ *ibid.*, paras 107 and 108.

2.8.4.2. Application of Article 81(3)

The next step for the Commission is to examine whether two of the aforementioned clauses – i.e. those concerning the obligation imposed upon the parties to give TPS first refusal in respect of all their special interest channels and the TPS's exclusive right to distribute digitally the four general interest channels – satisfy the criteria for an exemption under Article 81(3).

In particular:

a) Improving the range of services on offer and increasing distribution and production

By playing an important role in protecting TPS for the period of launching the platform and thus ensuring its success, these two clauses enable a new operator to emerge and increase the scope of pay-TV services offered to French viewers. In addition, the emergence of TPS has led to an increase in the number of special interest channels. For instance, eight new channels have been produced by TPS and its shareholders while contracts have been concluded with foreign channels to be broadcast on the platform. The creation of TPS, therefore, contributes to an improvement in the production and distribution of goods and has a positive impact on technical and economic progress.¹³¹

b) Benefits for consumers

The aforementioned increase in the number of new channels and services cannot but be considered as beneficial to consumers. However, this would have not happened without the two clauses in question since, by facilitating the launch of the new platform, they ensure the development and eventually the success of TPS in the pay-TV market. In addition, the competition that developed after the emergence of TPS between that platform and CanalSatellite/Canal+ has led to lower prices, advantageous financial

¹³¹ *ibid.*, paras 114 and 115.

conditions and higher quality for subscribers as the competitors attempt to differentiate their service offerings in order to gain a commercial advantage. This also serves as an incentive to innovate which is considered as an outcome of effective competition and as a benefit to customers.¹³²

c) Indispensability of the restrictions

It has already been shown that the Canal+ group has concluded exclusive output deals for pay-TV rights and thus holds a commanding position in the market. Therefore TPS has to rely on the special interest channels and services which are edited and controlled by its parent companies. In other words, the successful launch of the new platform would not materialise without the clause granting TPS preferential access to those channels. As the Commission states:

“It is therefore particularly important for TPS, as a new market entrant facing competition from a well-established first operator possessing attractive and plentiful programme content, to have priority access to its members’ special interest channels during the launch period so that it can create an identity for itself and ensure continuity in the services it offers during that period”.¹³³

The Commission took the same view with regard to the clause which grants to TPS exclusive rights to distribute digitally the four general content channels, namely that the success of TPS would be jeopardised in case the clause was not included. As it pointed out:

“In order to put together an attractive choice which differs from that of its competitors and to circumvent the difficulty of acquiring rights to films and sporting events, TPS has relied on the exclusive presence of the general interest channels in order to offer a wide range of programmes. The exclusive transmission of the general interest channels is the factor which differentiates TPS’s package from the others. Given the reception problems with terrestrial broadcasts in certain areas of France, the inclusion of those channels gives

¹³² *ibid.*, paras 118-120.

¹³³ *ibid.*, para. 122.

TPS considerable consumer appeal in those areas. Without the general interest channels, TPS would have no chance of successfully penetrating the French pay-TV market and standing as a genuine alternative to Canal+/CanalSatellite. ... It should therefore be concluded that the exclusive transmission of the general interest channels, by making the TPS package attractive to consumers and differentiating it from other services, is indispensable to its penetration of the French pay-TV market".¹³⁴

d) Non-elimination of competition in respect of a substantial part of the products in question

The TPS agreements have not eliminated competition on the pay-TV market or on the markets for the purchase of TV rights or the distribution of special interest channels. Indeed, according to results recorded on the pay-TV market, the Canal+ group's strong position will continue for the foreseeable future. In addition, the competition that developed after the emergence of TPS between that platform and CanalSatellite/Canal+, and the increase in the number of cable subscribers clearly show that "competition has, on the contrary, been strengthened on these markets by the entry of a new player".¹³⁵

So, in accordance with Article 81(3), the provisions of Article 81(1) are inapplicable to the clauses concerning the obligation imposed upon the parties to give TPS first refusal in respect of all their special interest channels and the TPS's exclusive right to distribute digitally the four general interest channels. Therefore, the Commission authorised the agreements creating the digital platform for TPS.¹³⁶

¹³⁴ *ibid.*, paras 129-132.

¹³⁵ *ibid.*, paras 135-138.

¹³⁶ *ibid.*, Article 3 of the Decision.

3. CONCLUSIONS

1. As a general comment, and based on the line of cases just discussed, it seems that the Commission has a positive view on strategic alliances in the pay-TV market whose parents' television activities are taking place on separate geographic markets.¹³⁷ The Commission's approach changes when the parent companies have a strong presence on the pay-TV market and there is a significant overlap in the geographic areas of their activities. The Commission has opposed those cases since, if the proposed operations had been concluded, they would have strengthened the dominance of the parent companies and thus they would have had the effect of raising entry barriers still higher. Indeed, such concentrations would form a long-term obstacle to the installation of an alternative technical platform for digital television and, therefore, would be able to use their power in order to strengthen their position and to eliminate competition in the related broadcasting and content markets.¹³⁸ Finally, it appears from its ruling in the TPS case that the Commission will take a positive attitude under the competition rules to the creation of strategic alliances between companies which, although active on the same geographic area, have only limited activities (or are not active at all) on the pay-TV market.

2. Since the development of a set-top box requires massive investment and entails an enormous economic risk, the most sensible option (in business terms) for the new entrants is to use the already existing set-top boxes (developed by the incumbent pay-TV operators). In addition, it is a fact that each of the platform operators (digital satellite, terrestrial and cable) has opted for proprietary technology in key areas such as APIs and EPGs.¹³⁹ As a result, content providers who want to enter the market do not have any choice but to

¹³⁷ See Case IV/M.410, *Kirch/Richemont/Telepiou* [1994] O.J. C225/1; Case IV/M.584, *Kirch/Richemont/Multichoice/Telepiou* [1995] O.J. C129/6; Case IV/M.779, *Bertelsmann/CLT* [1996] O.J. C364/3.

¹³⁸ See Case IV/M.649, *MSG Media Service Decision* [1994] O.J. L364/1; Case IV/M.993 *Bertelsmann/Kirch/Premiere* [1999] O.J. L53/1.

use the set-top boxes of the incumbent pay-TV operators. There is therefore the danger that vertically integrated broadcaster/platform operators will be able to control market developments and restrict the range of services which can be made available to consumers. The Commission's goal is to prevent those dominant players from strengthening their positions and foreclosing further access; gates cannot be allowed to close before they have even started to develop. The target of creating open and competitive markets can be achieved by facilitating entry and introducing competition from alternative platform operators.

3. The Commission attaches a major importance to the promotion of technical innovation and to the emergence of new products and services which can contribute to the development of the information society. The Commission's determination to encourage technical innovation is evident from the fact that it recognises the technical risks and vast investment associated with entering a new and high-risk market such as the pay-TV. Thus, although some agreements impose restrictions which could distort competition, the Commission has made it clear that it will view them favourably and grant an exemption when they are indispensable to the successful launch of a new product or service, bring important benefits to the consumers, and contribute to the development of a competitive European pay-TV sector.

4. The Commission has shown that it seeks to achieve the balance between risks and benefits in its application of EU competition rules. Thus it recognises that its protectionist intervention, i.e. providing new entrants with the means (granting exemption to the clauses which could impose restrictions) and the time to become established, cannot go on indefinitely. The fact that it shortens the period during which those clauses are considered to be indispensable to the establishment of the project¹⁴⁰ is a clear indication of the Commission's attempt to strike the right balance in order to facilitate the entry of new

¹³⁹ See for instance: "The Development of the Market for Digital Television in the European Union – Report in the context of Directive 95/47/EC of the European Parliament and of the Council of 24th October 1995 on the use of standards for the transmission of television signals", Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM (1999) 540, 10 November 1999, at para. 3.2.1, p. 18.

¹⁴⁰ See *TPS*, paras 99, 122 and 134.

competitors and support technological progress without seriously damaging the market structure and distorting competition.

SECTION 3: THE IMPORTANCE OF MAINTAINING COMPETITION IN INTERNET MARKET

1. INTRODUCTION

As in the pay-TV cases, the issue of access is becoming increasingly relevant in the Internet market. The speed of the technological and market developments, alongside with the commercialisation of the Internet, means that competition issues will be raised very soon. The Commission is aware of this prospect and wants to prevent a handful of players from abusing key bottleneck positions and controlling market developments. The following case is indicative of the policy that the Commission is determined to follow.

2. THE WORLDCOM/MCI CASE¹⁴¹

In November 1997 the Commission received notification of a proposed concentration whereby WorldCom Inc. (WorldCom) and MCI Communications Corporation (MCI) – both telecommunications companies providing inter alia Internet services – would merge within the meaning of Article 3(1)(a) of the Merger Regulation. After an initial assessment of the notification, the Commission stated that the operation raised concerns with regard to its compatibility with the common market and thus second phase proceedings were opened pursuant to Article 6(1)(c) of the Merger Regulation.

2.1. Commercial operation of the Internet

Alongside its legal analysis, the Commission gave an overview of how the Internet industry works, in terms of technology and market structure.

End users obtain access to the Internet by subscribing for access services supplied by Internet Service Providers (ISPs). The vast amount of traffic generated by or destined for customers will have to pass on to another network. Thus if two networks have no direct interconnection, the traffic must pass through one or more intermediate networks ('transit traffic') so that it will reach finally the required network.

The exchange of traffic between networks is usually achieved either by "peering" or "transit" arrangements. If the model of peering arrangements is followed, then no settlement payments are involved in the traffic exchange but there are limitations with regard to the type of traffic which is allowed to pass. As the Commission points out,

"in order to prevent either party exploiting this arrangement, it is usual to find that the peering agreement is limited so as to prevent either party using it to hand off to the other traffic destined for or coming from a third party. Thus, if A has a peering agreement with B but not with C, and B has a peering agreement with C, A cannot use his peering agreement with B as a way of

¹⁴¹ Case IV/M.1069, *WorldCom/MCI* [1999] O.J. L116/1.

getting B to pass his traffic to C. Similarly, A is not obliged to accept from B any traffic addressed to him but which he knows to have originated from C".¹⁴²

In transit arrangements, on the other hand, although transmission of traffic across the networks is unrestricted, settlement payment is required.

It is interesting to note that, although peering agreements are made on a payment-free basis, the largest networks have started to ignore this practice. Indeed, especially when there is a clear imbalance in bargaining power between networks, it is increasingly common for the larger or technically superior ISP to charge for peering or to impose conditions – such as the introduction of minimum standards of network quality, traffic flow and technical upgrades – which, in cost terms, amount to the same for the smaller ISP. Thus, as the Commission stated, “the term ‘peer’ can be misleading, because the ISP who is obliged to pay has his cost structure dictated to some extent by the superior ISP, and the relationship is akin to a purchase of interconnection”.¹⁴³ This policy of the larger ISPs, in conjunction with the fact that transit arrangements are associated with settlement payments, makes it safe to argue that “internet connectivity represents a service which can be sold and resold on a commercial basis at any level of the ISP hierarchy”.¹⁴⁴

2.2. Identification of the problem

However, the only providers of Internet access services capable of offering full connectivity (‘top level’ or ‘universal’ Internet connectivity) on their own account are the so-called top-level ISPs. These top-level ISPs are in a privileged position – unlike all subordinated ISPs – since they do not have to pay others in order to complete the connections. Indeed, what they need, in order to maintain their position, is to possess peering agreements with all other top-level networks.¹⁴⁵

Thus the Commission showed that the Internet has a hierarchical structure –

¹⁴² *ibid.*, para. 33.

¹⁴³ *ibid.*, para. 37.

¹⁴⁴ *ibid.*, para. 40.

top-level ISPs, secondary peering ISPs, resellers – and that neither the secondary peering ISPs nor the resellers can prevent the top level networks from acting independently. Therefore, it concluded that the market for the provision of top level or ‘universal’ Internet connectivity constitutes a distinct and narrower market within the Internet sector.¹⁴⁶

According to the WorldCom and MCI’s estimates, their combined market share – based on their revenues from Internet access services – would not exceed 20% of the total market. However, the Commission did not accept their method of calculation, mainly due to the existence of many contradictory reports, the use of different methodologies, and the lack of reliable publicly available estimates.¹⁴⁷ Thus the Commission conducted its own enquiries and, after examining factors such as revenue and traffic flow, numbers of addresses reachable, and aggregate capacity in interconnecting links, it concluded that the combination of the merging parties’ networks would create a single entity which would hold a market share of more than 50%, irrespective of how widely the market is defined.¹⁴⁸

The Commission presented an analytical list of the strategies that would enable MCI WorldCom to act independently of its competitors and customers and thus to control the market and strengthen its market share even further.¹⁴⁹ It must be noted that the term ‘customers’ – in other words, resellers – refers to the ISPs who are selling Internet connectivity to final users. They will compete with MCI WorldCom at the retail level but will depend on it for the provision of the connectivity. Thus there is the risk that MCI WorldCom could leverage its position, that is, use its power in the market for the provision of top level Internet connectivity so as to strengthen its position and to eliminate competition in the related retail market.¹⁵⁰

The extent of the bargaining power of the MCI WorldCom network – if the notified concentration was to go ahead – was well summarized and illustrated by the Commission when it stated:

¹⁴⁵ *ibid.*, paras 41-46.

¹⁴⁶ *ibid.*, paras 60-70.

¹⁴⁷ *ibid.*, paras 88-95.

¹⁴⁸ *ibid.*, paras 96-114.

¹⁴⁹ *ibid.*, paras 117-125 and 127-131.

¹⁵⁰ *ibid.*, paras 124 and 133.

“Because of the specific features of network competition and the existence of network externalities which make it valuable for customers to have access to the largest network, MCI WorldCom’s position can hardly be challenged once it has obtained a dominant position. The more its network grows, the less need it has to interconnect with competitors and the more need they have to interconnect with the merged entity. Furthermore, the larger its network becomes, the greater is its ability to control a significant element of the costs of any new entrant. It can achieve this by denying such entrants the opportunity to peer and insisting that they remain as customers and pay a margin accordingly for all the services they want to offer. The merger could thus have the effect of raising entry barriers still higher”.¹⁵¹

It is interesting to note that the Commission’s conviction about the enormous negative impact of the proposed concentration on the market is such that it does not hesitate to qualify it as an essential facility. It is argued that, as a result of the merger, the MCI WorldCom network would be indispensable for all those ISPs willing to develop viable economic operations. They would have no choice but to interconnect since only then would they be able to provide credible Internet access services to their customers.¹⁵²

For the reasons described above, the Commission concluded that the proposed concentration, if not altered, would give MCI WorldCom a dominant position on a lasting basis in the market for the provision of top level Internet connectivity.¹⁵³

2.3. Divestment of MCI’s Internet business

In order to address the Commission’s competition concerns about the proposed merger, the parties offered undertakings. The most important commitment involved the divestment of MCI’s entire Internet activities. According to the proposal, all of MCI’s Internet business would be first divested into a separate wholly owned subsidiary of MCI – NewCo – and then they

¹⁵¹ *ibid.*, para. 126.

¹⁵² *ibid.*

¹⁵³ *ibid.*, para. 135.

would be transferred to a single purchaser who had to be selected and identified prior to the Commission's final decision on the notification.¹⁵⁴

The Commission – after conducting a market test – concluded that the divestment of the MCI's Internet activities was sufficient to remedy the competition concerns about the impact of the proposed merger.¹⁵⁵ Thus the proposed concentration of MCI WorldCom was declared compatible with the Common Market, subject to the carrying out of the commitments undertaken by the notifying parties.¹⁵⁶

3. CONCLUSIONS

1. The Commission takes a positive attitude to the creation of strategic alliances which promote technical innovation, offer new products and services and, therefore, contribute to the development of multimedia markets.

2. At the same time, the Commission's target is to maintain open and competitive market structures in the Internet. It is, therefore, determined to prevent a handful of players from having unconstrained power and controlling access to the key networks. In addition, it will not allow dominant players in the telecommunications sector leveraging their dominance into new or neighbouring markets. Otherwise, market foreclosure can hinder innovation, hold back market development and have an enormous impact on the future competitive structures of the EU communications sector.

3. Thus the Commission will not accept foreclosure of markets (caused by defensive commercial moves), especially in those markets which have not yet started to develop. So, in order to prevent the gatekeepers from strengthening their positions (or forming new super-monopolies), competition law comes to the forefront because it can be applied across sectors. Competition rules, therefore, will be applied in a firm manner to adapt to the changing situation

¹⁵⁴ *ibid.*, paras 136-138.

¹⁵⁵ *ibid.*, paras 139-144.

and, in particular, to deal with those cases where telecommunications or cable operators are moving into related fields such as Internet or digital TV.

4. It is generally accepted that structural separation constitutes the most effective measure in order to achieve transparency, effective monitoring of abusive behaviour and to facilitate pro-competitive structures in the EU communications sector. This is the reason why the Commission considered the divestment of the MCI internet business to be sufficient to tackle the fundamental competition problems raised by the proposed concentration. It seems therefore that the Commission will not hesitate to take action under the relevant instruments of competition law by imposing divestiture measures if required. Finally, a similar example of the Commission's determination to apply competition rules in order to create the right pro-competitive structures for the expansion of multi-media industry can be seen in its approach in the *British Interactive Broadcasting (BiB)* case.¹⁵⁷ In that case, BT decided to accept the Commission's central condition for clearing the proposed joint venture, namely to divest its remaining cable interests in the UK and not to expand them further.¹⁵⁸

GENERAL CONCLUSIONS OF CHAPTER 3

This chapter also dealt with the **second phase** of the transition from a regime of a State-run monopoly to an effectively competitive market. It showed that competition law can address the serious anti-competitive problems that might arise by the creation of strategic horizontal alliances between several telecommunications operators, which hold strong positions in their respective domestic markets. The Commission has made it clear that certain restrictions on competition between the parent companies can be justified, provided that the parties would accept to fully comply with a number of necessary undertakings. In an attempt to accelerate the implementation of the

¹⁵⁶ *ibid.*, para. 165 and Article 1 of the decision.

¹⁵⁷ Case IV/36.539, *British Interactive Broadcasting (BiB)/Open* [1999] O.J. L312/1.

liberalisation timetable, and alongside the target of preventing monopolistic abuse and anti-competitive behaviour, the Commission has imposed on governments the obligation to break down the monopolies and lift the legal barriers of their home markets as a necessary pre-condition to let the deals go through.

In addition, as already mentioned, the nature of competition law is inherently flexible and allows for the application of its rules and the effective handling of the issues appearing in the converging markets. This is the reason why competition law can deal with those cases where large telecommunications or cable operators are moving into related fields in an attempt to take advantage of the new opportunities arisen due to the accelerating change of markets with the technological and market-led convergence. Due to its nature, therefore, the application of competition law can prevent those dominant players from strengthening their positions, foreclosing further access, and eliminating competition in the related markets by forming new super-monopolies.

¹⁵⁸ *ibid.*, para. 172.

PART III

ADAPTING THE EUROPEAN TELECOMMUNICATIONS REGULATORY REGIME TO THE EMERGING MULTIMEDIA ENVIRONMENT

Chapter 4

EU Radio Spectrum Policy in the Converging Environment

*Tackling the Barriers to the Convergence of
Telecommunications, Media and IT Sectors*

According to the Commission's Green Paper on the Convergence of the Telecommunications, Media, and Information Technology sectors,¹ the term convergence is most commonly expressed as "the ability of different network platforms to carry essentially similar kinds of services, or the coming together of consumer devices such as the telephone, television and personal computer".²

Convergence on a technological level has been taking place for more than ten years and has largely been driven by digitalisation. Whereas since the early 1990s market-based convergence has been fuelled by the alliances and mergers formed by players active in the telecommunications, media and IT sectors. Those alliances have already been examined in Chapter 3.

Convergence of the telecommunications, media, and IT sectors is driving the emergence of a multimedia market, with the latter being defined as:

"a service which incorporates more than one type of information (e.g. text, audio, images and video) on the same delivery mechanism, and which gives the user the ability to interact with or manipulate that information. The key elements of the definition, therefore, are two-way communication or interactivity, and the combination of different types of information".³

The Convergence Green Paper identified a series of existing and potential barriers, which have and may, in the future, have a substantial impact on the development of a European multimedia market. This chapter focuses on one of the most important barriers and examines how the Commission attempts to address the problems that could arise.

In particular, there is a popular notion that, with the launch of digital television and radio and with the development of the new transmission technologies, the problem of the present shortage of capacity in the delivery of

¹ Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the implications for Regulation – Towards an Information Society approach, COM(97) 623, 3.12.1997. Hereafter: The Convergence Green Paper.

² Convergence Green Paper, Chapter 1, p. 1.

³ "Study on Adapting the EU Telecommunications Regulatory Framework to the Developing Multimedia Environment", prepared for the European Commission by Squire, Sanders and Dempsey L.L.P. and Analysys Ltd., January 1998, at p. 9.

telecommunications and broadcast services will be solved.

However, although frequency scarcity can be partly overcome by the emergence of digitalisation, it will remain a finite resource – at least for the foreseeable future.⁴ This is the result of an increasing demand for radio-spectrum from new digital services – especially the parallel growth of services like television broadcasting, mobile multimedia and voice applications. Furthermore, additional spectrum will be needed since broadcasting will be simultaneously transmitted – for some time – through digital and analogue frequencies.

Another aspect raised in the Convergence Green Paper is the different principles applied for the allocation of frequencies between broadcasting (essentially free) and telecommunications (increasingly the result of an auction). Those differences in prices between broadcasting and telecommunications usage as well as the manner in which spectrum is allocated in the broadcasting sector are considered potential barriers since they may favour competitive entry into one sector over another and thus act as a brake to market development.

Due to the complexity of the issues associated with the European policy on radio spectrum in conjunction with the publication of the Radio Spectrum Green Paper and the hot debate it has generated, this chapter in its entirety will cover the issue of regulation of radio frequencies.

1. INTRODUCTION

Radio spectrum is becoming crucial for the development of the European economy since a number of industrial activities in sectors such as mobile and satellite communications, broadcasting, transport, R&D and services of general interest rely on its availability.⁵ This is the reason why radio spectrum is characterised as “essential backbone” for the aforementioned areas.⁶

The emergence of digitalisation, the liberalisation of the telecommunications market, the phenomenon of convergence, the increasing number of

⁴ *ibid.*, at p. 25.

⁵ Green Paper on Radio Spectrum Policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D (hereafter: the Green Paper on Radio Spectrum Policy), COM (1998) 569 final, 09.12.1998, at para. 2.1, pp. 4-5.

commercial applications and the globalisation of services and players (through strategic alliances and world-wide business deployment) will increase the demand for radio spectrum.⁷ The Commission rightly identifies the fact that the growing demand for spectrum will exceed supply – “demand for frequencies is greater than what is available”⁸ – and points out that “the increasing demand for radio spectrum is not counter-balanced by additional radio spectrum becoming available as new technology can stretch-up the availability of usable radio spectrum”.⁹ So the fact that spectrum is a finite resource in conjunction with the growing demand for it will inevitably lead to a situation where “radio spectrum availability can no longer be taken for granted”.¹⁰

This chapter attempts to address strategic matters relating to the Community’s approach by focusing on some of the most important issues raised during the public consultation period which followed the 1998 Green Paper on radio spectrum policy. Its aim is to assess whether the Community radio spectrum policy with regard to those issues requires adaptation and, if so, what kind of changes are needed in order to ensure that the new regime can respond to the increasing demands and complexities of spectrum management.

2. STRATEGIC PLANNING OF THE USE OF RADIO SPECTRUM: POLITICAL AND LEGAL FRAMEWORK IN THE TELECOMMUNICATIONS SECTOR

The planning of the usage of radio spectrum and, in particular, the decisions as to whether, how and under what conditions radio frequencies are allocated for the provision of specific services, are taken at World Radiocommunications Conferences (WRCs). At WRCs – organised under the auspices of a specialised body of the United Nations called International

⁶ Green Paper on Radio Spectrum Policy, at p. 1.

⁷ *ibid.*, para. 2.3, pp. 10-11.

⁸ *ibid.*, para. 2.1, p. 4.

⁹ *ibid.*, para. 2.3, p. 11.

¹⁰ *ibid.*, para. 2.3, p. 9.

Telecommunications Union (ITU) – 186 Member States (including the 15 Member States of the EU) participate biannually with the aim of achieving international radio spectrum harmonisation. At the European level a coordinated approach to the use and allocation of radio spectrum is being developed within the framework of the European Conference of Postal and Telecommunications Administrations (CEPT). CEPT comprises 43 European countries, and its aim is to adopt harmonised frequency allocation measures in Europe in order to facilitate the pan-European introduction and provision of services and equipment and to promote the Community interests by developing corresponding European positions in the WRC process. CEPT participates in the WRCs and negotiates on behalf of its 43 European members by developing the so-called European Common Proposals (ECPs).

In the telecommunications sector, a political and legal framework is set up within the European Union where certain requirements are introduced and specific legislative measures are adopted with regard to the strategic planning of the use of radio spectrum.

So, by means of Council Resolutions, CEPT is requested to undertake research into long-term requirements for the frequency spectrum taking account of market demand, standards requirements, and development of products as well as the needs of other users of the radio frequency spectrum.¹¹ When CEPT has completed its research and identified those factors which constitute an essential basis for a long-term frequency planning, it is asked to forward its recommendations to regulatory authorities or to the Community.¹² Moreover CEPT is requested to achieve a better-balanced allocation of radio spectrum between its various uses¹³ while, in the context of the European Radiocommunications Committee (ERC), the timely allocation of adequate frequency resources to mobile and satellite systems and the establishment of measures regarding common European standards are considered to be essential in order to foster the development of the mobile and personal

¹¹ Council Resolution of 28 June 1990 on the strengthening of the Europe-wide cooperation on radio frequencies, in particular with regard to services with a pan-European dimension, 90/C 166/02, at p. 6.

¹² *ibid.*

¹³ Council Resolution of 29 June 1995 on the further development of mobile and personal communications in the European Union, 95/C 188/02, at p. 4, 3(h).

communications sector.¹⁴

Alongside the political base, specific legislative measures are introduced with regard to the planning of the use of radio spectrum. Thus the GSM Directive¹⁵ requires Member States to ensure exclusive reservation of adequate frequency for the introduction of cellular digital land-based mobile communications systems.¹⁶ In particular, Member States are required to draw up plans for GSM to occupy the reserved frequency bands fully according to commercial demand as quickly as possible¹⁷ and to communicate these plans to the Commission.¹⁸ The ERMES Directive¹⁹ is aimed at reserving adequate frequency band for the introduction of land-based radio paging services. Member States are required to ensure that the necessary plans for ERMES are prepared as quickly as possible in order to fully occupy the reserved frequency bands according to commercial demand.²⁰

Also, the aim of the DECT Directive²¹ is to encourage the introduction of the Digital Enhanced Cordless Telephone system by requiring Member States to designate a specific frequency band for those services.²² Moreover, with regard to future designation of frequencies for specific communications services, the Mobile Directive²³ lays down the obligation of the Member States to publish the relevant frequency plans as well as the procedures to be followed. In addition, the Directive provides that allocation schemes of frequencies specifically reserved for mobile and personal communications services, including the plans for extension of those frequencies, must be published by the Member States every year and made available on request. Furthermore, current frequency

¹⁴ *ibid.*, at p. 4, 3(i).

¹⁵ Council Directive 87/372/EEC of 25 June 1987 on the frequency bands to be reserved for the co-ordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, OJ L 196, 17.7.1987, p. 85 (hereafter: the GSM Directive).

¹⁶ GSM Directive, at Article 1(1).

¹⁷ *ibid.*, Article 1(2).

¹⁸ *ibid.*, Article 4(2).

¹⁹ Council Directive 90/544/EEC of 9 October 1990 on the frequency bands designated for the co-ordinated introduction of pan-European land-based public radio paging in the Community, OJ L 310 of 9.11.1990, p. 28 (hereafter: the ERMES Directive).

²⁰ ERMES Directive, at Article 2(2).

²¹ Council Directive 91/287/EEC of 3 June 1991 on the frequency bands to be designated for the co-ordinated introduction of digital European cordless telecommunications (DECT) into the Community, OJ L 144 of 8.06.1991, p. 45 (hereafter: the DECT Directive).

²² DECT Directive, at Article 2(1).

²³ Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EC with regard to mobile and personal communications, OJ L 20 of 26.01.1996, p. 59 (hereafter: the Mobile Directive).

allocation must be reviewed by the Member States at regular intervals. Finally, where the number of licences is limited due to spectrum scarcity, Member States must review whether advances in technology can lead to an adjustment in the distribution of radio spectrum and, in particular, whether those developments can allow spectrum to be made available for further licences.²⁴

3. THE COMMISSION ASSESSES THE FUNCTIONING OF THE LEGAL FRAMEWORK

The Commission attempts to assess whether the Member States have effectively implemented the requirements laid down in the legal framework regarding the planning of the use of radio spectrum. The conclusion it reaches, however, is that the procedures and measures applied in many Member States do not conform to those obligations. Thus, although it has been already mentioned that the GSM and ERMES Directives require Member States to draw up plans as regards radio spectrum availability for mobile and personal communications and to forward them to the Commission, “these plans have been notified only by a limited number of Member States so far”.²⁵ Moreover the Commission recognises that the allocation of spectrum has fallen behind schedule in many Member States and underlines concerns regarding “the lack of procedural rules, ... the split of competences for the allocation of frequency ... or delays in the allocation of frequency”.²⁶ Furthermore, contrary to the legal requirements laid down in the Mobile Directive,²⁷ the Commission has not been informed by the Member States about any national reviews of current frequency allocation nor whether advances in technology can allow spectrum to be made available for extra licenses.²⁸ In addition, the Commission points

²⁴ Mobile Directive, at recital 15 and Article 3b.

²⁵ Communication from the Commission on the implementation and functioning of the mobile communication frequency Directives, COM (1998) 559, 9.10.1998, at 6.2, p. 20.

²⁶ Communication from the Commission – Fourth Report on the Implementation of the Telecommunications Regulatory Package, COM (1998) 594, 25.11.1998, at 2.4.7, p. 27.

²⁷ Mobile Directive, at recital 15 and Article 3b.

²⁸ Green Paper on Radio Spectrum Policy, Annex II, at p. II.

out that the CEPT has not responded efficiently to the requests laid down in the already mentioned Council Resolutions²⁹ to forward its recommendations for a long-term frequency planning to the Community and to achieve a better-balanced allocation of radio spectrum between its various uses.³⁰

Contrary to the exception of radio spectrum availability for mobile communications – where Community legislation exists – the planning of the availability and use of radio spectrum for other services (e.g. broadcasting, transport, R&D) has not been addressed in the European Union as a matter calling for political or legislative action.³¹ The European Union mainly relies on the work undertaken in CEPT regarding a strategically planned use of radio spectrum through a harmonised European table of frequency allocation and utilisation. It is sufficient to mention here that, since the CEPT is not a Treaty-based organisation, its harmonisation measures are not legally binding and, therefore, Member States are not required to comply.

Thus the fact that most of the Member States have not effectively implemented the legal requirements regarding the planning of the use of radio spectrum in conjunction with the discretion of Member States to comply or not with a harmonised European table of frequency allocation and the criticism of CEPT's performance led the Commission to the conclusion that the strategic planning regarding the future availability of radio spectrum is not characterised by clarity and legal security – necessary preconditions for investment decisions to be made.

²⁹ Council Resolution of 28 June 1990 on the strengthening of the Europe-wide cooperation on radio frequencies, in particular with regard to services with a pan-European dimension, 90/C 166/02; and Council Resolution of 29 June 1995 on the further development of mobile and personal communications in the European Union, 95/C 188/02.

³⁰ Green Paper on Radio Spectrum Policy, Annex II, at p. II.

³¹ *ibid.*, at para. 2.2, pp. 8-9.

4. MAJOR ISSUES RAISED IN THE CONSULTATION PROCESS

As a result of the changing environment for radio spectrum policy, a strategic and coherent approach is required in order to lead to an effective management of the radio spectrum to the benefit of the European Community and all its citizens. This presupposes a strategic review of spectrum policy which will comply with the following main objectives set out in the Green Paper on Radio Spectrum Policy:

- to stimulate the development of new services while ensuring an appropriate representation of consumer and governmental demands for radio services;
- to facilitate the development of the internal market for and competition in radiocommunications equipment and services. This implies that, in the context of the introduction of pan-European and global systems and services, a policy of harmonisation measures on the use and allocation of radio spectrum is required in order to avoid delay in the deployment of such systems;
- to safeguard the benefits to society resulting from the use of radio spectrum that is made for non-economic purposes such as defence, safety, cultural and social aspects etc.;
- to strengthen the negotiating position of Europe and promote European objectives and interests in multilateral and bilateral negotiations on radio spectrum;
- to encourage and support European industry's innovation and competitiveness;
- to contribute to economic growth, employment, and welfare.³²

In pursuance of the above objectives, the Commission recognises that effective spectrum management tools must be introduced and that, for the realisation of this target, the following key issues regarding the way in which spectrum use and allocation should be conducted must be taken into serious consideration:

- to secure radio spectrum availability for pan-European radio systems, services and equipment;

³² *ibid.*, at para. 3.1, p. 12.

- to ensure the efficient use of radio frequencies. This includes the need to reconcile the interests of the many different categories of spectrum users and to balance commercial and other public policy interests in the allocation of radio frequencies. It also includes the introduction of a policy according to which the fees payable for a licence reflect the economic value of the spectrum made available. An additional indication that the objective of an efficient spectrum management has been achieved is when radio spectrum policy does not impede competition and does not prevent technological innovation;
- to establish a predictable and legally certain regulatory framework regarding the future availability and use of radio spectrum so that investment decisions can be made;
- to ensure that the principles of openness, transparency, objectivity, and non-discrimination are applied in the management procedures of radio spectrum and, consequently, to establish a level playing field for all spectrum users;
- to support the development of economies of scale for the deployment of new equipment which meets the users' needs;
- to ensure that there are close links between the procedures for the elaboration and agreement of technical standards and the allocation of harmonised radio spectrum. There is also the need for a close co-operation between the standards making bodies and the spectrum management organisations.³³

The aim of the following sections is to examine whether the current practice of radio spectrum policy can ensure that the Community's aforementioned policy objectives are met or whether adaptation may be required - and in what extent - in the light of technological, market, and regulatory developments.

³³ *ibid.*, para. 3.1, pp. 12-13.

4.1. The institutional framework for radio spectrum co-ordination – A priori agreement on radio spectrum harmonisation – Voluntary implementation of ERC decisions – The case for legal obligation

With regard to the question on whether the current institutional arrangements for radio spectrum co-ordination are sufficiently transparent and legally certain, views were evenly balanced. Thus many contributions saw the CEPT machinery as sufficiently open and transparent. In addition, they highlighted its role in achieving the right balance between establishing appropriate stability and predictability on the one hand and recognising the need for flexibility and national discretion on the other. Following on from this, they argued in favour of the maintenance of the current framework for radio spectrum co-ordination.³⁴

They also emphasised that an a priori Community agreement on radio spectrum harmonisation would seriously undermine the developments within CEPT.³⁵ As the European Telecommunications Platform (ETP) points out,

“strategic planning and harmonisation of the use of radio spectrum for the whole of Europe is of utmost importance. Harmonisation and planning activities carried out within the European Union only would lead to an undesirable split. Planning of spectrum for the countries of the European Union has to be carried out as an integral part of the planning for Europe in its entirety. Consequently strategic planning and harmonisation of the use of radio

³⁴ Opinion of the Hungarian Administration concerning the Green Paper on Radio Spectrum Policy, April 1999, at p. 4; BBC's response to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 8; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 11; submission by WorldDAB, the Forum for Digital Audio Broadcasting, regarding the Green Paper on Radio Spectrum Policy, Brussels, 15 April 1999, at p. 13; European IT Industry Round Table (EITIRT) response to the EC Green Paper on Radio Spectrum Policy, 9 April 1999, at p. 3; comments from Tele Danmark regarding the EU Commission's Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 7; Vodafone's response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 5; comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11.

³⁵ Comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 6; BBC's response to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 8; One 2 One response to the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 9; Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 17; Comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 12; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 7.

spectrum is to be carried out within a pan-European forum. Since the CEPT consists of competent authorities from all European countries, the present arrangement with the CEPT responsibility within this area seems to be very appropriate".³⁶

Besides, it is stressed that there has never been a case where a CEPT position contradicts with the objectives of the EU countries³⁷ and, therefore, the current framework for radio spectrum co-ordination in CEPT is suitable to preserve the European Community's interests without resorting to an a priori Community decision.

In addition, many responses considered that the existing system of voluntary implementation on CEPT agreements constitutes an effective institutional arrangement. Otherwise, the decision-taking process within CEPT could be undermined.³⁸ As the Office of the Director of the Telecommunications Regulation of Ireland has put it,

"for an ECP to have a good possibility of being adopted at an ITU/WRC, it needs to be supported by the maximum number of countries possible. If there is a mandatory requirement to support ECPs then the possibility exists that ECP could not be agreed to for those topics that may conflict with the interests of some Member States. [Thus] the principle of subsidiarity should apply and procedures to mandate Member States to support the CEPT position should not be introduced".³⁹

³⁶ Response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 3.

³⁷ Comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 12; Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 17.

³⁸ Comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 12; comments from Tele Danmark regarding the EU Commission's Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 7; Vodafone's response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 6; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 6; opinion of the Hungarian Administration concerning the Green Paper on Radio Spectrum Policy, April 1999, at p. 5.

³⁹ Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 18.

On the other hand, many responses⁴⁰ agreed with the Commission's criticism of CEPT's performance, namely that it did not forward its recommendations for a long-term frequency planning to the Community and did not achieve a better-balanced allocation of radio spectrum between its various uses. Moreover, there is the criticism that the current processes undertaken by the CEPT are lengthy and cannot always reflect and promote the Community's position and interests.⁴¹

Thus they put forward the view that an a priori Community agreement on radio spectrum harmonisation is required – especially when major Community interests are at stake (e.g. the development and promotion of pan-European systems) – due to the non-binding character of ERC decisions.⁴² The fact that the implementation of ERC decisions occurs on a voluntary basis has led them to argue in favour of the introduction of additional procedures (i.e. the imposition of legal obligations in Member States) to ensure that the Member States support ECPs.⁴³ Their main argument is that when the ECPs are signed by the 43 CEPT members and submitted to the WRCs as a common

⁴⁰ Swissphone Telecom - Comments on the Green Paper on Spectrum Policy, 14 April 1999, at pp. 4-5; One 2 One response to the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 9; Telefonica's comments on the Green Paper on Radio Spectrum Policy, April 1999, at p. 12; comments of the European Cable Communications Association (ECCA) concerning the Green Paper on Radio Spectrum Policy, April 1999, at p. 11; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 11; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11.

⁴¹ Green Paper on Radio Spectrum Policy, at 4(5)(c), p. 22.

⁴² Comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 12; the EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, 13 April 1999, at p. 15; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 11; submission by CLUB DAB Italia & Radio Nazionali Associate (RNA) to the European Commission regarding the Green Paper on Radio Spectrum Policy, Roma, 14 April 1999, at p. 11; comments of the European Cable Communications Association (ECCA) concerning the Green Paper on Radio Spectrum Policy, April 1999, at p. 12; comments by the Association of European Airlines (AEA) on the Green Paper on Radio Spectrum Policy, April 1999, at p. 13.

⁴³ Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 12; Motorola's response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 6; One 2 One response to the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 10; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, at p. 7; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 11; The EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, 13 April 1999, at p. 16.

Community position, Europe can have a powerful bargaining and voting advantage vis-à-vis third regions and countries. However, their argument goes, due to the controversy and complexity of many issues – in economic and strategic terms – which emerge in the WRCs, there is a great possibility that some of the Member States will disagree and will not sign the relevant common proposals. In that case, the aforementioned strong European negotiating position could be seriously undermined.

It should be stressed that the Commission has opted for the adoption of legally binding harmonisation spectrum measures. Indeed, in the light of the 1999 Communications Review,⁴⁴ the Commission has proposed the introduction of a new European Parliament and Council Decision on harmonisation of the use of radio spectrum that will replace the UMTS and S-PCS Decisions when they expire.⁴⁵ The proposed Decision will simplify Community legislation and will be in line with the principle of technological neutrality, namely that radio spectrum policy issues will be governed by a single set of technologically neutral rules. Under the proposed Decision, the Commission will be authorised to mandate the CEPT to agree on technical harmonisation measures with the aim of securing a pan-European approach to radio spectrum availability across all sectors relevant to Community policies.

4.2. The need to balance the varying commercial and public interests in the allocation of radio spectrum – Criteria to identify priorities

A significant number of spectrum users are providing services which are not directly linked to commercial interests but are important from a political, cultural, consumer protection and safety as well as a public welfare point of view. These non-commercial spectrum users include the military, national broadcasters (before public broadcasters began to expand their activities into

⁴⁴ Communication from the Commission, "Towards a new framework for Electronic Communications infrastructure and associated services – The 1999 Communications Review", COM (1999) 539, 10 November 1999.

⁴⁵ Communication from the Commission, "Next Steps in Radio Spectrum Policy – Results of the Public Consultation on the Green Paper", COM (1999) 538, 10 November 1999, at 4.1.2, p. 16.

new on-line information and inter-active services), and services such as air and maritime transport, radio navigation, earth observation, radio-astronomy and space exploitation, as well as public services such as the police and fire departments. So while previously the allocation of radio frequencies was coordinated by Member States on behalf of a limited number of national spectrum users (mainly for the defence sector and for public telecommunications and broadcasting operators), the historical availability and preferential treatment of radio spectrum for these activities is being challenged by the emergence of global commercial players who compete for radio spectrum availability and use.

As a result, commercial applications now compete with non-commercial ones for radio spectrum access. Moreover convergence means that services from different sectors compete with each other for available radio spectrum. At the same time, due to convergence, current definitions of services and their classification under telecommunications or broadcasting law cannot be applicable any more on the new services offered. Hence it will become increasingly arbitrary to classify many services within one category rather than another and, consequently, it will become difficult to apply the traditional classification of spectrum users in order to assess how and under what conditions radio spectrum should be allocated.

The aforementioned technological, market and regulatory developments have inevitably increased the complexity of radio spectrum management and illustrate the need to address the balance between the varying commercial and public interests in the allocation of radio frequencies as a key issue in the EU decision-making process. As the Commission recognises,

“the share of commercial applications using radio spectrum is growing ... This puts pressure on the availability of radio spectrum for other applications of importance to the public interest ... Setting priorities as to who should be allowed access to spectrum can no longer be taken solely on the basis of technical information but requires careful balancing of interests taking economic and political factors into account ... A significant number of spectrum users do not operate in a commercial environment, but have to compete with commercial users when obtaining spectrum. A key regulatory task is to find the balance between certain well-defined public/non-commercial uses of radio spectrum and the need for radio spectrum as an essential resource for doing

business”.⁴⁶

According to the Commission’s proposal, the objective of meeting the various needs of the different categories of spectrum users and balancing commercial and other public interests in the allocation of frequencies can be achieved by setting up a Spectrum Policy Expert Group (SPEG).⁴⁷ The role of the SPEG will be to advise the Commission on market, technical and other relevant developments, to ensure that all economic and social policy considerations are taken into account, to promote the EU interests regarding radio spectrum in the global trade context, and to guarantee that the Community’s policy objectives with regard to radio spectrum are safeguarded.

However, the establishment of priorities for the use and allocation of radio spectrum will be a challenging task and the SPEG will have to consider the following crucial question: on the basis of what criteria should priorities be set in order to ensure that commercial and public interests are appropriately balanced? It must be noted that, according to the Council,

“the proliferation of wireless technology, digital television and other new communication services will continue making frequency spectrum a sought-after commodity ... Governments should take into consideration the needs of the broadcasting sector when allocating spectrum. It is in particular stressed that, because of the rapidly expanding mobile-communications industry, adequate space should be saved for the television industry given its contribution to political and cultural pluralism”.⁴⁸

If we accept that the Council’s recommendation implies that priority should be given to public broadcasting, it is logical to assume that priorities should also be given to other services of equal – if not higher – social significance (e.g. health, national defence, public safety, air traffic control and emergency services). If we want to believe that we live in a civilised society that respects and protects individuals, then we can easily conclude that there is no point in

⁴⁶ Green Paper on Radio Spectrum Policy, at para. 2.3, p. 11.

⁴⁷ Communication from the Commission, “Next Steps in Radio Spectrum Policy – Results of the Public Consultation on the Green Paper”, COM (1999) 538, 10 November 1999, para. 4.1.1, p. 15.

⁴⁸ Council’s Recommendation on Media Pluralism, January 19th 1999.

attempting to find how commercial and public interests should be appropriately balanced. This simply means that measures should be taken to ensure that adequate radio spectrum (and on an exclusive basis) is reserved for applications that safeguard public interest objectives.

It should be stressed that the tight association of a public organisation with the ability to safeguard the public interest objectives is increasingly becoming blurred. Obvious examples are the privatisation of previously government-owned enterprises in the telecommunications, railway, gas and electricity utility industries or the provision of services linked with non-commercial purposes (such as air traffic control and emergency services) by private companies. This is also recognised by the Commission when it states that “in the areas of broadcasting and transport, for instance, it is becoming increasingly difficult to define the boundary between public and commercial services”.⁴⁹ It should be underlined that the above analysis regarding the services to be given priorities for the allocation of spectrum does not refer to the distinction between a public or private operation. Indeed, the analysis focuses on whether a service is associated with the general public interest or not, irrespective of the fact that the service in question could be provided by a private/commercial company.

As a conclusion, therefore, the target of an effective spectrum management reaching a satisfactory balance between varying and conflicting demands on the allocation of frequencies should refer exclusively to the necessity of reconciling the commercial interests of market players from different sectors. Only then can economic considerations play a predominant role in frequency allocation decisions. In this context, the criteria to apply in order to set priorities should be associated with the number of users, the time of consumption, and the growth of market demand for the services. In addition, consideration should be given to whether the services stimulate technological innovation, promote the competitiveness of the European industry on the world market, and contribute to economic growth and welfare.

⁴⁹ Green Paper on Radio Spectrum Policy, at para. 2.2, p. 9.

4.3. Harmonisation is not suitable for all circumstances

Harmonisation of radio spectrum allocation is indispensable in order to permit the usage of services and equipment across Europe, to facilitate the production of new pan-European services and applications, to minimise coordination problems at frontiers and to exploit the economies of scale for the manufacturers. As a result, equipment costs for the consumer will be reduced and the European industry's position on the world market will be strengthened.

However, the different stages of economic and technological development among European countries in conjunction with the significant national divergences make it obvious that the advantages derived from harmonisation are particularly achieved only when major Community interests are at stake, i.e. when the applications offered have pan-European spectrum requirements. Otherwise, the case for harmonisation is weak. Indeed, each Member State needs to use the spectrum optimally in a way that takes account of local needs and reflects their own specific requirements. For example, maritime search and rescue (SAR) services in the UK are in need of sufficient frequencies on a non-interference basis – in order to ensure safety-of-life communications – due to the extensive coastline of this country. In contrast, it is logical to expect that a land-locked country like Austria will address radio spectrum availability and use of such services in a different manner.⁵⁰ In addition, the location and amount of radio spectrum reserved for defence purposes differ significantly between, for instance, Belgium and Greece. In the latter, the allocation of a considerable amount of radio spectrum for military applications is justified and understandable. Indeed, this is regarded as essential for the maintenance of an effective national defence policy considering the inherent military/political tensions in the Aegean area. It should be stressed that this point cannot be ignored, especially since the calls for releasing many bands previously allocated for defence purposes – due to the supposedly reduced international

⁵⁰ The United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 7.

military tensions – are increasing.⁵¹

Thus it is important to identify those applications which have pan-European spectrum requirements before any harmonisation measures are decided. It is obvious that the Council of the EU follows this approach when it recognises that “there is an indispensable requirement for coordination at the European level, in particular in the field of the new public mobile communications systems and that of satellite applications”⁵² and asks CEPT to identify those frequencies best suited for services with pan-European characteristics and to communicate its recommendations to the regulatory authorities or to the Community.⁵³ Moreover, the Council requires Member States to participate in the development of ERC decisions on harmonisation measures regarding the provision of the necessary frequencies for significant pan-European radio services.⁵⁴ And it concludes by requesting Member States to implement the ERC decisions on the coordinated introduction of TFTS (Terrestrial Flight Telecommunications System) and RTT (Road Transport Telematics), according to ERC procedures.⁵⁵

This political commitment to secure the harmonised availability of radio spectrum for pan-European services is accompanied by the establishment of certain legal measures, such as the already mentioned GSM, ERMES, and DECT Directives, as well as the European Parliament and Council Decisions on S-PCS and UMTS.⁵⁶ These Decisions require CEPT to harmonise frequencies and authorisation conditions for S-PCS and UMTS and allow for

⁵¹ See for instance: the response by the European Telecommunications Platform (ETP) to the Commission’s Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 3; Ericsson’s comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 1; European IT Industry Round Table (EITIRT) response to the EC Green Paper on Radio Spectrum Policy, 9 April 1999, at p. 2; European Public Telecommunications Network Operators’ Association (ETNO) - Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 1; ITV’s response to the EC Green Paper on Radio Spectrum Policy, 12 April 1999, at p. 3; Telia’s comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 1.

⁵² Council Resolution of 28 June 1990 on the strengthening of the Europe-wide cooperation on radio frequencies, in particular with regard to services with a pan-European dimension, 90/C 166/02, at p. 4.

⁵³ *ibid.*, at p. 6.

⁵⁴ Council Resolution of 19 November 1992 on the implementation in the Community of the European Radiocommunications Committee Decisions, 92/C 318/01, at point 1.

⁵⁵ *ibid.*, at point 2.

⁵⁶ Decision No 710/97/EC of the European Parliament and the Council on a co-ordinated authorisation approach in the field of satellite personal communications services in the Community, OJ L105, 23.4.97; and Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community.

Community action to be taken in case work by CEPT is not satisfactory or the Member States do not implement sufficiently the measures adopted by CEPT.

In sum: a harmonisation policy must focus (on a case-by-case basis) on those emerging services that are of particular significance, i.e. services with a pan-European dimension which can contribute to the EU economy. An over-interventionist approach could undermine the decision-taking process within CEPT. Besides, it is interesting to note that the ERMES Directive is not considered to have contributed to the early introduction and development of ERMES services in Europe.⁵⁷ This proves that legally binding spectrum harmonisation measures do not necessarily ensure the take-off of innovative pan-European services.

4.4. Re-farming

There was a general agreement among the responses to the Spectrum Green Paper that re-farming constitutes an important element for an effective strategic planning of radio spectrum. The term 're-farming' refers to the case where the incumbent radio spectrum user is required to move to less congested frequency bands in order to accommodate the introduction of new services.⁵⁸ It is, in other words, a process which – given the growing demand for spectrum in conjunction with its finite availability – aims to modify the allocation of certain radio frequency bands. Examples of re-farming could be the phasing out of the service of one technology in favour of a technically superior one (e.g. the move from analogue to digital broadcasting and the re-farming of GSM spectrum for UMTS). Moreover re-farming is linked with the reallocation of spectrum for a completely different usage, such as the release of broadcast spectrum for mobile services (in case this reallocation of

⁵⁷ See the Communication to the Council and for information to the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation and functioning of the mobile communication frequency Directives, COM (1998) 559, 9.10.1998, at 4.2.1 and 4.2.2, pp. 14-15.

⁵⁸ Green Paper on Radio Spectrum Policy, at para. 2.1, p. 4.

spectrum is regarded to be beneficial in efficiency terms).⁵⁹

There is therefore a recognition that the target of re-farming is not just to modify the allocation of certain parts of the radio spectrum but to achieve a better frequency utilisation. However, it is also recognised that excessive use of re-farming could have undesirable effects. This is the reason why, in order to avoid compromising the investment made by the frequency users and customers, adequate consideration must be given to whether or not the efficiency gains from re-farming surpass the costs.⁶⁰ As the Commission admits, trade-offs have to be made when re-farming goes ahead, since the incumbent radio spectrum user will have “to replace or adapt existing equipment in order to comply with the different characteristics of the frequency bands he is moved to”.⁶¹ Thus, considering the financial consequences that re-farming can have for the incumbent radio spectrum user in conjunction with the fact that huge investment is required for the launch of commercial wireless ventures, it is logical that compensation mechanisms are recommended in order to offset non-recovered investments.⁶² As underlined in the US Government’s response,

“the proponents of new services must be encouraged to develop creative solutions to minimize disruption of existing services. In addition, in some cases it may be possible for multiple services to share the same spectrum based upon sharing etiquettes. ... Where the cost of relocation is great and there is no ability to share the spectrum, it may be appropriate for the proponents of the new services to pay to move the incumbents to new spectrum”.⁶³

⁵⁹ See Motorola’s response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 2.

⁶⁰ See for instance the comments from Tele Danmark regarding the EU Commission’s Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 3; Motorola’s response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 2; BBC’s response to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 4.

⁶¹ Green Paper on Radio Spectrum Policy, at para. 2.1, p. 5.

⁶² *ibid.*

Moreover, an effective spectrum re-farming policy must make sure that the incumbent radio spectrum user is given reasonable transition time⁶⁴ in order to move to the new frequency bands and to respond to the change by using the necessary measures to accomplish an equipment replacement programme. Furthermore, as already mentioned above, an excessive use of re-farming could have undesirable effects. Therefore, in order to be successful, a re-farming policy must carefully focus on identifying and promoting those emerging services with a pan-European dimension which can contribute to the EU economy in terms of technological innovation, competitiveness, economic growth and employment. Thus it is clear that re-farming should be addressed in the context of facilitating the introduction of new services – especially those with a European dimension – and that this approach requires the necessary political support. This is illustrated by the Council Decision of 14 December 1998⁶⁵ which committed the Member States to introduce a concerted approach at Community level and to secure frequency availability for the development of Europe's future third generation mobile communications systems, known as UMTS (Universal Mobile Telecommunications System). This is also reflected in the Council's determination to facilitate the rapid introduction of compatible satellite personal communications services (S-PCS) in the Community through the harmonisation of frequency bands and the removal of barriers to the free movement of terminal equipment.⁶⁶

It seems however that the aforementioned cases constitute the exception, since only a small percentage of radio services can be provided on a pan-European or international level; the majority of the allocated licences are linked

⁶³ United States' comments regarding the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 5. See also the Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 2; Telefonica's comments on the Green Paper on Radio Spectrum Policy, at p. 4.

⁶⁴ See the comments from Tele Danmark regarding the EU Commission's Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 3; United States' comments regarding the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 5; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 2; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 2.

⁶⁵ Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community, OJ L17/1, 22.1.1999.

⁶⁶ Decision No 710/97/EC of the European Parliament and the Council on a co-ordinated authorisation approach in the field of satellite personal communications services in the Community, OJ L105, 23.4.1997.

to local or regional services.⁶⁷ In addition, due to the uneven status and the various levels of technological and market development among Member States, different strategic planning is set-up by the national regulatory authorities regarding the speed of phasing out of analogue spectrum and the take-up of digital.⁶⁸ Thus each Member State needs to use the spectrum in a way that will reflect their own specific local needs and requirements. This is the reason why the majority of the responses to the Spectrum Green Paper argue that there is no need to implement common European mechanisms for re-farming and that, on the contrary, the responsibility for a re-farming strategy should be undertaken at the national level by the national frequency authorities.⁶⁹

4.5. Radio spectrum assignment and licensing

As the Commission recognises, there are large differences in Member States with regard to assignment mechanisms. In addition, there are even differences in the amount of spectrum assigned to operators within the same country.⁷⁰ Thus some responses illustrated the possibility that these differences could have a negative effect on competition and consequently lead to inefficient use

⁶⁷ The United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 6.

⁶⁸ BBC's response to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 4.

⁶⁹ See, for instance, the Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 2; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 2; Office of the Director of Telecommunications Regulation (O.D.T.R.) – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 7; the United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 8; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 4; BBC's response to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 4; response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 9; Motorola's response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 3.

⁷⁰ Communication from the Commission on the Implementation and functioning of the mobile communication frequency Directives, COM (1998) 559, 9.10.1998, at 6.3, p. 21.

of spectrum.⁷¹ However, the majority of the commentators argued that diverging assignment methods are justified by the different needs and priorities of the individual Member States.⁷² Thus there is general recognition that the issue of the assignment methods should be left to the discretion of Member States. This view is supported by the Commission when it states that “the frequency assignment is a matter for the national authorities to decide”.⁷³ It is therefore widely recognised that, where systems are essentially local and do not require a pan-European provision, there is no need for a unified assignment approach as long as licensees are treated in accordance with the principles laid down in the Licensing Directive, i.e. on an open, objective, transparent and non-discriminatory basis.⁷⁴ On the other hand, the significance of having a common process for spectrum assignment for pan-European services (such as third generation mobile telephony and satellite personal communication services) was highlighted.⁷⁵ However, many responses questioned the necessity for reaching such a uniform approach as unnecessary and unrealistic – “there are up to now no indications that diverging national mechanisms did influence the successful introduction of

⁷¹ One 2 One response to the EC Green Paper on Radio Spectrum Policy, April 1999, at pp. 5-6; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 7.

⁷² Telefonica's comments on the Green Paper on Radio Spectrum Policy, April 1999, at p. 7; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 4; comments from Tele Danmark regarding the EU Commission's Green Paper on Radio Spectrum Policy, April 20, 1999, at p. 4; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 4; Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 12.

⁷³ Communication from the Commission on the Implementation and functioning of the mobile communication frequency Directives, COM (1998) 559, 9.10.1998, at 6.3, p. 21.

⁷⁴ Comments from Tele Danmark regarding the EU Commission's Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 4; Vodafone's response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 4; Telefonica's comments on the Green Paper on Radio Spectrum Policy, April 1999, at p. 8; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 4; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 8; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 4; Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 12; opinion of the Hungarian Administration concerning the Green Paper on Radio Spectrum Policy, April 1999, at p. 3; NATO Frequency Management Branch – Response to the Commission of the European Communities Green Paper on Radio Spectrum Policy, April 1999, at p. 3.

pan-European services”⁷⁶ – despite the fact that they recommended a specific assignment method.⁷⁷

Whilst there was general agreement on the need to encourage greater efficiency in radio spectrum use, there were opposite views on how this could be achieved. Thus some placed emphasis solely on the commercial value of frequencies while others perceived the term ‘efficiency’ as a notion which includes technical and economic as well as public interest considerations. More analytically:

The assignment of radio spectrum is described as “the process where administrations authorise individual users to use radio stations or to provide radio services within identified frequency bands”.⁷⁸ Currently the fees for the use of radio spectrum cover only the administrative costs incurred. However, since demand for radio spectrum is increasing rapidly, it is believed that the administrative cost of licensing does not reflect the real market value of the frequency spectrum. As a consequence, spectrum pricing measures must be introduced (in addition to administrative costs) in order to ensure a better management of the spectrum resources.

The ability of NRAs to increase spectrum fees is established by the legal principles laid down in the Licensing Directive. Indeed, it is stated that the charges required for the use of radio spectrum must cover only “the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences” and “be proportionate to the work involved”.⁷⁹ Nevertheless, national administrations are given the discretion to impose additional non-discriminatory charges “which reflect the need to ensure the optimal use of these [frequency scarce] resources” and “take into particular account the need to foster the development of innovative

⁷⁵ The Satellite Industry Association (SIA) – Comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 2; the EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, 13 April 1999, at p. 11.

⁷⁶ Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 12.

⁷⁷ The United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 12.

⁷⁸ Green Paper on Radio Spectrum Policy, at para. 3.2, p. 15.

⁷⁹ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licenses in the field of telecommunications services (the Licensing Directive), OJ L 117/15, 5.5.1997, at Article 11(1).

services and competition”.⁸⁰

This imposition of additional charges for the use of frequencies (in order to reflect the real economic value of spectrum) finds its application in the form of competitive bidding (auctions) which, it is argued, can stimulate an efficient and effective use of radio spectrum. This can be achieved due to the major advantages that auctions can offer in comparison with the traditional assignment methods. In particular, auctions address licence applications in a manner that minimises delay. In addition, the speedy licensing procedures are not achieved at the expense of proper evaluation of the facts. Indeed, contrary to the ‘beauty contest’ mechanism (comparative hearings) – where it is argued that the decisions are likely to be biased towards incumbent operators with an established track record⁸¹ – auctions are associated with a fair, objective and transparent decision-making process. Furthermore auctions make sure that licences are acquired by those bidders who value them most and who then have the incentive to use the assigned spectrum efficiently (in order to avoid compromising their investment and to maximise their commercial return).⁸²

Thus many responses put forward the view that spectrum pricing and the choice of auction as a method of assigning spectrum will play a valuable role in achieving an efficient spectrum management policy. Indeed, spectrum efficiency will improve since users will have the economic incentive to release some of their existing under-used spectrum – while previously they were able to reserve spectrum in anticipation of the rapid market developments.⁸³ Furthermore, when the fees payable for the use of radio spectrum cover only the administrative costs incurred, prices charged to small users of spectrum are the same as those charged to large ones.⁸⁴ This policy is considered to be inconsistent with the overall goal of establishing a level playing field. The obvious implication of this discrimination is that the competitive process is distorted as small users find themselves unfairly disadvantaged. Auctions, on the other hand, ensure that fees are more realistic and reflect an objective

⁸⁰ *ibid*, at article 11(2).

⁸¹ The United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 15.

⁸² United States’ comments regarding the Green Paper on Radio Spectrum Policy, 14 April 1999, at pp. 8-10; the United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at pp. 13-15.

⁸³ The United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 13.

⁸⁴ *ibid*.

price of spectrum set by the market.

On the other hand, many responses drew attention to possible distortions of competition arising from the fact that later market entrants are required to pay a market value for the use of radio spectrum whereas existing users were charged much lower fees.⁸⁵ It is also argued that the proponents of auctions have failed to take into account the fact that the spectrum manager has to balance a wide range of technical, cultural, geographic, and social considerations in order to ensure that the specific local needs, views and priorities of each Member State are accurately addressed. Thus there are widespread concerns about the fact that auctions can result in excessive charges for the players involved and, as a consequence, these charges are passed on to the consumer. As Motorola argues,

“the cost of auctions and associated relocations place a tremendous financial burden on the operators, which trickles down to the end user. Allowing the highest bidder to determine the use of the spectrum causes inconsistency and uncertainty, which in turn raises equipment cost to users, negate economies of scale, retard manufacturer investment, increase the potential for interference and threaten the investment of existing operators. Such results are not compatible with sound spectrum management”.⁸⁶

The imposition of such high charges is considered by many responses to be driven by national budgetary thinking rather than by the target to ensure the efficient use of radio frequencies – “the auction must be designed in a manner that optimises the efficiency of the allocation, rather than maximises revenue”.⁸⁷

⁸⁵ See the Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 23.

⁸⁶ Motorola's response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 3. See also: Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 5; Comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 8; Response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 13; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 8; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at pp. 8-9.

Thus comparative bidding ('beauty contest') mechanisms were held by the majority of the responses to the Spectrum Green Paper to be more appropriate and effective and less restrictive in the development of competition and the promotion of innovative services.⁸⁸

Even the most passionate supporters of auctions, whilst recognising the advantages and potential benefits that derive from this spectrum assignment mechanism, nevertheless cautioned against excessive reliance on such method. In particular, it must be remembered that spectrum auction is an assignment method used when the number of licensees must be restricted because of spectrum scarcity. Thus in the case where the licences offered can accommodate all the qualified applicants, auctions are not suitable. The same is true when radio spectrum is not being available on an exclusive basis since the spectrum manager is not required to consider any competing alternatives.⁸⁹

In addition, given the satellite's unique international character – their beams are not confined to national borders – sequential auctions are required since satellite service operators will have to obtain licenses from multiple governments in order to operate a system. These sequential auctions can create significant uncertainty for potential service providers as they cannot predict the final cost of their enterprise, let alone the fact that it would be

⁸⁷ One 2 One response to the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 7. See also: the EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, 13 April 1999, at p. 10.

⁸⁸ Comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 4; Alcatel's comments to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 6; comments from Tele Danmark regarding the EU Commission's Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 5; response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 2; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at pp. 8-9; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 8; One 2 One response to the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 7; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 5; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at pp. 9-10.

⁸⁹ United States' comments regarding the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 11; the United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 14.

virtually impossible to win auctions in all the countries they wish to operate.⁹⁰ This uncertainty can obviously discourage technological innovation and investment in new satellite systems. This is the reason why the Satellite Industry Association (SIA) points out that “satellite auctions could create substantial harms that outweigh any alleged benefits of administrative efficiency or revenue generation”⁹¹ and asks the Commission to “consider the public harms unique to satellite spectrum auctions and to prohibit their use in licensing satellite services”.⁹²

Finally, a sole reliance on a pure market mechanism like auctions cannot ensure a balanced approach between achieving an efficient (from an economic standpoint) assignment of spectrum – in order to meet the commercial interests and requirements of market players – and safeguarding public interest objectives. This is the reason why the BBC believes that, in order to secure public interest objectives, it is essential that adequate radio spectrum at an affordable price is reserved for applications which can safeguard the public interest objectives, before any spectrum is assigned to commercial operators via auctions.⁹³ This proposal reflects the concerns of public service broadcasters that they will face a competitive disadvantage due to the ability of commercial operators to earn investment returns from the utilisation of spectrum. If this is the case, then auctions can act as a brake on the realisation of public interest objectives such as pluralism of opinions and diversified information. This inability of auctions to achieve a satisfactory balance between ensuring that the fees payable for the use of frequencies reflect the economic value of radio spectrum and meeting public policy objectives is illustrated by the view of the Forum for Digital Audio Broadcasting (WorldDAB):

“auctions would lead to spectrum allocations being made solely on the basis of ‘ability to pay’. This would place broadcasters at an enormous disadvantage

⁹⁰ For more details, see: The EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, 13 April 1999, at p. 10; United States’ comments regarding the Green Paper on Radio Spectrum Policy, 14 April 1999, at pp. 11-12; the Satellite Industry Association (SIA) – Comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at pp. 4-5; Motorola’s response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 4.

⁹¹ The Satellite Industry Association (SIA) – Comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 5.

⁹² *ibid.*, at p. 2.

and, even within the broadcasting sector, only the handful of very large companies would be likely to succeed in such an environment. Radio's pluralism - one of its core strengths - would be severely threatened".⁹⁴

4.6. Radio equipment and standards

Many responses were critical of the fact that ETSI (European Telecommunications Standards Institute) often started producing radio equipment standards without taking account of spectrum issues at an early stage – "i.e. standards now and frequencies later".⁹⁵ As a result of ETSI's approach, there were cases where standards equipment did not comply with the characteristics of the frequency bands or radio spectrum was not available at all for specific equipment standards.

From the above it is obvious that standardisation of radio equipment and harmonisation of spectrum allocation are closely connected. This interrelation was also recognised by the Commission and the Council when it was stated that

"agreement on common frequency bands for radio communications systems with pan-European characteristics is an essential basis for technical standardization in the field of radio equipment ...; common frequency bands are required in order to permit the use of equipment in different countries, to minimize coordination problems at frontiers and to facilitate the large production runs for equipment necessary to make European industry

⁹³ BBC's response to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 6. See also: European Broadcasting Union (EBU) – Comments on the Green Paper on Radio Spectrum Policy, 26 March 1999, at p. 2.

⁹⁴ Submission by WorldDAB, the Forum for Digital Audio Broadcasting, regarding the Green Paper on Radio Spectrum Policy, Brussels, 15 April 1999, at p. 11. See also the response from Channel 4 to the EU Green Paper on Radio Spectrum Policy, April 1999, at p. 1.

⁹⁵ European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 9; response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 14; the United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, at p. 2; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 10.

competitive on the world market”.⁹⁶

In addition, there was widespread agreement on the need to encourage a close co-operation between those bodies responsible for developing equipment standards (e.g. ETSI) and those organisations responsible for radio spectrum management (e.g. CEPT).⁹⁷

This particular attachment to the importance of co-operation is reflected in the Memorandum of Understanding signed by CEPT and ETSI with the aim of improving the relationship between standardisation and frequency use. This arrangement is the result of the Council’s political commitment to secure it as a major policy goal. Indeed, according to the Council, CEPT was required to adopt a framework where it would “cooperate and interact closely with ETSI and with the other standardisation bodies concerned in order to take full account of the close link between standards development and allocation of frequency spectrum”.⁹⁸ The co-operation of ETSI and CEPT under this Memorandum of Understanding has proved generally to function smoothly,⁹⁹

⁹⁶ Council Resolution of 28 June 1990 on the strengthening of the Europe-wide cooperation on radio frequencies, in particular with regard to services with a pan-European dimension, 90/C 166/02, at p. 4.

⁹⁷ The United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, at p. 18; European Public Telecommunications Network Operators’ Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 9; Telefonica’s comments on the Green Paper on Radio Spectrum Policy, at p. 11; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 5; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 10; Motorola’s response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 5; Vodafone’s response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 5; One 2 One response to the EC Green Paper on Radio Spectrum Policy, at p. 8; comments from Tele Danmark regarding the EU Commission’s Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 6; Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 15; opinion of the Hungarian Administration concerning the Green Paper on Radio Spectrum Policy, at p. 4.

⁹⁸ Council Resolution of 28 June 1990 on the strengthening of the Europe-wide cooperation on radio frequencies, in particular with regard to services with a pan-European dimension, 90/C 166/02, at p. 6.

⁹⁹ Comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11; Vodafone’s response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 5; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 10; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 5; BBC’s response to the European Commission Green Paper on Radio Spectrum Policy, April 1999, at p. 8; Telefonica’s comments on the Green Paper on Radio Spectrum Policy, at p. 11; the United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, at p. 18.

although it is recognised that there is still ground for improvement.¹⁰⁰

The Commission's proposal for a Directive on radio and telecommunications terminal equipment¹⁰¹ was finally adopted by the Council and the European Parliament on 9 March 1999.¹⁰² This Directive replaces current Directive 98/13/EC¹⁰³ (which applied only to terminal equipment) and its scope is extended by covering also radio equipment.

It is believed that the R&TTE Directive will remove many regulatory barriers to the free movement and use of equipment and will provide a single European regulatory framework for R&TTE. This can be achieved since telecommunications equipment which conforms to the essential requirements laid down in the Directive¹⁰⁴ can move freely in the European Community without being subject to further national regulation.¹⁰⁵

Thus the new regime will provide a substantially simplified procedure for equipment manufacturers to access the market since it will replace the "one-stop-shopping" notification regime introduced by Directive 91/263/EEC¹⁰⁶ and will avoid the need for mutual recognition arrangements between Member States. Indeed, it must be remembered that Directive 91/263/EEC had

¹⁰⁰ One 2 One response to the EC Green Paper on Radio Spectrum Policy, at p. 8; comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11; Vodafone's response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 5; Motorola's response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 5; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 5; Telefonica's comments on the Green Paper on Radio Spectrum Policy, at p. 11; European Public Telecommunications Network Operators' Association (ETNO) - Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 9; National Air Traffic Services Ltd (NATS) - Comments on the Commission of European Communities Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 3; the United Kingdom Government - Comments on the EC Green Paper on Radio Spectrum Policy, at p. 18; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 10.

¹⁰¹ Proposal for a European Parliament and Council Directive on connected telecommunications equipment and the mutual recognition of the conformity of equipment, COM(97) 257, OJ C248, 14.8.1997.

¹⁰² Directive of the European Parliament and of the Council of 9 March 1999 regarding radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity, 99/5/EC, OJ L 91/10, 7.04.1999 (hereafter: R&TTE Directive).

¹⁰³ Directive 98/13/EC of the European Parliament and of the Council of 12 February 1998 relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity, OJ L 074, 12.03.1998.

¹⁰⁴ R&TTE Directive, Articles 3 and 4.

¹⁰⁵ *ibid.*, Article 6 (1).

cancelled the obligation for multiple testing and type approval carried out in each Member State (introduced by Directive 86/361/EEC)¹⁰⁷ and provided that terminal equipment which is authorised in one Member State may be sold and utilised throughout the Community, without having to undergo additional testing and approval procedures.

This abolition of the a priori market access controls established by the R&TTE Directive will be supplemented by an increase in the responsibility and liability of manufacturers and suppliers¹⁰⁸ and by the imposition of increased responsibility for surveillance on Member States.¹⁰⁹

So the R&TTE Directive provides for safeguards allowing Member States to protect their radio spectrum. Thus, for instance, one of the essential requirements laid down in the Directive is the “effective use of spectrum allocated to terrestrial/space radio communication”.¹¹⁰ Member States have the right to withdraw from the market products which do not comply with the relevant essential requirements.¹¹¹ In addition, when the manufacturer/supplier intends to place on the market equipment which uses non-harmonised frequencies, then a 4 week advance notification period is required.¹¹²

Although the Directive was welcomed as a useful measure,¹¹³ many commentators thought it to be less satisfactory with regard to radio equipment – “it develops its potential only in the small area of harmonised frequencies

¹⁰⁶ Council Directive of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, 91/263/EEC, OJ L128/1, 23.05.91.

¹⁰⁷ Council Directive of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, 86/361/EEC, OJ L 217/21, 5.08.1986.

¹⁰⁸ R&TTE Directive, Article 8.

¹⁰⁹ *ibid.*, Articles 6(3), 7(1), 7(2).

¹¹⁰ *ibid.*, Article 3(2)(c).

¹¹¹ *ibid.*, Article 7(1).

¹¹² See Green Paper on Radio Spectrum Policy, Annex II, at p. VII.

¹¹³ Comments by the Association of European Airlines (AEA) on the Green Paper on Radio Spectrum Policy, at p. 11; Swissphone Telecom – Comments on the Green Paper on Spectrum Policy, 14 April 1999, at p. 4; opinion of the Hungarian Administration concerning the Green Paper on Radio Spectrum Policy, at p. 4; the United Kingdom Government - Comments on the EC Green Paper on Radio Spectrum Policy, at p. 19; comments from Tele Danmark regarding the EU Commission’s Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 6; response by the European Telecommunications Platform (ETP) to the Commission’s Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 14; European Public Telecommunications Network Operators’ Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 10; Telia’s comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 10; comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11.

[and] contributes less to the harmonisation of radio spectrum”¹¹⁴ – and highlighted the need to intensify the efforts for further radio spectrum harmonisation.¹¹⁵

4.7. Ensuring availability of information on spectrum use

It should be emphasised that the responses to the Spectrum Green Paper recognised that, in order to ensure legal certainty and transparency to market players, information on spectrum allocation must be made available by

¹¹⁴ European Public Telecommunications Network Operators’ Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 10; Telia’s comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 10; response by the European Telecommunications Platform (ETP) to the Commission’s Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 14; comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11.

¹¹⁵ European Public Telecommunications Network Operators’ Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 10; Telia’s comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11; response by the European Telecommunications Platform (ETP) to the Commission’s Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 14; comments of the Federal Government of the Federal Republic of Germany on the Commission Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 11.

publishing a full set of national frequency allocation tables.¹¹⁶ This information should be presented in a homogeneous and normalised format, be easily accessible and therefore, given the speed and ease of modern communications, be available electronically on the administrations' websites in the individual countries. It should be stressed that the trend towards open availability of information concerning frequency allocations is in line with the obligation of the Member States to publish the allocation schemes of frequencies specifically reserved for mobile and personal communications services¹¹⁷ as well as in accordance with the ERC Decision on the Publication of National Tables of Frequency Allocations.¹¹⁸

It is useful here to distinguish between the terms 'allocation' and 'assignment' – radio spectrum allocation means the allocation of a frequency band to a service/application while radio spectrum assignment is associated with spectrum assignment to a radio transmitter¹¹⁹ – and to stress that, with regard to the latter, the level of detail of information available should be assessed against some sensitive issues regarding business demands for confidentiality. Thus the information on individual frequency assignments –

¹¹⁶ One 2 One response to the EC Green Paper on Radio Spectrum Policy, at pp. 3-4; response from the Independent Television Commission (ITC) to the EC Green Paper on Radio Spectrum Policy, at p. 5; Telefonica's comments on the Green Paper on Radio Spectrum Policy, at p. 3; response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at pp. 8-9; Vodafone's response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at pp. 2-3; Nortel Networks' response to the European Commission's Green Paper on Radio Spectrum Policy, at pp. 1-2; United States' comments regarding the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 4; Office of the Director of Telecommunications Regulation (O.D.T.R.), Ireland – Response to the Green Paper on Radio Spectrum Policy, 14 April 1999, at pp. 6-7; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at pp. 3-4; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, at p. 2; the EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, April 13, 1999, at pp. 3-4; Motorola's response to the EC Green Paper on Radio Spectrum Policy, April 7, 1999, at p. 2; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 4; comments from Tele Danmark regarding the EU Commission's Green Paper on Radio Spectrum Policy, April 20, 1999, at p. 2; comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 2; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 4; the United Kingdom Government - Comments on the EC Green Paper on Radio Spectrum Policy, at pp. 7-8; comments of the European Cable Communications Association (ECCA) concerning the Green Paper on Radio Spectrum Policy, at p. 8.

¹¹⁷ Mobile Directive, Article 3b.

¹¹⁸ ERC/DEC/(97)01 of 21 March 1997.

¹¹⁹ Response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 17.

which would include the details of the licence holder¹²⁰ – must be regarded as confidential since an operator of a mobile telecom system, for instance, “may not wish a competitor to get hold of data concerning the infrastructure of the base station network”.¹²¹ Moreover it is obvious that such detailed information regarding frequencies reserved for defense use and for specific government uses could have undesirable effects.¹²²

With regard to where and how information on radio spectrum allocation should be collected and presented in the European Community, views were evenly balanced between those favouring a centralised European information database and those opting for a decentralised approach. Among the former, there was agreement that the National Table of Allocations of each Member State should be published in a spectrum database created and maintained by the European Radiocommunications Committee (ERC) and that the ERO could be the appropriate organisation to maintain Internet links with the relevant government departments.¹²³ It seems that the CEPT has similar views since it is working towards the production of a European Common Frequency Allocation table, through the Detailed Spectrum Investigation (DSI) process. On the other hand, there are arguments that the provision of information on radio spectrum allocation centrally on an EU-wide basis – considering the requirement for constant revision of information relating to 15 countries¹²⁴ –

¹²⁰ This kind of information could include the name/address of licensee/contact person, channels assigned per transmitter, location/coverage area of operation, operating power, height of antenna, authorized emission, term and expiration date of license, see: The EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, April 13, 1999, at p. 3.

¹²¹ Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 4.

¹²² Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, at p. 2; United States' comments regarding the Green Paper on Radio Spectrum Policy, 14 April 1999, at p. 4; European Public Telecommunications Network Operators' Association (ETNO) – Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 4.

¹²³ See for instance the comments of the European Cable Communications Association (ECCA) concerning the Green Paper on Radio Spectrum Policy, at p. 8; Motorola's response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 2; Vodafone's response to EC Green Paper on Radio Spectrum Policy, 20 April 1999, at p. 3; response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 9; the EU Committee of the American Chamber of Commerce in Belgium – Comments on the European Commission Green Paper on Radio Spectrum Policy, 13 April 1999, at p. 3.

¹²⁴ The United Kingdom Government – Comments on the EC Green Paper on Radio Spectrum Policy, at p. 8.

could “create bureaucracy without solving the problem”¹²⁵ and “require excessive resources ... and lead into inefficiency and maintenance difficulties”.¹²⁶

5. CONCLUSIONS

1. It is in the interest of the EU Member States that strategic planning and harmonisation of the use of radio spectrum has as broad a support as possible throughout Europe, taking all diverging contributions into account. Therefore, a pan-European forum is required and CEPT – consisting of competent authorities from all European countries – provides a suitable framework for this. The consequence of an a priori agreement on radio spectrum harmonisation would be that the non-EU CEPT administrations would not be able to influence the content of the ERC decisions. In other words, the EU would take over the power of decisions within the CEPT and, therefore, the possible risk of an undesirable split would undermine the negotiating position of Europe at the global market.

2. In general, the Community should avoid imposing legal obligations on Member States to harmonise availability and usage of radio spectrum. Indeed, an over-zealous approach – referring to an increase in the imposition of legal obligations on Member States – is problematic and could seriously undermine the decision-taking process within CEPT. Only in specific cases might there be a need for legal obligation, in particular when there is a serious indication that the adoption of harmonisation spectrum measures can facilitate the introduction of new and pan-European services. Therefore, in order to be successful, a harmonisation policy must carefully focus on identifying (on a

¹²⁵ Comments of FINNET Group on the Green Paper on Radio Spectrum Policy, 15 April 1999, at p. 2.

¹²⁶ Comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 4.

case-by-case basis) and promoting those emerging services with a pan-European dimension which can contribute to the EU economy.

3. The significance of the services which perform public interest functions makes it obvious that harmonisation of radio spectrum allocation for these uses is neither practical or desirable. Indeed, since the spectrum manager has to balance a wide range of technical, cultural, geographic and social considerations, the amount of spectrum allocated for applications safeguarding the public-interest objectives must be decided in a political process and be undertaken at the national level by the national frequency authorities. In addition, there should be no doubt that, with regard to the allocation of radio spectrum, demand for public interest applications should be satisfied first.

4. The current licensing framework allows Member States to use auctions and administrative pricing as a means to encourage the optimal use of radio spectrum. According to the Commission's proposal regarding the new regulatory framework, Member States will remain free to establish auctions and other spectrum pricing mechanisms for assignment of frequencies.¹²⁷ This reluctance to adopt a single EU-wide assignment approach is justified by the existence of different views as to which assignment mechanism is best suited to achieving spectrum efficiency and fostering the development of innovative services and competition. Finally, it is submitted that the responsibility for a reforming strategy should be a matter of national competence in order to ensure that specific local needs and priorities are efficiently addressed.

¹²⁷ DG Information Society Working Document, Subject: A common regulatory framework for electronic communications networks and services, 27 April 2000, at p. 10; Communication from the Commission, "The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework", COM (2000) 239 final, 26.4.2000, at p. 20.

Chapter 5

The Challenges of Convergence to Current Regulatory Approaches - Nature and Scope of the Future Regulatory Regime

1. HORIZONTAL REGULATION OF INFRASTRUCTURE – SPLIT BETWEEN ECONOMIC AND CONTENT REGULATION – REGULATION OF SERVICES

One of the points made in the Convergence Green Paper¹ was that the application of digital technology leads towards a rapid transformation of the existing telecommunications, media and IT sectors.² One of the results of the technological developments is the fact that the convergence of technological platforms and network infrastructures is a reality: “technological convergence is already happening”.³ That networks may increasingly provide both telecommunications and broadcasting services as well as the development of the Internet is cited by the Commission in order to illustrate the emergence of the technological convergence phenomenon.⁴ It is accepted therefore that any network can carry any service, which means that different forms of communication have become independent of the method of technological delivery. This is in line with the Commission’s definition, according to which the term convergence expresses “the ability of different network platforms to carry essentially similar kinds of services”.⁵

However, it should be stressed that, although there was a general agreement on the emergence of the technological convergence of networks, there were different views regarding the scope and the time duration of its impact on markets and services.⁶ As the Working Group 3 – set up by the Birmingham Audiovisual Conference in order to examine the right regulatory framework for a creative media economy in a democratic society – stated,

¹ Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation - Towards an Information Society Approach (hereafter: the Convergence Green Paper), COM (97) 623, 3.12.1997.

² Convergence Green Paper, at p. 1.

³ *ibid.*, at p. 2.

⁴ *ibid.*, at pp. 2-4.

⁵ *ibid.*, at p. 1.

⁶ *ibid.*, at p. 8.

“even those who are most convinced of the inevitability of technological convergence differ on the timing of its achievement. The sheer complexity of the process, and the difficulty of predicting consumer behaviour, create an uncertainty that makes all forecasting risky. By a considerable majority, it was the Group’s opinion that the transition period is likely to be long rather than short”.⁷

The recognition of the reality of the technological convergence strengthens the view which supports the change from a sectoral organisation of the regulation towards a more horizontal approach. An important first step towards horizontal regulation would be the separation of the regulation of content provision from that of service provision and infrastructure for all three sectors of the convergence. The regulation of content would deal with content issues and be concerned with aspects such as media plurality, taste, decency, harmful and illegal content, security, privacy, cultural and linguistic diversity, and universal service obligations as well as the protection of IPRs and liability. On the other hand, transport (economic) regulation would deal with the communications services required to provide access to the content and the infrastructure over which the services operate. This regulation would typically cover the economic or technological aspects, such as the safeguards required for the development of effective competition, access to networks and digital gateways, licensing procedures, the interconnection and interoperability of services and networks, frequency spectrum, and equipment certification.

The vast majority of the comments received by the Commission favoured the

⁷ Birmingham Audiovisual Conference, 6-8 April 1998, Conclusions of Working Group 3, at p. 2.

split between content/cultural and transport (economic) regulation,⁸ an approach recommended by the Squire, Sanders and Dempsey L.L.P and Analysys Ltd study.⁹ Furthermore, in order to underline the general agreement which has emerged (and not only in the industry) regarding the separation of transport and content regulation, it is useful to cite some of the conclusions and recommendations adopted by two prestigious conferences, organised under the aegis of the UK and Austrian Presidencies respectively. Thus it was held that “the developing legal framework needs to be capable of dealing separately with technological issues and content issues”;¹⁰ that “the regulatory focus should in future distinguish between infrastructure and content”;¹¹ and that “the desire to see a tendency towards separate regulation for infrastructure and content is reaffirmed”.¹² Even more importantly, the

⁸ See for instance: Telecom Italia’s comments on the Convergence Green Paper, Roma, 18 March 1998, at p. 9; VECAL (the Dutch Association for cable TV operators) comments on the Convergence Green Paper, April 1998, at p. 21; the Cable Communications Association (CCA) response to the Convergence Green Paper, April 1998, at pp. 6-7; European Telecommunications Platform (ETP) - Position Paper on the Convergence Green Paper, 30 April 1998, at p. 2; Submission by Cable & Wireless Communications on the Convergence Green Paper, May 1998, at p. 12; European Broadcasting Union (EBU) Reply to the Convergence Green Paper, April 1998, at p. 20; European IT Industry Round Table (EITIRT) - Informal responses to the Convergence Green Paper, April 1998, at p. 2; Legal Advisory Board’s (LAB) position on the Convergence Green Paper, April 1998, at p. 4; EFTA’s comment on the Convergence Green Paper, April 1998, at pp. 4-5; Opinion of the Centre europeen des entreprises a participation publique et des entreprises d’interet economique general (CEEPT) on the Convergence Green Paper, April 1998, at p. 7; Draft Opinion of the Section for Industry, Commerce, Crafts and Services on the Convergence Green Paper - Economic and Social Committee of the European Union, Brussels, 20 March 1998, at pp. 2-3; Coalition of Service Industries - Response to the Convergence Green Paper, April 1998, at p. 5.

See also the Commission’s papers: Communication from the Commission, “The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework”, COM (2000) 239 final, 26.4.2000, at p. 20; Communication from the Commission, “Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age”, COM (1999) 657 final, 14.12.1999, at p. 11; Communication from the Commission “Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review”, COM (1999) 539, 10 November 1999, at p. 5; Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108, 10.3.1999, at p. 9; Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 30.

⁹ “Study on Adapting the EU Telecommunications Regulatory Framework to the Developing Multimedia Environment”, prepared for the European Commission by Squire, Sanders and Dempsey L.L.P and Analysys Ltd., January 1998, at p. 256.

¹⁰ Birmingham Audiovisual Conference, 6-8 April 1998, Conclusions of Working Group 3, at p. 3.

¹¹ *ibid.*, at p. 6.

¹² Vienna Conference on convergence, 3 November 1998, see the Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108 EN final, 10.3.1999, at p. 22.

European Parliament agreed that the “regulatory framework applicable to electronic communications infrastructure should remain separate from that applicable to the content conveyed”.¹³

The indisputable emergence of the convergence of technological platforms and network infrastructures in conjunction with the agreement on the separation of transport and content regulation are the determinants which can take the horizontal approach to the regulation one step further. Indeed, these two factors could easily result in the acceptance of the notion that similar regulatory conditions should apply to all network infrastructure and associated services, irrespective of the types of services carried over them. In other words, networks should be governed by a single set of technology neutral rules.¹⁴ This agreement on the horizontal approach to the regulation of infrastructure was once again backed by the opinion of the European Parliament when it stated that “there should be a single regulatory framework for what is basically the same activity, the transport of information through the different networks”.¹⁵

However, there is a wide agreement that the trend towards horizontal regulation of networks will not change the nature of the services which are carried through this infrastructure. Indeed, services must keep their specific characteristics, which were and still are crucial in deciding how and to what

¹³ The opinion of EP of 22 October 1998, see the Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108 EN final, 10.3.1999, at p. 7.

¹⁴ DG Information Society Working Document, Subject: A common regulatory framework for electronic communications networks and services, 27 April 2000, Chapter I, at p. 5; Communication from the Commission, “The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework”, COM (2000) 239 final, 26.4.2000, at pp. 8 and 20; Communication from the Commission “Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review”, COM (1999) 539, 10 November 1999, at pp. 3 and 6; Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108 EN final, 10.3.1999, at pp. 2 and 9; Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 30.

¹⁵ The opinion of EP of 22 October 1998, see the Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM(1999) 108, 10.3.1999, at p. 7.

extent these services should be regulated.¹⁶

Moreover, the Commission has identified the inability of the current definitions to follow the rapid advances in technology and the new mixture of services now possible. The result is that those definitions are becoming increasingly blurred and obsolete. This happens because current definitions of services and their classification under telecommunications or broadcasting law are created in national and mono-product contexts and are based on a technology-deterministic approach. What is therefore required is the review of those definitions which are based on technological concepts and the establishment of a clear and predictable regulatory framework built on the new commercial realities and the market characteristics of the specific services.

The idea that the regulation of services will and must become independent from the technology used – technology-neutral regulation – is widely supported.¹⁷ Consequently, services must be regulated independently of the form of distribution and therefore it can be argued that, in order to reflect the specific nature and the distinctive characteristics of the services concerned, different types of regulation are required for different types of services.

1.1. Conclusions

1. The shift towards the horizontal regulation of networks will not change the nature of the services which are carried through this infrastructure. In other words, services must be regulated independently of the form of distribution. Therefore, regulation will have to reflect the distinctive nature and characteristics of a given service.

¹⁶ Communication from the Commission “Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age”, COM (1999) 657 final, 14.12.1999, at p. 11; Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at pp. 6 and 9.

¹⁷ Communication from the Commission “Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age”, COM (1999) 657 final, 14.12.1999, at p. 10; Communication from the Commission “Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review”, COM (1999) 539, 10 November 1999, at p. 13; Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 27.

2. Rejecting the tight association between a specific service and its relevant infrastructure - and thus applying the kind of regulation which is based on the market characteristics of the specific services - has as a result that the rules traditionally applied to broadcasting will be prevented from applying mechanically to the on-line services.

2. SPECIFIC REGULATION VERSUS COMPETITION LAW

This section examines whether market forces and competition law should be the sole drivers for the development of an effective communications market or whether sector-specific regulation is still required.

2.1. Limitations of the current specific-regulation

The open network provision (ONP) rules were conceived in order to safeguard and promote the development of competition in the telecommunications sector by monitoring operators with significant market power and making sure that new entrants had sufficient and fair access to public switched telecommunications networks (PSTN). This means that the scope of the ONP framework is limited, in the sense that it cannot address issues which are found in the other sectors affected by the convergence process, and which may remain in a fully converged market. So, for instance, the current ONP rules cannot cover issues such as access agreements between private networks and service providers and cannot apply to converging services such as Internet telephony.

This limitation of the sector-specific regulation in conjunction with the fact that access problems are not confined to the public telecommunications networks only raises competition concerns. For instance, Commission officials identify the increasing commercial importance of the Internet and underline the

significance for market players of having access to that marketplace.¹⁸ However, they are concerned that the increasing involvement of established players from the telecommunications, media and IT sectors into the Internet market creates “risks of anti-competitive behaviour on the Internet [which] are already apparent and could become dramatic”, and could lead to “a substantial potential for abuse of market positions or conclusion of anti-competitive agreements in the global arena”.¹⁹ This is the reason why the Commission expresses determination to maintain an open and competitive Internet market,²⁰ and states that “the area of backbone access to the Internet is one which the Commission will keep under close review”.²¹

Thus it becomes clear that the ONP regime – in its current form – cannot work satisfactorily in the future converging environment. Indeed, this is true not only because of its inability to address the issues from a wider point of view (and not just from a strict telecommunications one). It is also because the regime has become obsolete,²² since the emergence of new converged services requires a technology-neutral regulation which is based on market concepts²³ and not one like the current ONP framework, which is based on a technology-determined approach. Therefore one could find a sound basis in Belgacom’s argument that “at the network level, ... the 1998 regulatory framework is already looking out of date, even before the ink has dried”.²⁴

BT also seems to back this view when it states that

“the application of ex-ante rules on a sector specific basis cannot hope to be

¹⁸ Karel Van Miert, “Mapping the new open telecommunications marketplace”, at p. 2, IIC Telecommunications Forum Brussels, 7/07/1997.

¹⁹ Kevin Coates, DG IV- C-1, “Competing for the Internet”, Competition Policy Newsletter, 1998, Number 1 February, at p. 17.

²⁰ Herbert Ungerer, “Open competition in the post-1998 European telecoms market”, at p. 8, Swedish Telecoms Summit '97, 3/12/1997.

²¹ Kevin Coates, DG IV- C-1, “Competing for the Internet”, Competition Policy Newsletter, 1998, Number 1 February, at p. 14.

²² See the response from Microsoft Corporation to the Working Document [SEC(98) 1284], 3 November 1998, at p. 7; submission by Cable & Wireless Communications on the Convergence Green Paper, May 1998, at p. 15.

²³ See the Northern Telecom Limited (Nortel) response to the Convergence Green Paper, at p. 6; Telefonica’s comments on the Convergence Green Paper, at p. 9; VECAI (the Dutch Association for cableTV operators) comments on the Convergence Green Paper, at p. 21; Draft Opinion of the Section for Industry, Commerce, Crafts and Services on the Convergence Green Paper - Economic and Social Committee of the European Union, Brussels, 20 March 1998, at p. 13.

²⁴ Belgacom’s position on the Convergence Green Paper, at p. 10.

other than a temporary fix in this situation. They will quickly become outdated and have a distorting effect on the development of competition”.²⁵

This argument can find support from the fact that a very specific regulatory framework is not flexible enough and thus not capable of predicting and coping with rapid market developments:

“The speed of technological and market change is greater than the speed by which regulation can move”,²⁶ “the faster the technological and market lead development is going the more difficult it will be for regulators to keep up with the pace of changes when trying to regulate the market”.²⁷

As it was put by Ionica:

“there is little point in regulators or market participants claiming any particular foresight or devising detailed solutions at this stage. This market requires an *ex post* regulatory environment which must be sufficiently flexible to accommodate unanticipated developments”.²⁸

So the acceptance that the current ONP framework is not sufficient to address the issues of a fully converged market – especially the access issues – raises the question of whether competition law alone can be an effective instrument for the realisation of that target.

2.2. Limitations of competition law

It is true that competition law can cope with the rapidity of technological and market change, given its ex-post nature and its case-by-case approach. Thus it is sufficiently flexible to deal with all future problems that may arise in a converged environment and to accommodate unanticipated developments. On

²⁵ BT's response to the second stage of the European Commission's Consultation on convergence [SEC(98) 1284], 29 October 1998, at p. 2.

²⁶ Response from Olivetti to the Convergence Green Paper, at p. 6.

²⁷ Tele Danmark's comments on the Convergence Green Paper, 30 April 1998, at p. 2.

²⁸ Ionica's comments on the Convergence Green Paper, at pp. 1-2.

the other hand, however, if it is decided that market forces and competition law should be the guiding principles driving convergence, then it would probably result in lack of legal certainty. This uncertainty derives from the fact that the market is still developing – “convergence and the information society are still in their infancy”²⁹ – and thus it is difficult to predict the speed and the exact way in which many convergent services, products and markets will develop. It is not hard for someone to understand that this uncertainty and unpredictability characterising the process towards convergence can easily discourage investment and hamper the incentive to develop new services. This uncertainty and unpredictability become even stronger if we take into consideration the inability of competition law to address anti-competitive practices quickly. For example, intervention by a competition authority on the grounds of Article 82 EC will not take place when a market player has the ability to harm competition significantly but only after an abuse of a dominant position has been committed. This approach is not considered satisfactory by many market players, since it can discourage companies from entering the market. Indeed, by the time the competition authority attempts to restore competition it is possible that the complainant will have already been forced out of business. As it was put by ITV,

“*ex post* competition law procedures are inherently unsuited to start up businesses. The gatekeepers should not be allowed to deny access to new businesses, given that these businesses may no longer exist by the time that the *ex-post* competition law remedy has been obtained. Further, if the remedy in question is compensation, the problem of accurately quantifying the loss suffered by being denied the opportunity to start up a business is such that the remedy will not be able to reflect the loss sustained. It is for these reasons that sector-specific rules remain necessary”.³⁰

²⁹ The Cable Communications Association (CCA) response to the Convergence Green Paper, at p. 6.

³⁰ The Independent Television Association’s (ITV) reply to the Commission’s Working Document [SEC(98) 1284], at p. 2.

2.3. Interrelation between competition law and sector-specific regulation

It is also true that Community competition rules cover areas which are not addressed by a sector specific regulation such as the ONP framework, and are thus able to apply horizontally across the sectors which participate in the convergence process. This is recognised by the Commission when it states that the objectives of its Access Notice are “to explain how competition rules will be applied in a consistent way across the sectors involved in the provision of new services, and in particular to access issues and gateways in this context”, and “to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors”.³¹ It also points out that “as this notice is based on the generally applicable competition rules, the principles set out in this Notice will ... be equally applicable in other areas, such as access issues in digital communications sectors generally”.³² On the other hand, it should not be forgotten that the ONP rules are applied to TOs with significant market power to engage in abusive behaviour and to prevent the development of competitive market structures. So the level of market power needed to invoke ONP obligations is lower than the level required for the application of competition law. This is illustrated in the 1998 Access Notice where the determination of whether an organisation is dominant requires – amongst a number of factors – a market share of more than 50%.³³ In comparison, the starting presumption that an organisation has significant market power depends on the demonstration of a market share of over 25%.³⁴ In that sense, the application of the ONP rules is wider, since it is not bound to meet the criterion of ‘dominance’ which is an essential condition for the application of Article 82 of the Treaty. In addition, the detailed nature of ONP rules lays down obligations imposed on TOs (e.g. obligations with regard to price structures, accounting obligations and also price levels) that go substantially beyond the requirements of Article 82.³⁵

³¹ Commission’s Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, C 265/2, 22.08.1998 (hereafter: The Access Notice), at the preface.

³² Access Notice, at para. 6.

³³ *ibid.*, at para. 73.

³⁴ See the Interconnection Directive, 97/33/EC, OJ L 199, 26.7.1997, p. 32, at article 4 (3); see also the Access Notice, at footnote 57.

³⁵ See, for instance, the Access Notice, at para. 15.

Of course, sole reliance on competition law would be sufficient if effective competition was introduced and established in the distinguishable markets and then in the converged environment. However, this is not the case, because the telecommunications sector – and especially the local access market – is not being fully exposed to competitive forces. On the contrary, the incumbent telecommunications operators still control a huge share of the market – more than 90%³⁶ – by virtue of their monopoly background. There are also market players who insist that fully effective competition on the local loop – introduced by a satisfactory number of alternative local loop infrastructures – may never happen.³⁷ This problem is recognised by the Commission when it states that “the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time”,³⁸ and that these parallel networks cannot be regarded as “satisfactory alternatives to the facilities of the incumbent operator”.³⁹ One of the most important reasons for this is that lots of capital is required in order to build a network which can provide the same extensive geographic coverage as that of the TO’s network.⁴⁰

However, some market players take a diametrically opposite position and argue that issues regarding access to networks cannot be identified as a barrier which may distort competition and hamper the convergence process. Their view is based on the presumption that the liberalisation process has provided a competitive environment and that cable, satellite and the third generation of mobile telephony systems (UMTS) can constitute a viable alternative access route in the local loop. Thus it is stated that “access networks ... are becoming less of an obstacle to development”,⁴¹ and that, “by the time convergence is fully developed, access networks will not remain a bottleneck”;⁴² “the last remaining network bottleneck and access concerns will have been eliminated”.⁴³ However, despite the fact that the CATV networks are

³⁶ Herbert Ungerer, “Beating the bandwidth bottleneck”, at p. 8, ATM Year 98 Europe Conference, London, 16th September 1998.

³⁷ MCI WorldCom response to the Commission’s Working Document [SEC(98) 1284], at p. 3.

³⁸ Access Notice, at para. 64.

³⁹ *ibid.*, at para. 91(a).

⁴⁰ See BBC’s response to EU Convergence Working Document [SEC(98) 1284], November 1998, at par. 1.4, p. 4.

⁴¹ Telefonica’s comments on the Commission’s Working Document [SEC(98) 1284], at p. 2.

⁴² European Public Telecommunications Network Operators’ Association’s (ETNO) Reflection Document on the Commission’s Working Document [SEC(98) 1284], at p. 2.

⁴³ KPN Telecom’s submission to the European Commission Working Document [SEC(98) 1284], November 1998, at p. 3.

reaching penetration rates of over 90% in some countries,⁴⁴ it is recognised by the Commission that the penetration of cable networks is “very unevenly spread across the EU’s Member States, with a wide variation from nearly 0% to nearly 100% penetration”,⁴⁵ and that “only in some Member States has cable developed into a credible alternative in some areas”.⁴⁶ In addition, many argue that satellites and wireless access means still have limited technological capabilities in order to reach the same interactive multi-media requirements as telephone and cable networks.⁴⁷ This was also one of the results of the Commission’s Cable Review of the impact on competition of the joint provision of telecommunications and cable TV networks by a single operator and the restrictions on the use of telecommunications networks for the provision of cable TV capacity. Indeed, after examining four criteria which were identified as ‘key issues’ in the reports⁴⁸ undertaken for the Commission – i.e. the range of services, the level of service innovation, the potential limitations of different network types and the encouragement of competition in the local loop – the Commission found that only two network types can fully qualify as capable of fostering the development and realisation of the widest range of the new telecommunications and multi-media technologies: the telephone and cable networks. As it was put in the Commission Communication concerning the Cable Review,⁴⁹

“the two wireline technologies – telecommunications and cable TV networks – are at this stage the only ones which can promote optimal development

⁴⁴ *ibid.*, at p. 2.

⁴⁵ H. Ungerer, “Infrastructure, Telephony, and Competition: Developing cable networks into full-scale multi-media networks”, p. 3, at the Second World CATV Strategies Summit, 3-5 February 1999, Cannes, France.

⁴⁶ H. Ungerer, “Managing the Strategic Impact of Competition Law in Telecoms”, at p. 8, Brussels, 9th February 1999.

⁴⁷ Position of AOL Bertelsmann Online on the Commission’s Working Document [SEC(98) 1284], 09 November 1998, at p. 2.

⁴⁸ “Cable Review - Study on the competition implications in telecommunications and multimedia markets of (a) joint provision of cable and telecoms networks by a single dominant operator and (b) restrictions on the use of telecommunications networks for the provision of cable television services”, Arthur D. Little International, 1997, and “Study on the Scope of the Legal Instruments under EC Competition Law available to the European Commission to implement the Results of the ongoing review of certain situations in the telecommunications and cable television sectors”, Coudert, 1997.

⁴⁹ Commission Communication concerning the review under competition rules of the joint provision of telecommunications and cable television networks by a single operator and the abolition of restrictions on the provision of cable television capacity over telecommunications networks, (98/C 71/EC) OJ C 71, 7.3.1998, p. 4.

according to all four criteria The other wireless technologies currently available still have limitations of one or more of the criteria which makes them less suitable for the optimal development of multimedia services”.⁵⁰

2.4. Conclusions

From a market perspective, regulation is only necessary until the establishment of effective competition on the markets. Since the market is still developing, adequate regulatory safeguards are required in order to promote and establish effective competition. Indeed, moving directly to the application of competition rules alone could lead to new forms of integrated dominance and to new multimedia market monopolies. As the Commission states,

“it would be counterproductive to remove sector specific rules designed to ensure fair competition too rapidly if this resulted in anti-competitive outcomes, for example if it were to lead to incumbent operators extending their strong or dominant position throughout the converged markets”.⁵¹

Beyond the market perspective, the justification for regulatory intervention is associated with a social policy aim involving issues such as the need for universal access to networks – achieved through universal service obligations. Regulation is also required in order to meet public interest objectives such as media plurality and diversity, taste and decency, impartial information, dissemination of culture and languages, education, and the need to protect consumers, especially minors, from ‘inappropriate’ material – i.e. positive and negative obligations within the audiovisual sector which are usually linked with public service broadcasting. There is widespread agreement on the fact that the aforementioned social objectives cannot be ensured by means of

⁵⁰ *ibid.*, at para. 23.

⁵¹ DGXIII, Discussion Document, Subject: The 1999 Review: regulatory principles, Brussels, 21 May 1999, at Chapter 4.2, p. 6.

competition law;⁵² on the contrary, “competition law may even turn a blind eye to the public policy objectives of both media and telecoms law”.⁵³

Therefore, three main points should be underlined. The first is that the level of market power needed to invoke ONP obligations is lower than the level required for the application of competition law, that the proceedings for the application of competition law tend to be lengthy and, therefore, safeguards and certainty to investors and new entrants cannot be provided. The second is linked with the social policy aim of securing certain public interest objectives. And the third is associated with the role of economic regulation to provide the temporary measures in order to guarantee equal and fair conditions to all market players until the converged market has matured.

From the above points, we can easily reach the conclusion that sector specific regulation will continue to be necessary. Of course, the long-term objective that competition law will take over and specific regulation will fall away remains valid. However, this will happen only with the realisation of an effectively competitive market. In the meantime, during the transition phase, specific regulation will play a fundamental role alongside the application of competition law.

Thus, at this transitional stage of development, sector-specific regulation should be divided into two different regulations (economic and social) and, accordingly, specific rules should focus on two general areas:

- rules to provide the temporary measures in order to prevent market failures from restricting or distorting competition. These rules will have to mimic the effect of competition and address issues such as access to networks and interconnection, access to digital gateways, standards and interoperability, pricing, and the establishment of objective licensing criteria for ensuring an equitable distribution of limited resources (like frequencies and numbering);
- rules to ensure public interest objectives (including the universal service obligation in the telecommunications industry and the public service mission conferred on public broadcasters) and rules of content.

⁵² Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM(1999) 108, 10.3.1999, at p. 3.

3. SCOPE AND EXTENT OF THE NEW INFRASTRUCTURE REGULATORY REGIME IN THE CONVERGENCE ENVIRONMENT

3.1. Introduction

It has already been shown that general agreement exists on the need for a homogenous treatment of all transport network infrastructure. It was also confirmed that the telecommunications sector – and especially the local access market – is not being exposed to competitive forces since the incumbents control almost all local access by virtue of their monopoly background. Moreover it was established that sole reliance on competition law during an intermediate stage can neither encourage market entry, nor ensure efficient and non-discriminatory access to networks and, therefore, cannot promote the development of open and competitive markets.

Therefore the immediate question concerns the scope and nature of the sector-specific rules that should apply to infrastructure and whether self-regulation could play an equally significant role.

3.2. Discussion

Based on the general agreement that a single set of technologically neutral regulatory rules should apply to all transport network infrastructure irrespective of the types of services carried over them, and on the fact that the regulatory regime for ensuring access in the telecommunications sector is far more mature and comprehensive than in the neighbouring sectors, the application of ONP-type open provision rules seems the most reasonable, practical and

⁵³ European Broadcasting Union (EBU) Reply to the Convergence Green Paper, April 1998, at p. 19.

efficient approach. Thus for a number of years – and until effective infrastructure competition has finally become established – the regulatory model of infrastructure in the converging environment should resort to the existing European regulation, namely the ONP regime and interconnection regulation of the telecommunications sector. This answers the Commission's question of whether the ONP telecommunications rules should be expanded to the other sectors affected by the convergence process.⁵⁴

Thus the scope of the new infrastructure ONP style regulatory regime will become broader. It will not be confined to the telecommunications sector but will apply to all forms of cable- and radio-based infrastructure (including cable TV and broadcast infrastructure, Internet etc.), and to any operator with significant market power across sectors. In addition, it will cover issues such as access agreements between private networks and service providers and will not distinguish between fixed-network and mobile communications network/services.

The problem is that this expansion of ONP telecommunications rules to the other sectors contradicts the Commission's stated target for dis-engaging from detailed regulatory intervention.⁵⁵ Therefore it becomes obvious that, in order to pursue the goal of a light regulatory approach, convergence enforces reconsideration of the present regulatory regime's basic principles and tools. So a large majority of the prescriptive regulations currently in place will need to be replaced by a harmonised framework of very light and general principles and overall targets which can identify and monitor barriers to competition within a converging market and can ensure equal and fair conditions for market players.

3.3. Conclusions

It must be remembered here that the aim of the ONP telecommunications framework was to create an open and harmonised approach for infrastructures and to enhance interoperability of networks and services throughout Europe. It should be also underlined that, according to that framework, open network

⁵⁴ See the Convergence Green Paper, at p. 23.

⁵⁵ See for instance the Convergence Green Paper, at p. 33.

provisions must meet a set of basic principles, namely that they must be based on objective criteria, be transparent and published in an appropriate manner, guarantee equality of access and be non-discriminatory.⁵⁶

What is therefore needed for the convergence environment is a regulatory regime which will draw on the basic principles set out within the ONP access framework. These principles will be extended and applied equally to the broadcasting sector in order to provide a common regulatory approach to communications infrastructure in the European Union.

In addition, the different approaches to licensing within Member States regarding the treatment of broadcasting and telecommunications threaten to impede the development and distribution of innovative multimedia products and services. What therefore is required is the establishment of a common approach to licensing – with the minimum possible variations – which will cover both the telecommunications and broadcasting sectors and will be consistent with the basic principles set out in the Licensing Directive. In order to achieve this target, and in the light of convergence, it is obvious that a number of aspects of existing broadcasting regulation will need revision.

In Part IV of this thesis we will examine in detail the Commission's proposed Framework, Access/Interconnection, and Licensing Directives. But the next section deals with the issue of the access to digital gateways and examines the scope of the necessary regulation and its interrelation with competition law.

⁵⁶ Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, 90/387/EEC, OJ L 192/1, 24.7.1990, (hereafter: the 1990 ONP Framework Directive), at Article 3(1).

4. THE NEW LEGAL FRAMEWORK FOR DIGITAL GATEWAYS – THE COMPLEMENTARY NATURE OF COMPETITION LAW AND SECTOR-SPECIFIC REGULATION

This section identifies the access to digital gateways as a key commercial and regulatory issue in the converging environment and attempts to examine whether regulation should play a prominent role alongside the application of competition law. In the light of the widespread public debate on the Commission's Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the 1999 Communications Review,⁵⁷ it describes the existing access regulatory regime for digital television conditional access systems and comments on the future regulatory framework.

4.1. Introduction

An issue of major concern in the Convergence Green Paper is the ability of certain actors to control bottlenecks in the provision of services. In particular, the control of essential interfaces towards consumers may be used in such a way as to exclude competitors from access to consumers. So new possibilities for abusing a dominant position will emerge, mainly due to the technical and economic restrictions which can be imposed by 'gate-keeping' companies at all stages of delivery to customers.

The main examples of interfaces with the consumer are set-top boxes, electronic program guides (EPG) and application programming interfaces (APIs). The set-top box is a device which adds intelligence to the basic television set and allows it to have some interactive capabilities. Again, browsers (e.g. Netscape, Microsoft Explorer), search engines (e.g. Altavista, Yahoo, etc.) and EPG are necessary to navigate through the mass of content

that is becoming available in the Internet. A solution is not easy, particularly because there are two opposite objectives: on the one hand, the introduction of proprietary access systems – a policy associated with the need to encourage innovation and investment – and, on the other hand, the need to promote a degree of openness in order to create pro-competitive market structures.

In addition, market players who control the bottlenecks in question will have the commercial incentive to extend their power to the provision of content. This can be done, for instance, when gatekeepers block or limit consumer access via their set-top boxes to certain programme services. Therefore the bottleneck issue must be tackled, not only because of its anti-competitive effects, but also because of certain public policy priorities, for instance the preservation of pluralism.

4.2. Structure of the market – Identification of the problem

There are three essential technical services embedded in a set-top box which control the conditions of access: conditional access systems, electronic program guides (EPGs) and application programming interfaces (APIs). These technical components in the set-top box are gateways which a service provider must use in order to reach the consumer.

Since the development of a set-top box requires massive investment and entails an enormous economic risk, the most sensible option (in business terms) for the new entrants is to use the already existing set-top boxes (developed by the incumbent pay-TV operators). In addition, it is a fact that each of the platform operators (digital satellite, terrestrial and cable) has opted for proprietary technology in key areas such as APIs and EPGs.⁵⁷ As a result, consumers are not willing to buy separate set-top boxes for each service provider and are, therefore, discouraged from subscribing to several platforms.

Hence it seems that content providers who want to enter the market do not

⁵⁷ Communication from the Commission, "Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review", COM (1999) 539, 10 November 1999.

⁵⁸ Communication from the Commission "The Development of the Market for Digital Television in the European Union - Report in the context of Directive 95/47/EC of the European Parliament and of the Council of 24th October 1995 on the use of standards for the transmission of television signals", COM (1999) 540, 10 November 1999, at 3.2.1, p. 18.

have any choice but to use the set-top boxes of the incumbent pay-TV operators. In other words, access to existing boxes is indispensable for all those companies willing to develop viable economic operations, since they will not be able to operate on the service market if they are refused access.

This is the reason why there is a widespread concern⁵⁹ that, if allowed not to grant access, vertically integrated broadcaster/platform operators – in Europe pay-TV operators are also the proprietors of technical services – will be able to control market developments and restrict the range of services which can be made available to consumers.

So, for instance, the API is an interface between the operating system of a set-top box and the application software. If potential competitors want to enter the market, they need to make content compatible with this interface. In order to achieve this, knowledge of the key technical specifications of such interface is essential. However, where the proprietor of the technology (i.e. the platform operator) is at the same time a programme provider, its content and services can be facilitated and provided smoothly due to its prior knowledge of the design of the API. Vertically integrated broadcaster/platform operators therefore have the incentive and the opportunity to enjoy considerable competitive advantages. Indeed, this can happen where the platform operator refuses access to the requesting competitors (while access has been of course available to its own programme provider) or when the platform operator decides to grant access to rival programme providers as well but treats its own downstream services operations more favourably (e.g. by discriminating on the terms of their access). The latter scenario was identified by the Commission in the Bertelsmann/Kirch/Deutsche Telecom case,⁶⁰ where CLT-UFA and Kirch wanted to merge their digital television activities in Germany into the Premiere venture. If the proposed concentration had been concluded, Premiere would have become the only pay-TV provider in Germany. This prospect in conjunction with other factors would give Premiere the ability to determine the conditions under which other broadcasters could enter into the pay-TV market. Thus, as the Commission stated, the fact that the existing decoder infrastructure, i.e. the d-box decoder and the Beta access technology, was

⁵⁹ See the Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108, 10.3.1999, at p. ii; and the Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 19.

⁶⁰ *Bertelsmann/Kirch/Premiere*, Case IV/M.993 and IV/M.1027, OJ L53/1, 27 February 1999.

controlled by CLT-UFA and Kirch “could ensure that the terms for the use of Beta access technology, and in particular the price structure applied, were advantageous to Premiere and unfavourable to potential competitors’ programmes”.⁶¹

EPG was also identified as another potential technical bottleneck. EPG serves the purpose of providing the user with the information about the programmes on offer for viewing. Besides simple program listings, EPG provides supplementary services such as program descriptions and reviews and gives users the ability to highlight those programs in which they are interested and to modify the order in which program information is displayed. Again content providers can be guaranteed to have access to the consumer only if their programmes on offer are displayed in the EPG menu. So it is clear that vertically integrated broadcaster/platform operators will have the chance to exclude other broadcasters’ programme information from their services or to unfairly favour their own programme providers (e.g. by discriminating against the presentation of other providers’ details on the EPG). As is pointed out in the Danish Government’s response to the Convergence Green Paper,

“when the consumer is to choose among several hundred offerings, it is not immaterial in what order or context an offering is presented. Control of an EPG may therefore serve as a basis for drawing attention to one’s own offerings, while offerings that the controlling operator does not wish to be promoted are given a less conspicuous presentation”.⁶²

4.3. The current regulatory regime

It must be remembered here that the TV Standards Directive⁶³ in 1995 established a regulatory regime for digital television conditional access systems with the aim to govern the economic behaviour of market players.

The TV Standards Directive recognises, on the one hand, that investors will have an incentive to enter such a highly uncertain market only if they can make

⁶¹ *ibid.*, at para. 58. See also at paras 67-68.

⁶² Danish Government’s reply to the Convergence Green Paper, April 1998, at p. 6.

a reasonable return on their risky investment. As it stated in the preamble, “the operators of conditional access services should be entitled to earn a return on their investments and for the provision of services to broadcasters as an incentive to continue to invest”.⁶⁴ This is the reason why the Directive tolerates proprietary conditional access systems embedded in digital television decoders. In addition, it seems to accept the fact that, in comparison with open standards, proprietary technology is developing more rapidly. This happens mainly because the process associated with open standards is time consuming and requires the participation and co-operation of different administrations and committees. Moreover, since the market development of digital platforms in Europe is still uncertain and definitely not yet completed, it would be premature to impose mandatory open standards. Indeed, such an approach would require regulators to choose standards and entail the risk that the wrong choice was made. As a result, investment and innovation could be hindered.

On the other hand, the Directive identifies the significance for a provider of content and services to have access to the services required for the utilisation of a digital infrastructure. Thus a requirement is introduced according to which a provider of services subject to conditional access is obliged to

“offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters’ digitally-transmitted services to be received by viewers authorized by means of decoders administered by the service operators, and comply with Community competition law, in particular if a dominant position appears”.⁶⁵

Thus it seems that the TV Standards Directive has opted for a light and compromising regulatory regime in order to support the start of digital TV services. Indeed, although it does not introduce unnecessarily onerous conditions (since it allows proprietary technology), it recognises the fact that, in order not only to prevent proprietary standards from hampering the creation and development of new services and markets, but also to ensure plurality and consumer choice, safeguard measures are required. This is therefore the role

⁶³ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, 95/47/EC, OJ L 281/51, 23.11.95 (hereafter: the TV Standards Directive).

⁶⁴ TV Standards Directive, at the preamble.

⁶⁵ *ibid.*, at Article 4(c).

of the aforementioned requirement that relations between conditional access providers and broadcasters should be conducted on fair, reasonable and non-discriminatory terms: to sustain competition and, at the same time, to ensure that the public interest is protected.

The Directive's attempt to find the right balance between encouraging sustainable competition in the market place and safeguarding the public interest while not hindering investment and innovation is well illustrated in the Convergence Green Paper:

"The Directive takes a deliberately balanced position for the start-up phase of this new industry. Its requirements are sufficiently light to encourage innovation and investment in a rapidly evolving technical and commercial environment, and sufficiently strong to protect fair competition and consumer welfare".⁶⁶

4.4. Proposals for a new regulatory framework

It should be stressed that the TV Standards Directive addresses only conditional access services for digital television. Thus it does not cover the provision of conditional access services for other kind of services, such as on-line services. In addition, it was conceived when the focus was on set-top boxes and conditional access as the only proprietary technical gateways. Due to rapid technological progress, however, as already mentioned, further gateway technologies related to digital television have emerged (e.g. APIs and EPGs) since the Directive was adopted.

So, with regard to the question of how digital gateways should be tackled in the converging environment,⁶⁷ many responses supported the principles of the Digital TV Standards Directive and considered them to be the best model for the regulation of digital services in the future. Thus some argued that the TV Standards Directive needs updating in order to include all the existing and potential gateway technologies (particularly, but not exclusively, the APIs and

⁶⁶ Convergence Green Paper, at p. 24.

EPGs).⁶⁸ Others went even further and, in the light of the agreement for a horizontal approach to the regulation of infrastructure, argued that the Directive should be replaced by an entirely new one providing a broader framework for access both to networks and gateways.⁶⁹ More specifically, in the context of evolving technology and markets, they stressed the need to take a cross-sectoral perspective on problems associated with access. Therefore, since the role of digital gateways is not confined to the broadcasting services only but extends to all digital services, they put forward the view that a consistent set of regulatory rules and principles should apply to any proprietary technical devices which may be used to restrict access, irrespective of the types of services carried via them.

This approach avoids the need for listing in detail all present and potential barriers to access and, therefore, in contrast to a simple updating of the TV Standards Directive – where there is the risk of the inability to predict and keep up with the pace of the rapid advances in technology – it allows regulators sufficient flexibility to react against all future access problems that may arise in a converged environment and to accommodate unanticipated technological and market developments. In addition, by not distinguishing between access to networks and access to digital gateways, it strengthens even more the general agreement on the need to move from sectoral organisation of the regulation of infrastructure towards a more horizontal approach: networks and digital

⁶⁷ See the Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 10; and the Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108, 10.3.1999, at p. 11.

⁶⁸ See for instance the BBC's response to EU Convergence Working Document [SEC(98) 1284], November 1998, at p. 9; the Independent Television Commission's (ITC) response to the Commission's Working Document [SEC(98) 1284], November 1998, at p. 3; DigiTAG responses to the questions posed by the European Commission's Working Document [SEC(98) 1284], November 1998, at p. 1.

⁶⁹ See for instance the response of the World DAB Forum (the Forum for Digital Audio Broadcasting) to the Commission's Working Document [SEC(98) 1284], November 1998, at pp. 5-6; and the Independent Television Association's (ITV) reply to the Commission's Working Document [SEC(98) 1284], November 1998, at p. 3.

gateways should be governed by a single set of technologically neutral rules.⁷⁰

4.5. The essential facilities doctrine and sector specific-regulation

Many Commission officials seem sceptical about the application of specific regulation whereas they appear to rely on the use of competition law and, in particular, on the essential facilities doctrine. For instance, Jean-Eric de Cockborne – Head of the Communications Regulatory Policy Unit at the European Commission – underlines the limitations of specific regulation when he stresses the timescales (two years) associated with the legislative process under the EU co-decision procedure (especially if we consider the rapid technological advances and market developments which will take place during that time).⁷¹ Furthermore, Dr. Ungerer supports an increasing reliance on competition law when he states that

“competition law - in the form of a developed essential facilities concept - can adjust, in a flexible manner, to situations of convergence, by adjusting the market definitions used and without changing either the regulatory framework or its basic principles”.⁷²

He justifies his preference for the application of competition law by stressing the disadvantage of the sector-specific regimes with regard to access to

⁷⁰ DG Information Society Working Document, Subject: A common regulatory framework for electronic communications networks and services, 27 April 2000, Chapter I, at p. 5; Communication from the Commission, “The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework”, COM (2000) 239 final, 26.4.2000, at pp. 8 and 20; Communication from the Commission “Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review”, COM (1999) 539, 10 November 1999, at pp. 3 and 6; Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108 EN final, 10.3.1999, at pp. 2 and 9; Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 30.

⁷¹ Jean-Eric de Cockborne, Bernard Clements and Adam Watson Brown, “EU policy on multimedia regulation”, presented on 14 June 1999 at the Montreux Symposium '99, p. 10.

⁷² Herbert Ungerer, “Ensuring efficient access to bottleneck network facilities: the case of telecommunications in the European Union”, at p. 27, Florence, 13th November 1998.

bottleneck situations, namely “their intrinsic ex-ante and more interventionist nature” which results in the need to “outguess to some extent the future (market and social) development if they want to ensure efficient access in such a situation of rapid market change”.⁷³

Of course, the disadvantage of the specific regulation associated with the long timescales required for the legislative process can be tackled, as proposed, by issuing non-binding interim access guidelines. The role of these guidelines (until the adoption of legislation) will be to establish legal and economic principles, clarify how NRAs should react to problematic situations and, thus, provide them with the opportunity to take steps in order to ensure effective competition on the market.⁷⁴ Even then, however, many believe that digital gateways can be considered as bottlenecks only in the short term⁷⁵ and, therefore, as BT has put it, in attempting to predict and accommodate market developments, “disproportionate effort will be put in to regulating for such eventualities”.⁷⁶

In addition, a number of contributions suggested that only competition law and, in particular, the application of the ‘essential facilities’ doctrine, can provide sufficient flexibility in order to take into account the rapid technical, economic and market developments and balance the interests of investors on the one hand with the interests of consumers and the need for open and competitive markets on the other.⁷⁷

It should be not forgotten, however, that investment is encouraged only by a regulatory framework characterised by stability and legal certainty. Since the

⁷³ *ibid.* See also: Response from Olivetti to the Convergence Green Paper, April 1998, at p. 6; Tele Danmark’s comments on the Convergence Green Paper, 30 April 1998, at p. 2; Ionica’s comments on the Convergence Green Paper, April 1998, at pp. 1-2.

⁷⁴ Jean-Eric de Cockborne, Bernard Clements and Adam Watson Brown, “EU policy on multimedia regulation”, presented on 14 June 1999 at the Montreux Symposium ‘99, p. 10.

⁷⁵ See for instance the response from Microsoft Corporation to the Working Document [SEC(98) 1284], 3 November 1998, at pp. 2-5; OFTEL’s response to the Working Document of the Commission [SEC(98) 1284], November 1998, at pp. 5-6; BT’s response to the second stage of the European Commission’s Consultation on convergence [SEC(98) 1284], 29 October 1998, at p. 3; Kirch Gruppe’s response to the Working Document of the Commission [SEC(98) 1284], November 1998, at p. 3.

⁷⁶ BT’s response to the second stage of the European Commission’s Consultation on convergence [SEC(98) 1284], 29 October 1998, at p. 3.

⁷⁷ See for instance the response of FINNET Group to the Commission’s Working Document [SEC(98) 1284], November 1998, at p. 2; BT’s response to the second stage of the European Commission’s Consultation on convergence [SEC(98) 1284], 29 October 1998, at pp. 2-3; Deutsche Telecom’s comments on the Commission’s Working Document [SEC(98) 1284], November 1998, at p. 3.

case law of the Court of Justice has not yet developed well-established principles and practices regarding access issues, it is obvious that reliance solely on competition law cannot provide the necessary stability and certainty. Otherwise, investors run the risk of becoming the 'sacrificial lambs' of an experimental policy. In addition, issues associated with access to digital gateways are considered to be of major importance, not only because of their potential anti-competitive effects, but also because of the existence of certain public policy objectives – such as the preservation of pluralism and consumer choice – which cannot be safeguarded by the sole application of competition law. This is another reason why the majority of the responses favoured a continuing role for specific regulation.⁷⁸

Moreover, it has already been shown above⁷⁹ that an over-zealous and over-interventionist approach concerning the application of the essential facilities doctrine can seriously undermine the incentive for firms to invest and innovate. So the essential facilities doctrine should be applied with caution and, therefore, a number of conditions should be identified which could help towards reducing or minimising the negative effects on the essential facilities operators. Among these conditions, a prominent role should be played by the principle that the essential facilities doctrine will apply only when the operator of the essential facility is also active (and possibly dominant) on the market downstream of that facility and, at the same time, there is no effective competition in the downstream market or the refusal to provide access can have a significantly negative effect on the downstream competition. The above principle should be always used alongside the qualified criteria identified by the Commission's Access Notice of August 1998.⁸⁰

The necessity for a less interventionist approach with regard to the application of the essential facilities doctrine is demonstrated by the ECJ in the *Oscar Bronner* case.⁸¹ In that case, the defendants (collectively referred to as Mediaprint) were all part of the same publishing group and published two newspapers read by 71 per cent of all newspaper readers in Austria, delivered by Mediaprint's nationwide early morning home delivery scheme. This scheme

⁷⁸ See the Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108, 10.3.1999, at p. 12.

⁷⁹ See Chapter 2.

⁸⁰ Commission's Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, [1998] O.J. C 265/2, at para. 91.

constituted the only nationwide home-delivery distribution service for subscribers of daily newspapers in Austria.

Mediaprint refused to include Oscar Bronner's newspaper, *Der Standard* (which had a 3.6 per cent share of the Austrian daily newspaper market), in the delivery service for a reasonable payment. Oscar Bronner applied for an order restraining Mediaprint from abusing its alleged dominant position on the market. Oscar Bronner referred to the essential facilities doctrine by arguing that Mediaprint's network was indispensable for all those companies willing to develop viable economic operations, since they would not be able to compete effectively on the daily newspapers market if they were refused access.⁸² It based its arguments on the grounds that Mediaprint was the only operator of a nationwide home-delivery scheme, that postal delivery does not represent an equivalent alternative to home delivery and that, due to the small circulation and consequently small number of *Der Standard* subscribers, it would not be economically viable to organise and operate – by itself or in co-operation with other publishers – its own national delivery scheme.⁸³

The Court held that there was no abuse of a dominant position,⁸⁴ as it did not consider Mediaprint's delivery scheme to be indispensable, i.e. a facility without access to which competitors cannot provide services to their customers. In particular, it stated that there were satisfactory alternative methods to the Mediaprint's network – such as distributing daily newspapers by post or through shops and kiosks – even if they were less advantageous.⁸⁵ Further, there was not

“any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in co-operation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers”.⁸⁶

⁸¹ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG* [1998] E.C.R. I-7791.

⁸² *ibid.*, at ground 24.

⁸³ *ibid.*, at ground 8.

⁸⁴ *ibid.*, at ground 47 and the operative part.

⁸⁵ *ibid.*, at ground 43.

The mere fact of the small circulation of Der Standard could not be used as an argument to demonstrate that it would be seriously and unavoidably uneconomic for Oscar Bronner to build up its own home-delivery scheme.⁸⁷

The opinion of Advocate General Jacobs in this case also illustrates the view that, in order to encourage innovation and technological progress, significant consideration should be given to the vast investment required to establish digital platforms and services as well as to the uncertain returns on digital investments. As Jacobs stated,

“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. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits”;⁸⁸ “particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment”.⁸⁹

Thus, in line with the Court’s view, it seems that most of the digital gateways cannot qualify as ‘essential facilities’. Indeed, it will be difficult to establish that the refusal to provide access to a digital gateway can have a significantly negative effect on the downstream competition. This is true since, in parallel with the digital gateway in question, other distribution systems will give content providers the opportunity to deliver their programmes to the consumers. This is also recognised by the study conducted by Squire, Sanders & Dempsey and Analysys when it points out that the essential facilities doctrine “cannot be relied on as the sole or principal tool to regulate *ex post* interconnection and

⁸⁶ *ibid.*, at ground 44.

⁸⁷ *ibid.*, at ground 45.

⁸⁸ *Oscar Bronner*, Opinion of Jacobs, A.G., 28 May 1998, at para. 57.

⁸⁹ *ibid.*, at para. 62.

access relationships”,⁹⁰ *ex ante* specific regulation will “continue to be necessary to regulate certain types of access issues, as competition rules may not always be able to produce satisfactory results of themselves”.⁹¹

In addition, since convergence and the information society are still developing, relying solely on competition law would result in legal uncertainty and, therefore, in discouragement of investment and innovation. This uncertainty becomes even stronger if we take into consideration the inability of competition law to address anti-competitive practices quickly. For example, intervention by a competition authority on the grounds of Article 82 EC will not take place when a market player has the ability to harm competition significantly but only after an abuse of a dominant position has been committed. This approach is not considered satisfactory by many market players,⁹² since it can discourage companies from entering the market. Indeed, by the time the competition authority attempts to restore competition it is possible that the complainant will have already been forced out of business.

Until the market has matured, therefore, dominant players holding potentially bottleneck positions must be prevented from strengthening their positions and controlling market development; gates cannot be allowed to close before they have even started to develop. As the Commission admits,

“it would be counterproductive to remove sector specific rules designed to ensure fair competition too rapidly if this resulted in anti-competitive outcomes, for example if it were to lead to incumbent operators extending their strong or dominant position throughout the converged markets”.⁹³

⁹⁰ Final Report of the Study “Consumer demand for telecommunications services and the implications of the convergence of fixed and mobile networks for the regulatory framework for a liberalised EU market”, prepared by Squire, Sanders & Dempsey and Analysys, February 2000, at p. 111.

⁹¹ *ibid.*, at p. 103.

⁹² See, for instance, the Independent Television Association’s (ITV) reply to the Commission’s Working Document [SEC(98) 1284], November 1998, at p. 2.

⁹³ DGXIII, Discussion Document, Subject: “The 1999 Review - regulatory principles”, 21 May 1999, at Chapter 4.2, p. 6.

4.6. Conclusions

We therefore reach the conclusion that, with regard to the access issues relating to digital gateways, the most efficient solution combines the application of competition law alongside the development of specific regulation. It has been shown that competition law in general and the essential facilities doctrine in particular will play a major role as the market develops. However, specific regulatory rules will still be required in order to promote and establish effective competition and to guarantee equal and fair conditions to all market players until the converged market has matured. Indeed, moving directly to the application of competition rules alone could lead to new forms of integrated dominance and to new multimedia market monopolies.

These specific regulatory rules will take the form of a new Directive which will include the principles of the Digital TV Standards Directive and provide a broader framework for access both to networks and digital gateways. As the Commission states, the objective for a horizontal approach to all transport network infrastructure and associated services will be achieved with the introduction of the Access/Interconnection Directive (which will be based and elaborate on the assumptions and principles of the current Interconnection and TV Standards Directives).⁹⁴ Well established principles – such as the obligation for accounting separation and the requirement for timely declaration of the necessary information on key technical specifications of digital gateways – will also have a significant role to play. The new Directive will be valuable during the transitional period towards a mature and competitive converged market and until the case law of the Court of Justice has specifically dealt with access to digital gateways.

⁹⁴ Communication from the Commission "Towards a new framework for Electronic Communications infrastructure and associated services – The 1999 Communications Review", COM (1999) 539, 10 November 1999, at pp. 16 and 17. See also the DG Information Society Working Document, Subject: Access to, and interconnection of, electronic communications networks and associated facilities, 27 April 2000.

GENERAL CONCLUSIONS OF PART III

Part III of this thesis examined the **third phase** of the transition from a regime of a State-run monopoly to an effectively competitive market. This third phase has arisen due to the convergence of telecommunications, media, and IT sectors, and relates to the way the current EU telecommunications regulatory regime must be adapted to the emerging multimedia environment.

Although it could be argued that competition law (given its *ex-post* nature and its case-by-case approach) can cope alone with the rapid technological and market developments, in practice it is not sufficient enough to deal with all future problems that may arise in a converged environment. This is true especially given the inability of competition law to address anti-competitive practices quickly, something which can result in lack of legal certainty and discourage companies from entering the market. Therefore, at least during the transition phase towards the realisation of an effectively competitive market, specific regulation will have to play a fundamental role alongside competition law.

At the same time, however, it was shown that the current EU regulatory regime cannot work satisfactorily in the converging environment since, in its current form, it is not flexible enough and thus not capable of predicting and dealing with rapid market developments. Thus, for *ex-ante* regulation to deal with the convergence phenomenon, reconsideration of the current regulatory regime is required. This means that a series of barriers which can have a substantial impact on the development of a European multimedia market have to be tackled. An example of such barrier is associated with the increasing demand for radio-spectrum from new digital services – especially the parallel growth of services like television broadcasting, mobile multimedia and voice applications –, something which results in frequency scarcity. In addition, the role of *ex ante* regulation will be to provide the temporary measures in order to guarantee equal and fair conditions to all market players until the converged telecommunications, media, and IT markets have matured. Therefore, although the long-term objective that competition law will take over and specific

regulation will fall away, remains valid, this will happen only with the realisation of an effectively competitive market. In the meantime, during the transition phase towards the realisation of an effectively competitive market, specific regulation will remain in force. Thus, taking account of the overall objective that regulation must be kept to the minimum where competition is self-sustaining, and in order to accommodate the new technological and market developments, the new regulatory framework must be light-touch, predictable, and based on the new commercial realities rather than on arbitrary and obsolete regulatory distinctions. Regulation has to be viewed as a tool that can be decreasingly used as effective competition develops.

PART IV

THE NEW EUROPEAN REGULATORY REGIME FOR ELECTRONIC COMMUNICATIONS NETWORKS AND ASSOCIATED SERVICES

Chapter 6

The Proposed Framework and Access/Interconnection Directives

1. INTRODUCTION

According to the Commission's proposal in the 1999 Communications Review, the number of legal measures in the field should be reduced from the current twenty to a total of six.¹ So, alongside a new consolidated and simplified Liberalisation Directive, the new regulatory regime will consist of a new Framework Directive (replacing the ONP Framework Directive) and four specific Directives: the Access/Interconnection Directive (based on the current Interconnection Directive and the TV Standards Directive); the Authorisation Directive (based on the current Licensing Directive); the Universal Service Directive (incorporating elements of the current Voice Telephony and Interconnection Directives); and the revised Data Protection and Privacy in the Telecommunications Sector Directive (based on the Telecommunications Data Protection Directive).

The Commission states that the above proposal constitutes "a substantial simplification and consolidation of current legislation"² and can render the new regulatory framework "more transparent and user-friendly".³ However, it is important that the Commission's proposal to simplify the current regulatory regime goes beyond merely reducing the number of Directives.

This Chapter focuses on the future Framework and Access/Interconnection Directives and attempts to assess whether the proposed regulation for electronic communications networks and associated services is in line with the main policy objectives and those regulatory principles that underpin the existing

¹ Communication from the Commission, "Towards a new framework for Electronic Communications infrastructure and associated services – The 1999 Communications Review" (hereafter the 1999 Communications Review) COM (1999) 539, 10 November 1999, at Section 3.3.1., pp. 15-17.

² The 1999 Communications Review, at p. 16.

regulatory framework and whose significance has been confirmed by the vast majority of the comments received in the course of the public consultation, namely legal certainty, flexibility, continuity, and transparency.

2. SIGNIFICANT MARKET POWER AND DOMINANCE – THE TWO-TIER APPROACH IS FINALLY ABANDONED

According to the Commission's proposal in the 1999 Communications Review, the new regulatory framework for access to infrastructure will be based primarily on commercial negotiation. Any party will be entitled to request access but the request in question would not have to be granted if neither party had market power. For access providers with market power, however, a two-tier approach was proposed with the aim of creating a regulatory regime which makes more use of competition law concepts. In particular, the Commission proposed to use the competition law concept of dominant position as the more appropriate trigger for the heavier *ex ante* obligations, e.g. obligations to supply unbundled, cost-oriented interconnection services as well as obligations concerning non-discrimination. At the same time, the Commission intended to retain the current lower threshold of significant market power (SMP) for other obligations, e.g. obligations to negotiate access and obligations for transparency. In any case, the new framework would make provision for the possibility of regulatory intervention in the event of an unresolved dispute or if commercial negotiation fails. The Commission also highlighted the importance of the application of the principle of proportionality in sector-specific regulation by stating that the degree of regulatory intervention must be proportionate to the level of competition in the market.⁴

It should be recognised that the Commission's proposal – with the introduction of the trigger of dominance in *ex ante* regulation and a SMP notion conceived along the lines of competition law – would bring the notion and application of *ex ante* regulation closer to the concept of competition law.

In addition, the Commission believed that “the use of two triggers gives

³ *ibid.*, at p. 3.

NRAs [national regulatory authorities] the means to apply the least burdensome regulation to market players”.⁵ Some responses agreed with this view.⁶ This could be based on the grounds that, according to the current regime, operators with SMP status are obliged to provide non-discriminatory access as well as cost-orientation and transparency obligations. If the Commission’s proposal was accepted, then the obligation to provide, e.g. non-discriminatory access, would be imposed only upon dominant operators. Those players with SMP would only be obliged to negotiate. Therefore, the argument goes, the target of having less regulation without sacrificing legal certainty is achieved.

However, regardless of whether the responses argued in favour of abolishing or retaining the SMP concept, the vast majority of the comments underlined its limitations.⁷

In order to illustrate this wide criticism, it is useful to quote some typical comments. Thus Vodafone AirTouch stated:

“Uncertainty would also arise from the fact that in a dynamic market where new market initiatives and technologies emerge at a rapid rate, companies would regularly cross the 25% boundary either by gaining market share or by losing it. Just as often they would have to be appointed as having SMP, or be discharged of their SMP obligations. This too, would lead to a great deal of

⁴ *ibid.*, at pp. 27 and 50.

⁵ *ibid.*, at p. 50.

⁶ See for instance: Comments of Energis on the five EC Working Documents, May 2000, at p. 3; Response of the United States Government to the 1999 Communications Review, February 11, 2000, at p. 7; Response from Oftel to the 1999 Communications Review, February 2000, at para. 58, pp. 9-10; Submission from Esat Telecom on the 1999 Communications Review, February 2000, at p. 10.

⁷ See for instance: Sonera Corporation’s comments on the 1999 Communications Review, 20 December 1999, at p. 3; Finnet Group’s comments on the 1999 Communications Review, February 2000, at p. 4; European Public Telecommunications Network Operators’ Association (ETNO) Reflection Document on the 1999 Communications Review, February 2000, at para. 2.1, p. 8; Position Paper by Telecom Austria on the 1999 Communications Review, 14 February 2000, at para. IV, pp. 10-11; European Cable Communications Association (ECCA) submission on the 1999 Communications Review, 15 February 2000, at para. 2.5.3, p. 10; Comments by BT on the 1999 Communications Review, February 2000, at p. 18; Response from Oftel to the 1999 Communications Review, February 2000, at para. 46, pp. 7-8; Response from NTL to the 1999 Communications Review, February 2000, at paras 112 and 115.

legal uncertainty”.⁸

And the BBC pointed out:

“In a converging and fast moving market, market positions can be built up – and lost – very rapidly. The new entrant who is refused access from a gateway controller with only 24% of the market for the delivery of one particular service today, may well find that the same firm has 60% of the market one year later. ... By the time gateway controllers become subject to access obligations their position may well be unassailable”.⁹

In addition, the overwhelming majority of the responses to the Commission’s proposals stressed the point that an obligation only to negotiate, coupled with the parties’ disincentive to reach an agreement and the power of NRAs to intervene, creates an equally problematic situation and results in regulatory uncertainty.¹⁰ Again, it is beneficial to cite some of those responses.

Take for example the European Cable Communications Association (ECCA):

“Imposing an obligation to negotiate access offers the worst of both worlds. ... The incentive of those requesting access is to turn the bargaining process into a managed media event, which would almost inevitably become political. ... [with] the risk that a politically expedient decision would be imposed on the parties. In expectation of this, political lobbying would become intense. This, of course, is an anathema to the idea of independent regulation and were this to occur it would likely have severe consequences for the level of investment in

⁸ Response from Vodafone AirTouch to the 1999 Communications Review, 24 January 2000, at pp. 13 and 23.

⁹ Response from BBC to the 1999 Communications Review, February 2000, at para. 21, p. 7.

¹⁰ See for instance: Response of the Dutch Government to the 1999 Communications Review, January 2000, at p. 15; Position of AOL Europe to the 1999 Communications Review, 14 February 2000, at para. 32, p. 9; Omnitel Pronto Italia comments on the 1999 Communications Review, February 2000, at para. 3.2, p. 10; Submission of Versatel Telecom International to the 1999 Communications Review, February 2000, at p. 6.

the whole of the converging industries”.¹¹

And as Oftel has put it:

“The Commission’s belief that it will be sufficient to place SMP players under an obligation to negotiate access or interconnection is unrealistic. Market players with SMP will have no incentive to reach agreement unless the ground rules for NRA resolution of a dispute are clear. They need clarity about NRAs’ approach to interconnection and access. Equally, market players without SMP should not be encouraged to take unreasonable negotiating positions in the hope that these will be upheld by the NRA”.¹²

It is obvious from the aforementioned comments that the Commission’s proposals, even if we accept that they could contribute to a less regulated regime, would not tackle the problem of legal uncertainty. Therefore the Commission’s proposals should be reconsidered. However, instead of opting for abolishing the SMP criterion and relying exclusively on competition law – as some have argued – what is required is the revision of the definition of SMP in a relevant market. The aim should be to construct the definition along the lines of competition law, i.e. taking account of factors such as demand and supply substitutability as well as homogeneity of competitive conditions. This was finally recognised by the Commission which, as a result of the public consultation and the comments received, decided not to introduce two thresholds for the imposition of *ex-ante* rules. Instead, it proposed to have only one threshold, called SMP, but re-defined on the basis of the competition law concept of dominant position. As the Commission explained:

“[The] proposal to introduce two thresholds (SMP and dominance) for *ex ante* regulation is unlikely to be effective. ... A more flexible mechanism than the current SMP concept is required for determining the cases where imposition of *ex ante* regulation is indispensable, based on an economic market analysis and identification of the real sources of an operator’s power in a given market or market segment. This will have the advantage of giving flexibility to national

¹¹ European Cable Communications Association (ECCA) submission on the 1999 Communications Review, 15 February 2000, at para. 2.4, p. 8.

¹² Response from Oftel to the 1999 Communications Review, February 2000, at para. 18, p. 4.

regulators to fit the regulatory framework to its national situation, while maintaining the integrity of the single market through strong co-ordination procedures at European level. The Commission therefore proposes to modify the concept of SMP and use it as the underlying concept for imposing *ex ante* obligations relating to access and interconnection. In particular, the market share threshold of 25% would no longer be part of the definition. Instead, the definition would be based on the concept of dominant position in particular markets, calculated in a manner consistent with EC competition law practice, as a trigger for the heavier *ex ante* obligations, and would cover all aspects including joint dominance and leverage of market power into associated markets”.¹³

The following sections identify the most important issues found in the Working Documents of April 2000 and the Proposed Directives of July 2000 and attempt to assess whether the Commission’s goal of having a regulatory framework characterised by legal certainty, predictability, flexibility, continuity, and transparency is reached.

3. UNDERTAKINGS WITH SIGNIFICANT MARKET POWER

With regard to when NRAs will be able to notify companies as having SMP and thus to impose *ex-ante* obligations, the Commission follows the principles established in competition law practice. Thus it states that NRAs will be able to designate undertakings as having SMP only where such firms would be considered to have a dominant position under competition law and, in particular, if the undertaking in question,

“either individually or jointly with others as a result of economic interdependence between them, enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of

¹³ Communication from the Commission, “The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework”, COM (2000) 239 final, 26 April 2000, at para. 3.3, p. 22.

competitors, customers and ultimately consumers, and where

– the undertaking has financed infrastructure partly or wholly on the basis of special or exclusive rights which have been abolished, and there are legal, technical or economic barriers to market entry, in particular for construction of network infrastructure;

or

– the undertaking concerned is a vertically-integrated entity owning or operating network infrastructure for delivery of services to customers and also providing services over that infrastructure, and its competitors *necessarily* require access to some of its facilities to compete with it in downstream market”.¹⁴

It should be remembered that the Commission decided to abandon the “pre-established presumptions” based on 25% of market share and to rely on a more sophisticated economic market analysis. However, Section 13(2) puts the focus on incumbents by referring to undertakings which have “financed infrastructure partly or wholly on the basis of special or exclusive right”. This reference reflects judgments based on historic circumstances without taking into account the current situation and other market-oriented criteria. As the Hellenic Telecommunications Organisation (OTE) has put it,

“The concept of the original sin that will follow the incumbents does not go along with the developments in the market. The legislation of the sector must be aligned to the corresponding one for competition and the NRAs should intervene only in cases where market failures are observed according to the

¹⁴ DG Information Society Working Document, Subject: A common regulatory framework for electronic communications networks and services (hereafter the Working Document on a common regulatory framework), 27 April 2000, at Section 13(2).

powers provided for by the legislation”.¹⁵

Indeed, there is no sufficient reason to presume anti-competitive behaviour and thus to regulate incumbents as such only because they enjoyed special or exclusive rights in the past. Any decision to assess the competitiveness of a given market should be taken on consumer-benefit grounds and on the basis of a careful analysis of the actual and prospective state of competition in that market by identifying – amongst other things – the real sources of an operator’s power. Therefore, the reference to “special and exclusive rights” should be deleted.

Moreover, the Commission seems to have accepted the argument that it is excessive regulatory intervention and not consistent with EU competition law to suggest that a vertically integrated entity should be per se subject to ex-ante regulation even when no abuse of a dominant position has taken place.¹⁶

In addition, the Commission needs to clarify whether the term “necessarily” refers to the essential facilities doctrine. Although many responses believe that this is the case,¹⁷ the Independent Regulators Group (IRG) warns the Commission that “the essential facility test is too restrictive to use as a basis for a sector-specific threshold for intervention. The availability of an alternative facility is not a sufficient guarantee of effective competition”.¹⁸

As a result of the comments received, the Commission decided to delete paragraph 2(b) of Section 13. So, an undertaking will be considered to have

¹⁵ Hellenic Telecommunications Organisation (OTE) comments on the Working Documents of DG Information Society, May 2000, at p. 2. See also: Submission of Telenor AS to the Working Documents of DG Information Society, 19 May 2000, at p. 2; Royal KPN N.V. comments to the Working Documents of DG Information Society, May 2000, at p. 5; Preliminary comments of the Finnish Ministry of Transport and Communications on the DG Information Society Working Documents, May 2000, at p. 3; Comments by BT on draft proposals for Directives of 27 April 2000, May 2000, at p. 1; Belgacom S.A. position paper on the Working Documents of DG Information Society, May 19, 2000, at p. 1.

¹⁶ See for instance: Orange comments on DG Information Society’s Working Documents, May 2000, at p. 3; One 2 One’s comments on DG Information Society’s Working Documents, May 2000, at p. 5.

¹⁷ See for instance: United Pan-Europe Communications (UPC) comments on the DG Information Society Working Documents, May 2000, at pp. 4-5; E-Plus Mobilfunk GmbH, comments on the DG Information Society Working Documents, May 2000, at p. 1; Mannesmann Mobilfunk GmbH (MMO) comments on the DG Information Society Working Documents, May 2000, at p. 2; BT comments on the DG Information Society Working Documents, May 2000, at p. 1; Royal KPN N.V. comments on the DG Information Society Working Documents, May 2000, at p. 5.

¹⁸ Independent Regulators Group (IRG) common position on the DG Information Society Working Documents, May 2000, at para. 59, p. 12.

SMP “if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers”.¹⁹

Furthermore, it is interesting to note that the Commission takes into consideration the finding of the ECJ in *Tetra Pak*.²⁰ In that case, due to the extremely high market share on the dominated market and the close links between the dominated and non-dominated market, Tetra Pak was found “in a situation comparable to that of holding a dominant position on the markets in question as a whole”.²¹ Based on *Tetra Pak*, therefore, the Commission is determined to deal with those cases where dominant telecommunications (or cable) operators are moving into related fields such as the Internet or digital TV and are leveraging their dominance into those new or neighbouring markets. Indeed, if not acting, a potential market foreclosure could hinder innovation, hold back market development and have an enormous impact on the future competitive structures of the EU communications sector. This is why the Commission states:

“Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market *where it has a leading market position*, and 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”.²²

The Commission follows the same approach it took in its Communication of March 1998 on the Cable Review.²³ There, the Commission stated that Article 82 will

¹⁹ Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (hereafter the Proposed Framework Directive), COM (2000) 393, 12 July 2000, at Article 13(2).

²⁰ *Tetra Pak International SA v. Commission*, Case C-333/94 P, [1996] ECR I-5951.

²¹ *ibid.*, at ground 31.

²² Working Document on a common regulatory framework, at Section 13(3).

²³ 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 C 71/4, 7.3.1998.

“be applied a fortiori to an undertaking which is the owner of both a telecommunications and a cable network, in particular when it is dominant on both markets. Where companies enjoy a *dominant position on two markets*, they must take particular care not to allow their conduct to impair genuine undistorted competition. In particular, that dominance cannot be leveraged into neighbouring markets, impede the emergence of new services or strengthen their dominance through acquisitions or co-operative ventures either horizontally or vertically”.²⁴

However, the notion that Article 82 will be applied when the owner of both a telecommunications and a cable network enjoys a dominant position on both markets is problematic and does not seem to take into consideration the finding in the *Tetra Pak* case. Indeed, it is enough that the undertaking in question is dominant in one market and that there are close links between the dominated and non-dominated market.

Interestingly, it seems that the aforementioned argument is recognised by the Commission in its Proposed Framework Directive, since the words “where it has a leading market position”²⁵ are deleted in order to ensure consistency with the ECJ’s ruling. So Section 13(3) was amended to read as follows:

“Where an undertaking 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”.²⁶

Finally, the Commission is obviously concerned that following an overly-interventionist approach could hinder innovation and thus it points out that NRAs will not be able to classify any player in newly emerging markets as having significant market power – and therefore subject to regulatory obligations – since the first mover will almost certainly enjoy a substantial market share.²⁷ However, there is need for more clarification of what might be classified as a newly emerging market.

²⁴ *ibid.*, at para. 67.

²⁵ Working Document on a common regulatory framework, at Section 13(3).

²⁶ Proposed Framework Directive, Article 13(3).

In the end, the Commission decided not to include Section 13(4) in its Proposed Framework Directive. It is submitted that guidance and further clarification of the circumstances in which a market can be classified as “newly emerging” could be given by the Commission’s Decision on Relevant Product and Service Markets which will be issued under Article 14 of the Proposed Framework Directive.

4. MARKET DEFINITION AND ANALYSIS PROCEDURE

According to the Commission’s proposed model, relevant markets will no longer be prescribed in Directives – a method used in the current regime where the relevant market is defined in the specific ONP Directives (interconnection, voice telephony, leased lines). Instead, the responsibility for defining markets for the purposes of *ex ante* regulation will belong to the national regulatory authorities. Thus NRAs will be empowered to determine relevant markets from time to time using a methodology which follows the principles of EU competition law.

Such an approach achieves the target of bringing ex-ante specific regulation closer to the concepts of competition law. In addition, the regulatory framework becomes more technologically independent and, therefore, flexible enough to accommodate evolutionary market developments.

However, there is the risk that this approach could lead to legal uncertainty and market fragmentation since NRAs will have a significant degree of freedom to depart from the principles of competition law when undertaking the relevant market analysis. This could result in divergence of regulatory decision-making across the EU. The question therefore is, how can the process of defining the markets upon which the market power of an undertaking is assessed be associated with flexibility, objectivity, transparency, and legal certainty? It is submitted that harmonised EU guidance for the NRAs on making the assessment of relevant markets is indispensable. Indeed, such a guidance will constitute the right mechanism to co-ordinate a consistent

²⁷ Working Document on a common regulatory framework, at Section 13(4). See also the 1999

regulatory approach with regard to market definition and will ensure that NRAs decisions are compatible with EU competition rules. As the Commission has put it, “guidelines at European level would be necessary to facilitate correct application of the competition law principles, and to avoid having different market definitions in different Member States, which would have a negative impact on the internal market”.²⁸

The process to be used by NRAs when defining the markets and deciding whether to either impose, maintain or remove obligations on specific undertakings is set out in Article 14 of the Proposed Framework Directive. According to this process, the Commission – after consultation with the High Level Communications Group – will be required to publish a Decision (a Notice according to the Working Document on a common regulatory framework) on Relevant Product and Service Markets. This Decision – which will be subject to regular review (preferably issued on an annual basis) – will list those product and service markets within the electronic communications sector whose characteristics may justify the imposition of ex-ante regulatory obligations. In addition, the Commission will publish Guidelines on market analysis and the calculation of SMP.²⁹

NRAs will not be able to impose such ex-ante regulation in markets not identified in this Decision. Ex-ante regulatory intervention in markets not listed in the Decision can be justified only in exceptional circumstances – and only after the prior agreement of the Commission.³⁰

Within two months of the date of adoption of the Decision, NRAs will have to carry out an analysis of the product and service markets identified in the Decision, in line with the Commission’s Guidelines. Thereafter, NRAs will assess the extent of competition in a given market and will provide the Commission with a list of those undertakings with SMP for the purpose of implementing the ex-ante obligations. The NRAs’ analysis of each market will have to be published.

In particular, the following provisions will apply:

– When the analysis carried out by NRAs shows that a market identified in the Commission’s Decision is effectively competitive or that an operator no

Communications Review, at p. 27.

²⁸ The 1999 Communications Review, at p. 50.

²⁹ Proposed Framework Directive, Article 14(1)(a).

³⁰ Proposed Framework Directive, Article 14(1)(c); Working Document on a common regulatory framework, Section 14(2)(b).

longer has SMP status, then no ex-ante regulatory obligations can be introduced. If ex-ante obligations already existed, then NRAs will be required to suspend those obligations imposed on undertakings in that specific market.³¹

– When NRAs conclude – on the basis of the market analysis undertaken – that the characteristics of the market in question justify regulatory intervention (i.e. where competition is not effective), then the already existing regulatory obligations will be maintained. If the market analysis justifies the introduction of further ex-ante obligations, then NRAs will identify the undertakings on which the new obligations will be imposed as well as the obligations themselves.³²

The vast majority of the market players supported the aforementioned market analysis procedure, mainly due to the legal certainty that it seems to introduce. Indeed, the fact that NRAs will be able to impose *ex ante* obligations only in the markets identified in the Commission’s Decision on Relevant Product and Service Markets (with the exception of Article 14(1)(c)) can lead to a more certain and predictable environment.

However, nothing clarifies when and under what circumstances a “prior agreement of the Commission” can be given so that NRAs can impose *ex ante* obligations in markets not listed in the Decision. As an example of how vague this is, the Independent Regulators Group (IRG) took the view that the Commission’s consent is not necessary when NRAs want to impose ex-ante obligations on markets not set out in the Decision on Relevant Product and Service Markets. As IRG pointed out, any market may exhibit a large variation in the state of competition across Member States and, therefore, the issue of deciding the markets that are relevant for the assessment of SMP should be left to the discretion of NRAs. If the target is to carry out a detailed economic and competition analysis (which will take account of national circumstances), NRAs will need the power to consider additional markets – i.e. markets not listed in the Commission’s Decision – whenever that is objectively justified. As stated by IRG, section 14(2) – now article 14(1)(c) – constitutes an

“excessive centralisation of decision-making by the Commission, contrary to the principle of regulating as close as possible to the market. It also has the

³¹ Proposed Framework Directive, Article 14(4); Working Document on a common regulatory framework, Section 14(4).

³² Proposed Framework Directive, Article 14(5); Working Document on a common regulatory framework, Section 14(5).

potential to significantly restrict and slow down appropriate actions by NRAs while they await decisions by the Commission on the status of any markets. ... the Commission is in a poor position to reach conclusions on whether a particular market in a particular Member State is one where a competition problem arises. NRAs, not the Commission, have the expertise to do this and the local knowledge to do so in a timely manner”.³³

What IRG proposed therefore is that the second sub-paragraph of section 14(2) should be amended to read as follows:

“Where, after a justified application from an interested party or in an action taken on its own behalf, an NRA has to impose *ex ante* regulation on a market not listed in the Notice [now Decision], it shall: - Define such markets in accordance with the principles of market definition for the purposes of competition law, paying the utmost regard to any guidance issued by the Commission for that purpose; - and, observe the agreed transparency procedure [referring to section 6 of the Working Document on a common regulatory framework for electronic communications networks and services]”.³⁴

It is submitted that this IRG proposal, in conjunction with the safeguards of a provision allowing the Commission the possibility of revoking a decision of the NRAs and the application of the transparency procedure set out in Article 6 of the Framework Directive, can contribute to the achievement of the right balance between flexibility and stability. Indeed, such an approach will provide the necessary legal certainty for market players while making room for sufficient flexibility to allow NRAs to deal effectively with a market problem by interpreting it in the light of national circumstances.

In the end, the Commission did not proceed to any major modifications of the text. However, for the sake of transparency and legal certainty, it explicitly stated that “measures taken pursuant to paragraphs 4 and 5 shall be subject to the procedure set out in Article 6”.³⁵

³³ Independent Regulators Group (IRG) common position on the DG Information Society Working Documents, May 2000, at paras 69 and 71, p. 13.

³⁴ *ibid.*, at para. 73, p. 14.

³⁵ Proposed Framework Directive, Article 14(6).

5. CONSULTATION AND TRANSPARENCY MECHANISM

The NRAs' decisions to impose, maintain or remove obligations on undertakings will have to be notified to the Commission and other NRAs and to be in line with the procedures laid down in Section 6 of the Working Document on a common regulatory framework.

When NRAs take decisions affecting third parties, they will publish the decisions in draft and will give all interested parties the chance to comment. NRAs will postpone adoption of the final decision for three months from the date of receipt of the aforementioned notification by the Commission. The adoption of the final decision could be postponed for six months if the Commission believes (after delivering a detailed opinion) that the decision in question may jeopardise the achievement of the objectives of the Treaty.

The consultation and transparency procedure set out in Section 6 of the Working Document on a common regulatory framework is indispensable in order to ensure greater transparency and to promote a coherent application of communications law by regulators across the EU. However, there are some problem areas which certainly require further review:

- Clearly the Commission and other NRAs within Europe are included in the definition of "interested parties". However, it is not clear what the scope of "all interested parties" is and, therefore, further clarification is required on who should have the chance to comment on those measures suggested by NRAs. In addition, for the sake of transparency and certainty, the third sub-paragraph of paragraph 2 should be amended to read as follows: "The national regulatory authority shall take such comments into account, *together with those of interested parties referred to in 6(1)*, as far as possible ...".

- Furthermore, it is unclear what might be classified as a decision "which will affect" providers and users and the Commission needs, therefore, to clarify whether all decisions of NRAs or only a certain type of decision will be subject to the notification procedure. Thus guidelines are needed in order to provide a clear interpretation of the abstract concept of a decision which is capable of affecting providers and users. A sensible approach would be to distinguish between decisions with fundamental consequences and routine or minor

operational decisions. Otherwise, treating all decisions – irrespective of their nature – under the same process and timescales can significantly complicate and slow down the consultation process, create uncertainties for firms considering investing in infrastructure and services and jeopardise the efficient development of new services and products. As NTL illustrates:

“... the notification procedure can become too burdensome and time-consuming to be applied to every single NRA decision likely to affect market operators or users. NTL would therefore recommend that the fully-fledged notification procedure would be used only for major and precedent-setting NRA decisions, such as proposed *ex ante* obligations involving access to communications networks. For decisions of lesser importance, it should probably be sufficient for the NRAs merely notifying the Commission without an obligation to postpone the implementation of the decisions”.³⁶

Taking into consideration the comments received, the Commission hints that, in order to avoid an unnecessarily complicated and time-consuming consultation mechanism, only major decisions will be subject to the notification procedure. Indeed, in its Proposal for a Framework Directive, the Commission replaced the words “decisions which will affect” so that the text reads as follows: “Member States shall ensure that where national regulatory authorities intend to take *measures in accordance with this Directive or the Specific Measures* [found in the Proposal for an Access Directive], they give interested parties the chance to comment within a reasonable period”.³⁷ Moreover, it makes clear that NRAs will be subject to the consultation mechanism of Article 6 – and thus be obliged to follow the notification procedure and to

³⁶ NTL comments on the DG Information Society Working Documents, 19 May 2000, at p. 2. See also: DG Information Society Working Documents - An initial response from the United Kingdom from the Department of Trade and Industry, The Department of Culture, Media and Sport, the Office of Telecommunications and the Radiocommunications Agency, May 2000, at p. 7; the National Post and Telecom Agency in Sweden (PTS) comments on the DG Information Society Working Documents, May 2000, at p. 1; One 2 One comments on the DG Information Society Working Documents, at p. 2; Telenet Operations comments on the DG Information Society Working Documents, May 2000, at p. 1; Telenordia AB comments on the DG Information Society Working Documents, May 2000, at p. 3; Royal KPN N.V. comments on the DG Information Society Working Documents, May 2000, at p. 3; Finnish Ministry of Transport and Communications comments on the DG Information Society Working Documents, May 2000, at p. 2; Belgacom comments on the DG Information Society Working Documents, May 19, 2000, at p. 4; BT comments on the DG Information Society Working Documents, May 2000, at p. 2; WorldCom comments on the DG Information Society Working Documents, 24 May 2000, at p. 5.

communicate their draft measure to the Commission and other NRAs – only when they intend to take measures with fundamental consequences, namely measures under Article 8 or Article 14(4) and (5) of the Proposed Framework Directive or Article 8(2) of the Proposed Access and Interconnection Directive.³⁸

- The timeframes proposed in paragraphs 4 and 5 (6 and 12 months respectively) will extend the NRAs' decision making process and lead to an unnecessarily complicated and time-consuming notification procedure. Accordingly, it is suggested that the Commission consider using only one timescale, namely the three-month period proposed in paragraph 3. Moreover, paragraphs 4 - 6 should be deleted in order to ensure that no further delay is introduced into the consultation process.

In the end, the Commission adopted the view that a shorter timescale is essential and decided that the measures that NRAs intend to take will go into effect one month (instead of three months as had been initially proposed) after the date of the communication referred to in paragraph 2. A period of a further two months (thus a total of three months) will be required in case the Commission has serious doubts with regard to the compatibility of the measure with Community law and in particular the provisions of Article 7 of this Directive.³⁹

The Commission was convinced that the safeguards of paragraphs 1 to 3 are enough to ensure that speed – in terms of a shorter regulatory reaction time – will not be achieved at the expense of transparency and legal certainty. Further modifications and additions make this argument even stronger. Indeed, NRAs will be required to publish their national consultation procedures;⁴⁰ when they communicate their draft measure to the Commission, they will have to state the reasons and the grounds on which the measure in question is based;⁴¹ they will “take the utmost account of comments of other national regulatory authorities”⁴² (which is stronger in comparison with the words “shall take such comments into account as far as possible”);⁴³ and the Commission

³⁷ Proposed Framework Directive, Article 6(1).

³⁸ *ibid.*, Article 6(2).

³⁹ *ibid.*, Article 6(4).

⁴⁰ *ibid.*, Article 6(1).

⁴¹ *ibid.*, Article 6(2).

⁴² *ibid.*, Article 6(3).

⁴³ Working Document on a common regulatory framework, Section 6(2).

will be able, if necessary, to require NRAs to amend or withdraw the draft measure in question.⁴⁴

- Finally, it should be stressed that, in exceptional circumstances, i.e. when NRAs consider that there is an urgent need to act in order to protect competition and the interests of users, they may adopt measures immediately and thus avoid the consultation procedure set out in paragraphs 1 to 4.⁴⁵

It seems that such a proposal gives NRAs very wide powers and perhaps too much discretion to act in a manner not in concert with the spirit of Article 6 of the Framework Directive. Indeed, the consultation mechanism of Article 6 would be of little use if such discretionary powers were left to NRAs to establish exceptional circumstances without safeguards being introduced.

This is therefore the reason why the Commission makes clear that, in the case that NRAs have made use of paragraph 5 and adopted measures on the grounds of exceptional circumstances, they will immediately communicate them, alongside the full reasoning on which those measures were taken, to the Commission and the other national regulatory authorities. If the Commission cannot consider those measures to be justified and compatible with the provisions of Article 7 of the Framework Directive, it will be empowered to require NRAs to amend or abolish them.⁴⁶

It should be stressed here that the Commission has a responsibility to improve the consistency of NRAs' actions and to ensure that their decisions are compatible with the principles which are set out in the new regulatory framework. Thus the Commission will have to improve the co-ordination between NRAs at EU level and to achieve homogeneity of implementation. In order to succeed in this target, it is indispensable that the Commission is empowered

⁴⁴ Proposed Framework Directive, Article 6(4).

⁴⁵ *ibid.*, Article 6(5).

⁴⁶ *ibid.*, Article 6(5) sub-paragraphs 2 and 3.

“to challenge, and if necessary, require NRAs to suspend, the decisions taken if it considered they were not justified according to the regulatory framework. In deciding whether to do so, the Commission would consult the High Level Communications Group, and if necessary, the Communications Committee”.⁴⁷

However, it is strange that, despite the aforementioned Commission statement, nothing in Section 6 of the Working Document on a common regulatory framework made clear that the Commission would have the power to block a NRA’s decision which is considered to be contrary to the EU regulatory framework. On the contrary, it seemed that the final decision would belong to NRAs which could proceed with a decision that the Commission was opposing. This conclusion stems also from sub-paragraph 3 of section 6(2) of the Working Document on a common regulatory framework which stated that “the national regulatory authority *shall take such comments into account as far as possible* in making the final decision, and shall communicate the final decision to the Commission without delay”. So, the fact that NRAs were equipped with such a significant degree of discretion to depart from the principles set out in the EU regulatory framework could lead to uncertainty and raise a significant risk of market fragmentation. This is therefore the reason why many commentators asked the Commission to insert a provision allowing it the possibility to revoke NRAs’ decisions when these are inconsistent with EU telecoms regulation and the harmonisation process.⁴⁸

As it has been already seen, the Commission responded to those comments by introducing provisions according to which NRAs will be required to amend or abolish measures which cannot be regarded as compatible with Community law and in particular with the provisions of Article 7 of the Proposed Framework

⁴⁷ Communication from the Commission, “The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework”, COM (2000) 239, 26 April 2000, at p. 23.

⁴⁸ See for instance: Telenordia comments on the DG Information Society Working Documents, May 2000, at p. 3; Royal KPN N.V. comments on the DG Information Society Working Documents, May 2000, at p. 3; Vodafone AirTouch comments on the DG Information Society Working Documents, May 2000, at para. 2.4, pp. 5-6; BT comments on the DG Information Society Working Documents, May 2000, at p. 2; United Pan-Europe Communications (UPC) comments on the DG Information Society Working Documents, May 2000, at p. 4; Omnitel Pronto Italia comments on the DG Information Society Working Documents, 19 May 2000, at p. 3; GSM Europe comments on the DG Information Society Working Documents, 19 May 2000, at pp. 2-3; WorldCom comments on the DG Information Society Working Documents, 24 May 2000, at p. 5.

Directive.⁴⁹

In sum: the final text of Article 6 of the Framework Directive leaves adequate room for NRAs to deal quickly and effectively with a market problem by taking account of national circumstances while, at the same time, providing legal certainty for market players.

6. RIGHT OF APPEAL

According to Section 4 of the Working Document on a common regulatory framework, an undertaking affected by a decision of a NRA will have a right to appeal against this decision to an independent body. This provision is a further step in the right direction since a NRA's decision will be reviewed not only on procedural issues (e.g. whether it was outside the powers of the regulator) but also on the merits of the case in question. It is obvious that, by providing the aforementioned independent body with the right to make a proper evaluation of the facts of the case and not being limited to a review of the decision-making process, a reasonable degree of legal certainty is achieved.

At the same time, however, more detail should be given with regard to the process and nature of the appeal body. Indeed, it is important that the right to appeal does not lead to burdensome litigation, lengthy and time-consuming procedures and thus to a less predictable legal environment. Thus, in order to increase legal certainty, the Commission introduced three more paragraphs in Article 4 and gave more detailed information about the process and nature of the appeal body.

⁴⁹ Proposed Framework Directive, paragraphs 4 and 5 of Article 6.

7. EXCHANGE AND PROVISION OF INFORMATION TO NRAS AND THE COMMISSION

Section 5 of the Working Document on a common regulatory framework allows NRAs to collect information from market players, but provides that the information required should be proportionate and justified. It also establishes the right of NRAs to exchange confidential information as long as its confidentiality is respected.

However, the Commission's proposals raised serious concerns regarding the content, security and confidentiality of the information given from undertakings to NRAs. Thus the level of detail of information made available by market players should be assessed against some sensitive issues regarding business demands for confidentiality. Indeed, operators would be reluctant to provide NRAs with data when they know that regulators will be entitled to exchange these data between each other. In addition, it is logical that they will not be thrilled if NRAs are able to publish such information and, consequently, competitors can get hold of their business secrets. As Vodafone AirTouch has characteristically put it,

“most of the information submitted to NRAs is likely to include business secrets which, if disclosed to any third party, would be extremely harmful to the concerned party. Indeed, much of this information would be of considerable value to the concerned party's competitors. The proposed text will generate reluctance on the part of many undertakings to submit business secrets to their national regulatory authorities in the knowledge that the confidentiality of such information cannot be reasonably protected, at least outside their national territories”.⁵⁰

The same view is taken by the Independent Regulators Group (IRG) when it expresses its concern that the Commission's proposals

“may significantly weaken the ability of NRAs to protect commercially confidential information and as a result impair in practice the ability to obtain information from operators who may fear publication of such information. This

⁵⁰ Vodafone AirTouch comments on the DG Information Society Working Documents, May 2000, at p. 6.

has the potential to greatly hinder the effectiveness of NRAs".⁵¹

The Commission was clearly aware of the reaction and of the undesirable effects that its proposal could cause. This is therefore the reason why it included some words and sentences which, it thought, could act as a safeguard in the light of the NRAs' excessively discretionary powers. Thus the Commission believes that the fact that the information submitted to NRAs by market players can be exchanged between NRAs and obtained by the Commission, as well as the fact that Member States must ensure public access to all information submitted to the NRAs, can be balanced by the provisions that the use of information provided must respect the principle of proportionality,⁵² that reasons will be given by the NRAs in order to justify their request for information,⁵³ that the information submitted in confidence is also made available in confidence to another competent authority,⁵⁴ that Member States have to "balance the concerns of the parties submitting information and the interests of the public in accessing that information",⁵⁵ and that NRAs must take "due account of considerations of commercial confidentiality".⁵⁶

However, it should be stressed that, if the market players regard the information they give to NRAs as confidential, the NRAs should be bound not to submit it to another competent authority or to publish it. The exchange or publication of confidential information should be possible only when the undertakings have given their written consent or their agreement in advance. It is therefore imperative for the Commission to set a limit of the nature of information that can be made available and to state clearly that NRAs are not entitled to exchange or publish confidential information. This was finally recognised by the Commission in its Proposed Framework Directive where it categorically states: "Where information has been submitted in confidence, the Commission and the national regulatory authorities concerned shall maintain

⁵¹ Independent Regulators Group (IRG) common position on the DG Information Society Working Documents, May 2000, at para. 50, p. 11.

⁵² Working Document on a common regulatory framework, Sections 5(1)(b) and 5(3)(b).

⁵³ *ibid.*, Sections 5(1)(b) and 5(2).

⁵⁴ *ibid.*, Sections 5(2) and 20(3).

⁵⁵ *ibid.*, Section 5(4)(b).

⁵⁶ DG Information Society Working Document, Subject: Access to, and interconnection of, electronic communications networks and associated facilities (hereafter Working Document on Access and Interconnection), 27 April 2000, at Section 11(3).

the confidentiality of the information provided”.⁵⁷ Furthermore, it makes clear that NRAs will be entitled to publish information, “while respecting national and Community rules on commercial confidentiality”.⁵⁸

However, the Commission does not clearly state what is going to happen where the confidentiality of information is not respected by NRAs. In particular, although the right of the undertakings to appeal to an independent body (when they believe that the reasons given by the NRAs do not justify the request for information) is established by Article 4 of the Framework Directive, there are no provisions stating that NRAs could be held liable in case they disclose confidential information. The lack of such a provision generates market uncertainty and, therefore, the Commission fails to achieve its aim, namely drawing the right balance between transparency and commercial sensitivity.

8. CAN EX-ANTE OBLIGATIONS BE IMPOSED ON UNDERTAKINGS WHICH HAVE NOT BEEN DESIGNATED AS HAVING SMP STATUS? CAN NRAS IMPOSE OBLIGATIONS THAT GO BEYOND THOSE SET OUT IN THE SPECIFIC MEASURES?

The wording of Section 14(1) of the Working Document on a common regulatory framework – “In determining whether to impose ... obligations on undertakings, *including those with significant market power, ...*” – suggested that NRAs will be able to impose ex-ante obligations even on undertakings which are not designated as having SMP. However, it is understood that, as a rule, ex-ante obligations may only be imposed on entities having SMP and, therefore, the words “including those” should be deleted. Likewise, it should be clarified in Section 14(5)(a) that ex-ante obligations should only be imposed upon undertakings designated as having SMP. Therefore, the words “on entities designated as having SMP” should be inserted after the words “ex-ante

⁵⁷ Proposed Framework Directive, Article 5(2)(d).

⁵⁸ Proposal for a Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities (hereafter the Proposed Access and Interconnection Directive), COM (2000) 384, 12 July 2000, at Article 11(2)(b).

rules”.

In the end, the Commission decided that the first paragraph of section 14 would not be incorporated in Article 14 of the Proposed Framework Directive. One could argue that this is an implication that, as a rule, ex-ante obligations can be imposed only on undertakings with SMP. Moreover, by referring to “regulatory obligations set out in the Specific Measures”,⁵⁹ it makes clear that again, as a rule, the imposition of ex-ante obligations that go beyond e.g. those set out in Articles 9 to 13 of the Proposed Access Directive is not allowed.

The same approach is followed in the Proposed Access and Interconnection Directive. More analytically: Section 4(1) of the Working Document on access and interconnection stated that NRAs will have the power to intervene where parties fail to enter into an interconnection agreement. However, it is not clear which measures NRAs are empowered to take in order to solve a dispute between undertakings. Therefore, in order to avoid legal uncertainty, this section should contain a reference to sections 8 and 9 to 13 of the Working Document on Access and clarify that the imposition of ex-ante obligations outside the scope of those sections is not allowed.

In addition, the wording of Section 4(1) could lead to more regulation than is already permitted by the Interconnection Directive (according to which only operators having SMP are obliged to offer interconnection). Indeed, Section 4(1) does not explicitly refer to SMP operators so that the provision may be interpreted as if the obligation of offering interconnection can be also imposed on operators who do not have SMP. What is therefore required is an amendment which will ensure that the power of intervention is restricted only to cases in which an operator having SMP refuses to offer interconnection.

This was finally recognised by the Commission which, as a result of the comments received, decided that the text should be amended to read as follows:

“Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 6 to 13 of this Directive on operators that have been designated as having significant market power in a relevant market. In the absence of agreement between undertakings on access and interconnection arrangements, Member States shall ensure that the national regulatory authority is empowered to intervene at

⁵⁹ Proposed Framework Directive, Article 14(1).

the request of either of the parties involved or at its own initiative, taking account of the policy objectives and procedures included in Articles 6, 7, and 13 to 18 of Directive [on a common regulatory framework for electronic communications networks and services]”.⁶⁰

Finally, although some market players expressed their concerns⁶¹ about the possibility for NRAs to intervene on their own initiative in an access or interconnection dispute, the Commission rightly did not make any alterations. Indeed, it is questionable whether small companies would dare to challenge the powerful firms which can influence the decision-making process and control the ‘rules of the game’. This is therefore the reason why NRAs must be entitled to intervene at their own initiative: the threat of regulatory intervention gives the priority to commercial negotiation but, at the same time, can have an incentive effect on the market players to deal with the situation in a fast and efficient way.

The approach of Article 5(2) was also followed in Article 8(1) of the Proposed Access and Interconnection Directive. Indeed, this paragraph makes clear that ex-ante obligations can be imposed only on operators which have been designated as having SMP status; and that NRAs can impose only those obligations which are within the scope of Articles 9 to 13 of the Directive.

However, Article 8(2) of the Proposed Access and Interconnection Directive introduces two exceptions to the ‘rules’ that NRAs can impose ex-ante obligations only on operators with SMP; and that NRAs cannot impose obligations that go beyond those set out in Articles 9 to 13 of the Access and Interconnection Directive. Comments on Article 8(2) will be made in the following section which deals with the issue whether access to mobile networks should be mandated or not.

⁶⁰ Proposed Access and Interconnection Directive, Article 5(2).

9. ACCESS TO MOBILE NETWORKS – CASES WHERE SMP STATUS WILL NOT BE A PREREQUISITE FOR IMPOSING OBLIGATIONS

According to current telecommunications regulation, TOs with significant market power are obliged to grant all reasonable requests for access to their networks. However, this requirement is confined to operators of public telecommunications networks and does not apply to other forms of communications infrastructure. Since the new regulatory framework for access to infrastructure will apply to any operator with SMP across sectors, a key issue is whether specific forms of access to certain infrastructures should be mandated or not.

With regard to mobile operators in particular, the Commission – contrary to its position set out in the 1999 Communication Review – decided not to mandate access to mobile networks. In other words, no specific regulatory obligations on mobile operators to grant access will be introduced. This results from the fact that the extent of competition in mobile markets varies across Member States and, therefore, any decisions by NRAs about imposing access on mobile network operators must be made by carrying out a detailed market analysis and taking into account the state of competition and the extent of customer choice as well as the economic impact and the benefits to be achieved. At the same time, it is obvious that the Commission took into serious consideration the vast investment required to establish mobile networks and accepted the mobile operators' argument that imposing on them an obligation to provide access to service providers would undermine their incentive to innovate and invest.⁶²

However, the Commission did not yield to pressure from mobile operators

⁶¹ See for instance: Finnish Federation for Communications and Teleinformatics (FiCom) comments on the DG Information Society Working Documents, May 2000, at p. 2; Royal KPN N.V. comments on the DG Information Society Working Documents, May 2000, at p. 8; Orange comments on the DG Information Society Working Documents, May 2000, at pp. 3-4; Telefonica comments on the DG Information Society Working Documents, May 2000, at pp. 4 and 14; Omnitel Pronto Italia comments on the DG Information Society Working Documents, 19 May 2000, at p. 5; GSM Europe comments on the DG Information Society Working Documents, 19 May 2000, at p. 6.

⁶² See for instance: Response from Vodafone AirTouch to the 1999 Communications Review, 24 January 2000, at p. 12; Response from Belgacom Mobile to the 1999 Communications Review, February 2000, at p. 12; Response from Omnitel Pronto Italia to the 1999 Communications Review, February 2000, at pp. 7-9.

that Section 8(4) of the Access and Interconnection Working Document should be deleted.⁶³ As it is put in the Proposed Access and Interconnection Directive,

“National regulatory authorities may, without prejudice to the provisions of Article 6, impose on operators, *including operators other than those with significant market power*, the obligations set out in Article 9 to 13 in relation to interconnection, in order to comply with international commitments”.⁶⁴

To put it simply, this paragraph gives NRAs the right to impose obligations even on operators which are not designated as having significant market power. In other words, in some cases SMP status will not be a prerequisite for imposing obligations on operators. The idea behind this approach is the Commission’s conviction that ex-ante sector specific rules will continue to be needed when, as is the case in the mobile sector, there is no single network operator dominance and a limited number of players is coupled with high barriers to enter the market. As the Commission states, amongst those factors which constrain the competitiveness of the market at present is

“the existence of legal barriers to market entry that exist in the mobile sector, where currently the availability of spectrum means that the number of players is limited to four or five, which has not been enough to ensure competitive pricing in all segments of the mobile market”.⁶⁵

This is therefore the reason why – according to the Commission’s thinking – Section 8(4) (now Article 8(2)(a)) has to remain: to keep the mobile markets open by giving NRAs the flexibility to intervene and interpret the state of competition in the light of national circumstances.

However, it is stated that the obligation to offer interconnection can be imposed on operators who do not have SMP status “in order to comply with international

⁶³ See for instance: Orange comments on the DG Information Society Working Documents, May 2000, at p. 4; One 2 One comments on the DG Information Society Working Documents, May 2000, at p. 9; Omnitel Pronto Italia comments on the DG Information Society Working Documents, 19 May 2000, at p. 6; Royal KPN N.V. comments on the DG Information Society Working Documents, May 2000, at pp. 9 and 21; Vodafone AirTouch comments on the DG Information Society Working Documents, May 2000, at para. 3.5, p. 12; GSM Europe comments on the DG Information Society Working Documents, 19 May 2000, at pp. 7-8.

⁶⁴ Proposed Access and Interconnection Directive, Article 8(2)(a).

commitments”⁶⁶ or where “the structure and characteristics of a particular market justify this approach”.⁶⁷ Thus, in both cases, nothing clarified when and under what circumstances such a measure might be justified. In addition, with regard to Article 8(2)(b) of the Proposed Access and Interconnection Directive, nothing clarifies (the same as in Article 14(1)(c) of the Proposed Framework Directive) when and under what circumstances a “prior agreement of the Commission” can be given so that NRAs can impose obligations for access and interconnection that go beyond those set out in Articles 9 to 13 of this Directive.

Therefore, in order to avoid legal uncertainty and excessive regulatory intervention, those circumstances must be outlined by the Commission – possibly in the Guidelines on Market Analysis. Otherwise, the new SMP test would serve little purpose if NRAs are equipped with a significant degree of discretion to establish ‘exceptional circumstances’ without an economically in-depth market analysis and a list of tests being required to justify this status.

10. FACTORS DETERMINING WHEN AN OPERATOR SHOULD BE OBLIGED TO GRANT ACCESS

The Commission states that, in order to determine whether an operator should be obliged to grant access, four factors should be taken into account. These factors include the availability of sufficient capacity to provide access and the feasibility of providing access to the requesting company.⁶⁸ It is logical to assume that the term “feasibility” – like the term “overriding difficulty” met in the Commission’s Access Notice of August 1998⁶⁹ – includes the essential

⁶⁵ Working Document on Access and Interconnection, at p. 4.

⁶⁶ Proposed Access and Interconnection Directive, Article 8(2)(a).

⁶⁷ Working Document on Access and Interconnection, Section 8(4).

⁶⁸ Proposed Access and Interconnection Directive, Article 12(2)(b); Working Document on Access and Interconnection, Section 12(3)(b).

⁶⁹ Commission’s Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (hereafter the Commission’s 1998 Access Notice) [1998] O.J. C 265/2, at para. 91.

requirements⁷⁰ which are laid down in the Interconnection Directive, i.e. security of network operations, maintenance of network integrity, interoperability of services and protection of data.⁷¹ Besides, the Commission's reference to "the technical and economic viability of using or installing competing facilities"⁷² strengthens this argument.

In addition, the Commission takes into account market uncertainty, the technical risks and the vast investment associated with a high-risk market, and stresses the need to provide companies with the chance to recoup their production costs and the time to launch a new product.⁷³ The same approach is also met in the Commission's Access Notice, which cites as an example of a possible justification for refusing access "the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market".⁷⁴ This is in accordance with the opinion of Advocate General Jacobs in the *Oscar Bronner* case where he states that "particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment".⁷⁵

The fourth factor that should be taken into account by NRAs in order to determine whether or not to impose obligations on operators to grant access is "the need to safeguard competition in the long term".⁷⁶ This could also be explained as the Commission's aim not to hinder the incentive to invest in alternative infrastructure. As Jacobs illustrates,

"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

⁷⁰ The essential requirements are defined as the "non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services", see Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, 90/387/EEC, at Article 2(6).

⁷¹ Interconnection Directive, at Article 10.

⁷² Proposed Access and Interconnection Directive, Article 12(2)(a); Working Document on Access and Interconnection, Section 12(3)(a).

⁷³ Proposed Access and Interconnection Directive, Article 12(2)(c); Working Document on Access and Interconnection, Section 12(3)(a).

⁷⁴ Commission's 1998 Access Notice, at para. 91(e).

⁷⁵ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG* [1998] E.C.R. I-7791. Opinion of Jacobs, A.G., 28 May 1998, at para. 62.

⁷⁶ Proposed Access and Interconnection Directive, Article 12(2)(d); Working Document on Access and Interconnection, Section 12(3)(d).

developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term”.⁷⁷

11. LIST OF CANDIDATE MARKETS FOR INCLUSION IN THE DECISION ON RELEVANT PRODUCT AND SERVICE MARKETS

The Access and Interconnection Working Document contains a reference to Annex II which includes

“a initial list of wholesale markets to be considered for inclusion in the Notice on Relevant Product and Service markets to be published by the Commission in accordance with the procedure in section 14 of the Working Document on a common regulatory framework for electronic communications networks and services”.⁷⁸

However, the problem is that the candidate markets in Annex II are set out without proper analysis and reasoning. In addition, it should be stressed that the identification by the Commission of product and services markets susceptible to the introduction of *ex ante* obligations constitutes the basis for the proposed access regime. Indeed, NRAs will not be able to impose such *ex-ante* regulation in markets not identified in the Decision on Relevant Product and Service markets. Ex-ante regulatory intervention in markets not listed in this Decision can be justified only in exceptional circumstances – and only after the prior agreement of the Commission.⁷⁹

Bearing in mind that Annex II is not a draft of the Notice, it is highly

⁷⁷ *Oscar Bronner*, Opinion of Jacobs, A.G., 28 May 1998, at para. 57.

⁷⁸ Working Document on Access and Interconnection, Section 7(2)(b).

⁷⁹ Proposed Framework Directive, Article 14(1)(c); Working Document on a common regulatory framework, Section 14(2)(b).

questionable whether the decision to include at this stage a list of possible markets would be the right one. Indeed, it is premature to attempt to identify markets when the regulatory proposals are not to apply before 2003. Due to the rapid technological developments, the relevant markets put forward for consideration in the working document are likely to have changed significantly by the time the proposed regulatory package is implemented. Additionally, it is certain that a list which pre-determines relevant markets will pre-empt the debate on the Notice on Relevant Product and Service Markets and, consequently, will unduly influence the NRAs' decisions.

As a result of the above arguments, the Commission decided to delete Annex II and not to include it in the Proposed Access and Interconnection Directive.

12. CONCLUSIONS

a) The Commission believes – and this has been confirmed by the vast majority of the comments received in the course of the public consultation – that common principles should be established for regulation of access across all communications infrastructure.⁸⁰ This Commission's objective for a horizontal approach to all transport network infrastructure and associated services will certainly be achieved with the introduction of the Framework and Access and Interconnection Directives.

⁸⁰ DG Information Society Working Document, Subject: A common regulatory framework for electronic communications networks and services, 27 April 2000, Chapter I, at p. 5; Communication from the Commission, "The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework", COM (2000) 239 final, 26.4.2000, at pp. 8 and 20; Communication from the Commission "Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review", COM (1999) 539, 10 November 1999, at pp. 3 and 6; Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108 EN final, 10.3.1999, at pp. 2 and 9; Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 30.

b) Consistently with the principle of continuity,⁸¹ the obligations imposed under the current Interconnection and TV Standards Directives will be carried forward into the new regulatory framework and, in particular, in the Access and Interconnection Directive. Thus, with regard to access and interconnection, all obligations that were applied under Articles 4, 6, 7, 8, 11, 12, and 14 of the Interconnection Directive will be maintained.⁸² The same applies for the obligations in relation to conditional access systems.⁸³ Thus all providers of services subject to conditional access are obliged to “offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters’ digitally-transmitted services to be received by viewers authorised by means of decoders administered by the service operators, and comply with Community competition law, in particular if a dominant position appears”; and they are also obliged to “keep separate financial accounts regarding their activity as conditional access providers”.⁸⁴

c) Due to the rapidity of technological and market development, detailed rules cannot keep up with the pace of changes. Frequent changes in regulation would be required, thereby leading to lack of legal certainty. This uncertainty can discourage investment and the incentive to develop new services. So, the target of dis-engaging from detailed regulation can be achieved with the increasing use of complementary non-binding regulatory measures. It is believed that the use of “soft-law” (such as the Guidelines on market analysis and the calculation of SMP) could play a significant role in achieving the desired flexibility in this dynamic and fast-moving market. As the Commission has put it:

“Such measures can be more easily and quickly agreed or adapted than legislation and – where they are agreed by consensus of interested parties and backed up by effective sanctions in cases of non-compliance – can be very effective. They provide a flexible tool for regulators, and will allow for regulation

⁸¹ See, for instance, the Proposed Access and Interconnection Directive, at p. 5.

⁸² Proposed Access and Interconnection Directive, Article 7; Working Document on Access and Interconnection, Section 7.

⁸³ Proposed Access and Interconnection Directive, Article 6(1), Annex Part I; Working Document on Access and Interconnection, Section 6(1) and Annex I (b).

⁸⁴ Directive 95/47/EC of the European Parliament and of the Council of October 24, 1995 on the use of standards for the transmission of television signals [1995] O.J. L281/51 (the TV Standards Directive), at Article 4(c).

that is responsive to the changing needs of the communications services market".⁸⁵

However, many commentators⁸⁶ have warned that non-binding regulatory measures are in general not considered as capable of decreasing legal uncertainty. In addition, non-compliance with the provisions of those measures has no (direct) legal consequence. Therefore, lack of clarity and transparency can arise for market players as to whether or not they are bound by such measures. This is therefore the reason – to increase legal certainty – why the Commission opted for the introduction of a Decision on Relevant Product and Service Markets (which is binding in its entirety and has immediate legal effect for its addressee) instead of a Notice (which is a non-binding legal instrument) as had been initially proposed.

d) Taking account of the transitional nature of the sector-specific measures and of the overall objective that regulation should be kept to the minimum where competition is self-sustaining, it is necessary to develop mechanisms to ensure the gradual phasing-out of sector-specific regulation. It seems that the principle of 'forbearance' – according to which the NRAs are required to forbear from applying rules when the regulatory objectives are being met in some other ways – constitutes a satisfactory solution. The application of this principle is found in the Framework Directive – and in particular in Article 14(4) – which provides that NRAs will evaluate on a regular basis whether certain rules are still necessary and will determine the moment that sector-specific regulation can be abolished.

In addition, the principle of forbearance and the decision not to mandate access to mobile and cable networks is another step closer to the realisation of the objective to keep regulation to the minimum necessary and not to expand it any further.

e) From the above, it is obvious that the new access regulatory framework will be characterised by a consistent set of rules and a continuity with the existing regime. This is in accordance with the general agreement that convergence is

⁸⁵ The 1999 Communications Review, at para. 3.3.2, p. 18.

an evolutionary rather than a revolutionary process. However, this attempt to achieve continuity with the current regulatory framework and the objective to keep regulation to the minimum necessary would be meaningless without safeguards which could prevent NRAs from exploiting their discretion and imposing unjustified ex-ante obligations. What the Commission has to do, therefore, is draw the right balance in order to achieve flexibility within a harmonised EU framework.

More analytically:

- The Commission should have a major role in supervising the consistent implementation and application of the Community regulation and thus preventing NRAs from getting out of line with the agreed harmonised European principles. This can be achieved with the introduction of the Commission's Decision on Relevant Product and Service Markets, the Guidelines on market analysis and the calculation of SMP, the right to appeal introduced by Article 4 of the Framework Directive, the consultation and transparency mechanism set out in Article 6 of the Framework Directive as well as the market definition and analysis procedure laid down in Article 14 of the same Directive which provides clear and unambiguous rules to be followed by NRAs when deciding whether to impose, maintain or remove obligations on undertakings.

- On the other hand, market development is different in each Member State and thus NRAs must have the opportunity to intervene and interpret the state of competition in the light of national circumstances. Indeed, an inflexible and over-centralised regulatory approach cannot deal with these differences because it is not in a position to be close enough to the national market in question and have a precise knowledge of the state of competition. Only NRAs can have the detailed knowledge of national markets to be able to react in a fast and effective way, an essential condition for attracting investment into the emerging markets.

As a result, for the sake of flexibility and consistency with the principle of subsidiarity – that is, action at EU level is justified only if the objectives of the proposed action cannot be achieved satisfactorily at the national level and can be achieved better by the Community – there will always be the opportunity for NRAs to establish “exceptional circumstances” in order to depart from the

⁸⁶ See for instance: Response of the Dutch Government to the 1999 Communications Review, January 2000, at p. 5; Microsoft's comments on the 1999 Communications Review, February 2000, at p. 2.

“norm”. So, NRAs can adopt measures immediately – when they consider that there is an urgent need to act in order to protect competition and the interests of users – and thus avoid the consultation procedure set out in paragraphs 1 to 4 of Article 6 of the Framework Directive (i.e. they do not have to communicate the draft measure in advance to the Commission and thus wait for the Commission’s decision in order to adopt the measure);⁸⁷ they can impose ex-ante regulation in markets not identified in the Commission’s Decision on Relevant Product and Service Markets;⁸⁸ in relation to interconnection, they can impose obligations even on undertakings which are not designated as having significant market power;⁸⁹ and they can impose on SMP operators obligations for access and interconnection that go beyond those set out in Articles 9 to 13 of the Access and Interconnection Directive.⁹⁰

Hence, there is the risk that the aforementioned NRAs’ significant degree of freedom could lead to excessive regulatory intervention and thus legal uncertainty. Accordingly, safeguards are required so that the Commission can monitor effectively the implementation and enforcement of the legislation to ensure that the harmonised EU framework will not be affected. I believe that the following three provisions answer the concerns that there could be different interpretation in different Member States of the principles and objectives which underline the EU communications regime, something which could lead to the fragmentation of the internal market. In particular:

- Ex-ante regulatory intervention in markets not listed in the Decision on Relevant Product and Service Markets cannot be justified without NRAs seeking and receiving the prior agreement of the Commission.⁹¹
- The Commission will require NRAs to amend or withdraw any draft measures which are not in accordance with Community law and in particular the provisions of Article 7 of the Framework Directive.⁹²
- If NRAs have made use of Article 6(5) of the Framework Directive and adopted measures on the grounds of exceptional circumstances, they will immediately communicate them, alongside the full reasoning on which those measures were taken, to the Commission and the other national regulatory

⁸⁷ Proposed Framework Directive, Article 6(5).

⁸⁸ *ibid.*, Article 14(1)(c).

⁸⁹ Proposed Access and Interconnection Directive, Article 8(2)(a).

⁹⁰ *ibid.*, Article 8(2)(b).

⁹¹ Proposed Framework Directive, Article 14(1)(c).

authorities. If the Commission cannot consider those measures to be justified and compatible with the provisions of Article 7 of the Framework Directive, it will require the NRAs in question to amend or abolish them.⁹³

The aforementioned conditions provide a safety net and contribute towards a regime characterised by transparency, legal certainty and predictability. This in turn provides the right climate to encourage further investment and commercial initiative in the telecommunications and multimedia sectors.

Of course absolute legal certainty can only be provided at the expense of flexibility which, never the less, is also indispensable to enable NRAs to implement and apply the Community legislation according to local market conditions. In addition, absolute certainty exists only in the sphere of fantasy or when someone has the magic power to gaze into the crystal ball and foresee the future. Unfortunately the real world is different and, under the current circumstances, the Commission's approach looks pragmatic and, therefore, likely to be successful.

⁹² *ibid.*, Article 6(4).

⁹³ *ibid.*, Article 6(5) sub-paragraphs 2 and 3.

Chapter 7

The New European Licensing Framework for Electronic Communications Networks and Services

1. INTRODUCTION

In the light of the widespread public debate on the 1999 Communications Review,¹ the 2000 Communication on the results of the public consultation,² and the subsequent Working Document on the authorisation of electronic communications networks and services,³ this Chapter introduces the key elements of the existing Licensing Directive⁴ and comments on the future licensing framework for electronic communications networks and services. Its aim is to assess whether the current situation requires adaptation and, if so, what kind of changes are needed in order to ensure that the Proposed Authorisation Directive⁵ can contribute to lighter and more transparent and simplified national licensing regimes.

¹ Communication from the Commission, "Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review" (hereafter the 1999 Communications Review) COM (1999) 539, 10 November 1999.

² Communication from the Commission, "The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework", COM (2000) 239 final, 26 April 2000.

³ DG Information Society Working Document, Subject: The authorisation of electronic communications networks and services, 27 April 2000.

⁴ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services (hereafter: The Licensing Directive), OJ L 117, 7.5.1997, p. 15.

⁵ Proposal for a Directive of the European Parliament and of the Council on the authorisation of electronic communications networks and services (hereafter the Proposed Authorisation Directive), COM (2000) 386, 12 July 2000.

2. THE CURRENT LICENSING DIRECTIVE

The licensing regime in the telecommunications sector is covered by the Licensing Directive, which provides the legal basis for supervising access to the market and for monitoring compliance with the requirements imposed on operators. The most important issues of the Directive are three in number:

First, the prohibition of any constraint in the number of new entrants. The only justifying restrictions are limited, *inter alia*, to security of network operations, maintenance of network integrity, interoperability, protection of data, and scarce resources – the last linked mainly with the efficient use of the frequency spectrum.⁶ However, the reasons for these restrictions must be made public, be objectively justified, and based on non-discriminatory, proportionate and transparent criteria.

Second, there is clearly a preference for moving away from individual licences and detailed licence provisions – “the introduction of individual licensing systems should be restricted to limited, pre-defined situations”⁷ – and heading towards general authorisations (which are associated with the absence of an explicit decision and a prior approval by the national regulatory authority).⁸

Third, the Directive provides security for new entrants by setting up time limits and other procedural demands and by establishing harmonised principles which Member States have to implement through their national regulatory authorities. So, for instance, the Directive refers to the conditions which are allowed to be attached to general authorisations and individual licences,⁹ it requires that those conditions are objectively justified and based on the principles of non-discrimination, proportionality and transparency,¹⁰ and it states that licence fees should cover only the administrative costs, be published and proportionate to the work entailed.¹¹

⁶ Licensing Directive, at Article 2(1)(d).

⁷ *ibid.*, at recital 13.

⁸ *ibid.*, at Article 2(1)(a).

⁹ *ibid.*, at Articles 3(2), 8(1), and Annex.

¹⁰ *ibid.*, at Articles 3, 4 and 8.

¹¹ *ibid.*, at Articles 6 and 11.

3. THE COMMISSION'S ASSESSMENT OF THE CURRENT LICENSING REGIMES – IDENTIFICATION OF THE PROBLEM

The Licensing Directive states that

“the regulatory regime in the field of telecommunications should be compatible and consistent with the principles of freedom of establishment and freedom to provide services and should take into account the need to facilitate the introduction of new services as well as the widespread application of technological improvements; ... therefore, general authorization and individual licensing systems should provide for the lightest possible regulation compatible with the fulfilment of applicable requirements”.¹²

However, has the Commission's aim of creating a flexible, transparent, open and light licensing regime in the telecommunications sector – a key factor for the establishment of competition and the development of new services – been achieved?

a) According to the current Licensing Directive, individual licences can be used with regard to “the provision of publicly available voice telephony services, the establishment and provision of public telecommunications networks as well as other networks, involving the use of radio-frequency”.¹³ This provision means that in practice all voice telephony services, public networks and all radio-based networks could be subject to individual licences. In a few words, therefore, Member States are allowed to insist on the use of individual licences, even though the Directive makes clear that priority should be given to general authorisation. As a consequence, the majority of Member States have made extensive use of this discretion so that individual licences have become

¹² *ibid.*, at recital 4.

¹³ *ibid.*, at Article 7(2).

the rule rather than the exception. This degree of control on market entry creates administrative barriers which may be disproportionate, and has contributed to a large variation in licence regimes for telecommunications across the EU. As stated in the Commission's Fifth Report on the Implementation of the Telecommunications Regulatory Package,

"There are wide divergences between the national licensing regimes, ranging from the lightest possible, where operators are free to enter the market without formality (Denmark) or are required simply to register (The Netherlands) or notify (Finland, Sweden) their intention to do so (except where the use of frequency spectrum is requested), to the extremely heavy, where individual licences are the rule and in some cases a government minister is required to sign every licence".¹⁴

b) The Annex of the Licensing Directive contains an exhaustive list of conditions (ranging from conditions regarding universal service, disabled users, and the effective use of radio frequency, to conditions to facilitate monitoring and enforcement by NRAs) which may be attached to general authorisations and individual licences. However, although this list represents the maximum conditions that may be imposed (and therefore their use is not obligatory), it appears that many Member States have taken it that all those conditions must necessarily be used.¹⁵ In addition, some Member States have imposed conditions which exceed those set out in the list of the Licensing Directive. As the Commission illustrates,

"In the lightest systems the conditions for the provision of networks or services are laid down in the legislation, providing the greatest possible transparency (Denmark, Sweden). In others (Belgium, France), onerous conditions going far beyond the letter and the spirit of the directives are laid down in the licences themselves, and in some cases are entirely confidential as between the issuing authority and the operator concerned. At least one regime involves the submission of detailed business plans covering long periods into the future

¹⁴ Communication from the Commission, "Fifth Report on the Implementation of the Telecommunications Regulatory Package", COM (1999) 537, 10 November 1999, at p. 12.

¹⁵ Proposed Authorisation Directive, at p. 3.

(Belgium)".¹⁶

It is therefore obvious that the current Licensing Directive has not prevented Member States from developing heavy and non-transparent licensing regimes.

c) Additional market entry hindrances are the cumbersome licensing procedures and excessive licensing fees applied in many Member States. In particular, some NRAs have established unreasonably onerous requirements – for instance, imposing requirements for information to be provided as a prior condition for market entry – and non-transparent procedures. As the Commission states,

“the problem remains of at least one ministry carrying out a second evaluation (France) which, in a certain number of cases, can be a source of inconsistent decisions between the two regulatory authorities which share responsibility for issuing licences. This can also lead to excessive delays in issuing licences or a lack of transparency in those decisions.”¹⁷

In order to illustrate the heavy, lengthy, and bureaucratic procedures for licensing which can be imposed in some Member States, it is useful to cite the comments of the US Government regarding the licensing regime in Spain:

“In Spain, any applicant seeking to obtain a national facilities based licence must have at least one point of interconnection in each of the 50 regions of Spain. This condition must be accomplished within one year from the date on which the carrier begins to carry traffic pursuant to its interconnection agreement with Telefonica. In addition to this burdensome build-out requirement, Spain also requires applicants for a facilities-based license to provide an excessive amount of information including: (1) detailed information about the network they intend to build; (2) a description of how the build-out will be financed; (3) evidence that the technical project has been signed by a qualified engineer who is a member of the Spanish engineers association; and (4) a business plan that covers the first four years of the term of the license

¹⁶ Communication from the Commission, “Fifth Report on the Implementation of the Telecommunications Regulatory Package”, COM (1999) 537, 10 November 1999, at p. 12. See also Versatel Telecom International, submission regarding the 1999 Communications Review, February 2000, at p. 2.

and includes economic information regarding the project (including details about the amounts to be invested during the term of the license)".¹⁸

In addition, the procedures in some Member States (for instance, Italy, Greece, and France) are too lengthy and the deadlines exceed the time limits established under the Licensing Directive.¹⁹ It should be remembered here that, for general authorisations, the time limit before starting to operate cannot exceed four weeks from receipt by the NRA of all the information it requires;²⁰ and for individual licences, the applicant market player must be informed of the NRA's decision within six weeks of receipt of the application.²¹

Moreover, there is a great diversity in terms of financial and administrative costs of gaining licences and authorisations across different Member States. This diversity in licence fees stems from the already illustrated variation of licensing regimes in the EU which range from the lightest possible to the extremely heavy. Indeed, the regulatory workload involved in managing the heavy-handed licensing regimes has as a direct result the imposition of excessive administrative charges on operators, especially in Germany, France, and Luxembourg.²²

Consequently, due to the existing licensing regimes, i.e. regimes where individual licences have become the rule and the imposition of licence conditions has exceeded the limit set out in the Annex to the Licensing Directive; due to the lengthy, cumbersome, and sometimes non-transparent procedures for granting licences; and due to the unjustified variation of the administrative costs across different Member States, there is need for lighter, more transparent, and simplified national licensing regimes. Indeed, only then can the aim of an effective internal market be achieved without the need for creation of a single European licence for electronic communications services or

¹⁷ Communication from the Commission, "Fifth Report on the Implementation of the Telecommunications Regulatory Package", COM (1999) 537, 10 November 1999, at p. 13.

¹⁸ United States comments regarding the 1999 Communication Review, February 11, 2000, at p. 3.

¹⁹ Communication from the Commission, "Fifth Report on the Implementation of the Telecommunications Regulatory Package", COM (1999) 537, 10 November 1999, at p. 13.

²⁰ Licensing Directive, at Article 5(2).

²¹ *ibid.*, at Article 9(2).

²² Communication from the Commission, "Fifth Report on the Implementation of the Telecommunications Regulatory Package", COM (1999) 537, 10 November 1999, at p. 13.

mutual recognition of authorisations. Otherwise, there is the risk of hampering the development of an integrated and competitive European market.

The Commission has correctly identified the problems and this is well illustrated in the declaration of the objective of the Proposed Authorisation Directive:

“The present proposal to revise the existing authorisation and licensing regimes is based on the need to stimulate a dynamic, competitive market for communications services, to consolidate the internal market in a converging environment, to restrict regulation to the necessary minimum and to aim at technological neutrality and accommodate converging markets ... An efficient and effectively functioning single European market can be achieved by rigorously simplifying existing national regimes using the lightest existing regimes as a model ... The aim of this Directive is to implement an internal market in electronic communications services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate the provision of electronic communications services and networks throughout the Community”.²³

4. TACKLING THE PROBLEMS – SPECIFIC PROPOSED MEASURES

4.1. Simplifying the licence application procedure

The Commission moves away from the current variable national licensing regimes by proposing the simplification of the licence application process. This is achieved by abolishing individual licenses and making all electronic communications networks and services subject to general authorisations,²⁴ with specific rights of use being limited to the assignment of radio frequency

²³ Proposed Authorisation Directive, at pp. 2, 3 and Article 1(1).

²⁴ *ibid.*, Article 3(2).

and numbers only.²⁵ Moreover, the Proposed Authorisation Directive establishes the principle that providers of electronic communications networks and services may only be subject to limited procedural requirements. This means that the undertakings concerned may be required simply to notify their intention to enter the market, but cannot be obliged to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising their rights arising from the authorisation. Immediately after the submission of the notification, the undertakings will be free to start their commercial activities.²⁶

In addition, it specifies that the notification referred to in paragraph 2 of Article 3 will comprise merely a declaration to the NRA of the intention to begin the provision of electronic communications networks and services. In addition, the information which NRAs may request under the notification procedure must be kept to what is strictly necessary, i.e. entailing only the identification of the undertaking, contact persons, and a short description of the service to be provided.²⁷ This provision will make sure that no excessive amount of information has to be provided as a prior condition for market entry and will eliminate the already identified practice in some Member States where undertakings are obliged to submit detailed business plans covering many years of the term of the licence.

4.2. Disentangling different categories of conditions – Maximum list of conditions attached to the general authorisation and to the rights of use for radio frequencies and numbers

The aim of Article 6 of the Proposed Authorisation Directive is further to limit and harmonise the conditions which may be attached to the general authorisation for the provision of electronic communications services or networks and to the specific rights of use for radio frequencies and numbers. This is achieved by establishing an exhaustive list of such conditions laid down in Parts A, B, and C of the Annex of the Directive. Furthermore, it stipulates

²⁵ *ibid.*, Article 5.

²⁶ *ibid.*, Article 3(2).

that all conditions must be objectively justified in relation to the service concerned, non-discriminatory, proportionate, and transparent.²⁸ In addition, it establishes the principle that specific obligations – such as obligations of transparency, non-discrimination, accounting separation, granting access to specific network facilities and associated services, and price control and cost accounting²⁹ – which may be imposed on providers of electronic communications services and networks by virtue of their SMP (as defined in Article 13 of the Proposed Framework Directive³⁰), must be imposed separately from the general rights and obligations under the general authorisation.³¹ It also requires that the criteria and procedures for imposing such specific obligations on undertakings must be mentioned in the general authorisation.³² This will play a significant role in achieving the required amount of transparency for undertakings. Finally, it requires a strict separation between conditions under general law (e.g. taxation, company law) which are applicable to all undertakings, conditions under the general authorisation, and conditions attached to rights of use for radio frequencies and numbers. In particular, it states that the general authorisation should contain only conditions which are specific to the electronic communications sector (limited to those set out in Annex A of the Proposed Authorisation Directive). The target is to increase transparency and to promote a lighter regime by not duplicating conditions which are already applicable by virtue of other existing national laws.³³ The simplification of the regime is also promoted by preventing NRAs from duplicating the terms of the general authorisation where they grant the right to use radio frequencies or numbers.³⁴

²⁷ *ibid.*, Article 3(3).

²⁸ *ibid.*, Article 6(1).

²⁹ See Articles 9 to 13 of the Proposal for a Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities (hereafter the Proposed Access and Interconnection Directive), COM (2000) 384, 12 July 2000.

³⁰ Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (hereafter the Proposed Framework Directive), COM (2000) 393, 12 July 2000.

³¹ Proposed Authorisation Directive, Article 6(2).

³² *ibid.*

³³ *ibid.*, Article 6(3).

³⁴ *ibid.*, Article 6(4).

4.3. Compliance with general authorisation conditions or rights of use

Article 10 of the Proposed Authorisation Directive provides procedural safeguards in case undertakings do not comply with the conditions of the general authorisation or for rights of use. In particular, in case of non-compliance, NRAs are required to inform the undertakings concerned about those findings in order to ensure that the undertakings have the chance to state their views or remedy any breaches. The time limit of the aforementioned procedure may not exceed one month after notification; however, it could vary in case of a different agreement between NRAs and the undertakings in question.³⁵

The reasoned measures taken by NRAs for non-compliance or for not remedying the breaches within the aforementioned time limits must be announced to the undertakings concerned within one week of their adoption and at least one week before they go into effect. In addition, these measures must be proportionate to the infringement. In practice, this means that NRAs will not be allowed to withdraw the right to provide electronic communications services or networks or usage rights.³⁶ However, it is stressed that an ultimate sanction (for example, depriving undertakings of their rights to operate) can be used in exceptional circumstances. In particular, NRAs may adopt interim measures immediately – and thus avoiding the aforementioned consultation and notification procedure set out in paragraphs 2 and 3 – when there is an urgent need to act in order to prevent a serious threat to public safety, security or health, and to protect the economic and operational interests of other undertakings.³⁷ It is obvious that such discretionary powers left to NRAs to establish exceptional circumstances could lead to excessive regulatory intervention and thus legal uncertainty for market players. This is why the Commission introduced two safeguards: first, if NRAs have adopted urgent interim measures on the grounds of exceptional circumstances, the undertakings concerned will afterwards be given the opportunity to comment

³⁵ *ibid.*, Article 10(2).

³⁶ *ibid.*, Article 10(3).

and to propose any remedies;³⁸ and secondly, the undertakings affected by measures taken by NRAs will have the right to appeal³⁹ against those measures to an independent body in accordance with the procedure set out in Article 4 of the Proposed Framework Directive. However, those safeguards are not enough to tackle the problem of legal uncertainty. It is submitted, therefore, that the Commission should explicitly state that NRAs have to be prevented from acting in a manner not in concert with the spirit of Article 6 of the Proposed Framework Directive. This means that when NRAs have adopted measures on the grounds of exceptional circumstances, they will have to communicate them immediately, alongside the full reasoning on which those measures were based, to the Commission and the other national regulatory authorities. If the Commission cannot consider those measures to be justified and compatible with the provisions of Article 7 of the Proposed Framework Directive, it will be empowered to require NRAs to amend or abolish them.⁴⁰

4.4. Rights to use radio frequencies and numbers - Procedure for restricted granting of rights to use radio frequencies

It has already been mentioned that Article 5 of the Proposed Authorisation Directive establishes the principle that the granting of specific rights may continue to be necessary for the use of radio frequencies and numbers. In addition, it introduces time-limits and transparency procedures in order to prevent NRAs from treating undertakings in a discriminatory way and to optimise the use of those scarce resources.

In particular, it states that, when NRAs are to decide on granting individual rights to use radio frequencies and numbers, no excessive delays can be caused by bureaucratic procedures.

So, these decisions will have to be taken, communicated and published within two weeks of receipt of the application by NRAs in the case of numbers, and

³⁷ *ibid.*, Article 10(4).

³⁸ *ibid.*

³⁹ *ibid.*, Article 10(5).

⁴⁰ Proposed Framework Directive, Article 6(5) sub-paragraphs 2 and 3.

within six weeks in the case of frequencies.⁴¹ Where comparative bidding procedures are to be used, the six-weeks period can be extended to up to six months in order to ensure an open, fair, objective and transparent decision-making process.⁴² Only such a design of comparative biddings (also known as “beauty-contest mechanisms”) can optimise the efficient assignment of radio frequencies, especially bearing in mind that the decisions taken during a comparative bidding procedure entail the risk of being biased towards incumbent operators with an established track record.⁴³

The Commission’s commitment to transparent procedures when granting individual rights to use radio frequencies and numbers is illustrated in Article 5(2)(b) where it states that “such rights of use shall be granted through open, non-discriminatory and transparent procedures”, and requires NRAs to clarify the situation in their national regimes with regard to transferability and secondary trading of usage rights. Moreover, the Commission requires the application of the principle of proportionality where NRAs grant rights of use for a limited period of time – “the duration shall be appropriate for the service concerned”.⁴⁴ It seems that the aim of this provision is to facilitate the entry of new market players and to avoid undermining the incentive for firms to invest. Indeed, the Commission takes into account the technical risks and the vast investment associated with entering a new market and realises that a reasonably extended period of time is indispensable in order to give undertakings the chance to develop and reap the benefits of their investment.

Furthermore, the Proposed Authorisation Directive provides that there should be no limitation on the quantity of licences granted to use radio frequencies and numbers. However, it establishes an important exception to this rule: restriction of rights of use for radio frequencies will be possible where this is necessary to achieve a better frequency utilisation.⁴⁵ This restriction is not allowed in the area of numbers, in line with the Full Competition Directive which placed an obligation on Member States to make adequate numbers

⁴¹ Proposed Authorisation Directive, Article 5(3).

⁴² *ibid.*, Article 7(4).

⁴³ See the comments of the United Kingdom Government on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 15.

⁴⁴ Proposed Authorisation Directive, Article 5(2)(b).

⁴⁵ *ibid.*, Article 5(4).

available from 1 July 1997.⁴⁶

Article 7 of the Proposed Authorisation Directive imposes strict conditions regarding the limitation of rights of use for radio frequencies and establishes procedures which must be followed in order to ensure that the assignment process is transparent and non-discriminatory. In particular, when Member States are considering – due to spectrum scarcity – limiting the granting of rights of use for radio frequencies, they are required to give due account to the need to maximise benefits for users and to stimulate the development of innovation and competitiveness; give all interested parties a minimum period of 30 days to comment on the decision to limit before the NRAs doing so; publish a reasoned decision; review the situation at regular intervals or at the request of undertakings, and invite applications for rights of use on the basis of objective, non-discriminatory, detailed, transparent and proportionate selection criteria.⁴⁷

In line with the requirement for NRAs to review the frequency allocation regimes at regular intervals, the Proposed Authorisation Directive stipulates that, where the number of licenses is limited due to spectrum scarcity, Member States must review whether advances in technology can lead to an adjustment in the distribution of radio spectrum and, in particular, whether those developments can allow spectrum to be made available for further licences.⁴⁸ If so, Member States are required to publish their findings and invite applications for such rights. The aim of this provision is to enhance transparency and certainty for market players, since the Commission has not been informed by the Member States about any national reviews of current frequency allocation, nor whether advances in technology can allow spectrum to be made available for extra licences.⁴⁹ It is submitted that further transparency is achieved if the Commission states that NRAs' decisions to limit the granting of rights to use radio frequencies will have to follow the consultation mechanism outlined in Article 6 of the Proposed Framework Directive.

⁴⁶ Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 074/13. See the paragraph which was added to Article 3(b) of the 1990 Services Directive.

⁴⁷ Proposed Authorisation Directive, Article 7, paras 1 and 3.

⁴⁸ *ibid.*, Article 7(2).

⁴⁹ See for instance the Green Paper on Radio Spectrum Policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D (hereafter: the Green Paper on Radio Spectrum Policy), COM (1998) 569 final, 9 December 1998, at Annex II, p. II.

It should be stressed here that, where the granting of use for radio frequencies needs to be limited, the Commission introduces criteria which will play a predominant role and become the guideline for NRAs when they take decisions on spectrum allocation. According to the Commission's thinking, the selection criterion which must be given paramount weight is "the need to facilitate the development of competition and of innovative services".⁵⁰ Although none can argue against the significance of this criterion, it is disappointing that the Commission does not make any reference to the need to safeguard public interest objectives, especially since the Council has stated:

"The proliferation of wireless technology, digital television and other new communication services will continue making frequency spectrum a sought-after commodity ... Governments should take into consideration the needs of the broadcasting sector when allocating spectrum. It is in particular stressed that, because of the rapidly expanding mobile-communications industry, adequate space should be saved for the television industry given its contribution to political and cultural pluralism".⁵¹

It is obvious that the Council's recommendation implies that, when Member States decide that the granting of use for radio frequencies needs to be limited, priority should be given to public broadcasting. This stems from the fact that the role of public broadcasters is considered to be synonymous with the public service remit of providing universally accessible services, reflecting all needs, cultures and groups in the society, offering impartial information and sound education and preserving plurality of opinions. Hence, if priority is given to public broadcasting, then priorities should be also given to other services of equal – if not higher – social significance (e.g. health, national defence, public safety, air traffic control, and emergency services). Therefore, the Commission should have explicitly stated in the Proposed Authorisation Directive that Member States will have to take measures to ensure that adequate radio spectrum (and on an exclusive basis) is reserved for applications that safeguard public interest objectives. So, it seems that the objective of reaching a satisfactory balance between conflicting demands on the allocation of frequencies is a pseudo-dilemma. Indeed, this objective should refer

⁵⁰ Proposed Authorisation Directive, Article 7(3).

⁵¹ Council's Recommendation on Media Pluralism, January 19th 1999.

exclusively to the need to reconcile the commercial interests of market players from different sectors. Demand for public interest applications should be satisfied first. Only then should considerations similar to those set out in paragraph 3 of Article 7 – i.e. whether the services stimulate technological innovation and promote competition – play a predominant role in spectrum allocation decisions.

4.5. Information required under the general authorisation and for rights of use – Publication of information

It has already been stressed that the cumbersome licensing procedures applied in many Member States create barriers to market entry. One of those market entry barriers is the imposition of unreasonably onerous requirements, for instance requiring applicants to provide an excessive amount of information as a prior condition for market entry. This is why the Proposed Authorisation Directive limits the information that NRAs may request under the notification procedure of Article 3 to the minimum necessary,⁵² and stipulates that no information may be required prior to or as a condition for market access.⁵³ Moreover, it provides that the information required should be proportionate and objectively justified.⁵⁴ Thus it makes clear that it is not necessary to require systematic and regular verification of compliance with all conditions under the general authorisation or attached to rights of use. Such systematic verification of compliance may only be required for conditions 1 (financial contribution to the funding of universal service) and 2 (administrative charges) of Part A, for condition 6 (usage fees) of Part B, and for condition 5 (transfer of rights and conditions for such transfer) of Part C of the Annex.⁵⁵ In addition, it allows NRAs to collect information for comparative bidding procedures for frequencies, for publication of comparative overviews of quality and price of services for the benefit of consumers, and for clearly described statistical

⁵² Proposed Authorisation Directive, Article 3(3).

⁵³ *ibid.*, Article 11(1) sub-paragraph 2.

⁵⁴ *ibid.*, Article 11(1).

⁵⁵ *ibid.*, Article 11(1)(a).

purposes.⁵⁶ Finally, it provides that reasons and purposes will be given by the NRAs in order to justify their request for information.⁵⁷

However, the Proposed Authorisation Directive requires Member States to publish and keep up to date any information on rights, conditions, procedures, charges, fees and decisions regarding general authorisations, rights of use of radio frequencies and numbers, and rights of way.⁵⁸ Although it is understandable that the target of this provision is to enhance transparency by ensuring that market players, consumers and other interested parties have easy access to the aforementioned information, it makes no reference to any kind of protection of commercially confidential information. Indeed, undertakings would be reluctant to provide NRAs with important data when they know that NRAs will be required to publish such information and, consequently, competitors can get hold of their business secrets. This is particularly true with regard to Article 11(1)(d), according to which NRAs are allowed to collect information for comparative bidding procedures for frequencies, for publication of comparative overviews of quality and price of services. As Vodafone AirTouch has put it:

“Quality and price of services are two of the essential elements used by competitors to differentiate themselves in the marketplace. Most operators, in particular mobile operators, already have quality of service obligations forming part of their licences, breach of which can have serious consequences. The high churn rates in the mobile sector already demonstrate that end-users are aware of these factors. Vodafone AirTouch also questions the overall benefit of such publications in fast-moving, competitive and innovative markets, such as the mobile sector”.⁵⁹

In any case, even if Articles 11 and 15 do not refer to business secrets and commercially confidential information, a relevant provision should be included as a safeguard, in line with Article 5 of the Proposed Framework Directive.

⁵⁶ *ibid.*, Article 11(1)(c)(d)(e).

⁵⁷ *ibid.*, Article 11(2).

⁵⁸ *ibid.*, Article 15.

⁵⁹ Response of Vodafone AirTouch to the Working Documents of DG Information Society, May 2000, at pp. 14-15. See also the One 2 One's comments on the DG Information Society Working Documents, May 2000, at pp. 18-19; GSM Europe comments on the DG Information Society Working Documents, 19 May 2000, at p. 8.

4.6. Reducing fees and charges

It has been shown so far that one of the major targets of the Proposed Authorisation Directive is to simplify the procedures and conditions for authorisation of the existing national regimes. Moreover, it has already been observed that the regulatory workload involved in managing the burdensome licensing regimes has as a direct result the imposition of excessive administrative charges on operators. The target therefore is to reduce the administrative costs incurred by limiting the regulatory workload.

Predictably enough, NRAs put forward the view that such an approach could lead to under-financed, non-independent and ineffective national regulators. As the Oftel and DTI response to the Working Document on the authorisation of electronic communications networks and services of April 27 2000 put it,

“The scope of costs that can be recovered from operators needs to be expanded to cover all those associated with fulfilling the objectives placed on NRAs by the new regulatory framework, not just the management, control and enforcement of the general-authorisation scheme. Without this, NRAs will continue to face financial shortfalls for such activities as international representation and consumer-protection measures and so remain financially dependent of state budgets”.⁶⁰

Whereas the National Post and Telecom Agency in Sweden (PTS) states:

“It is of importance for an independent regulator that is not state-financed to also in the future be able to cover its cost from administrative charges in order to ensure its independence. It must therefore be made clear that the administrative costs are not strictly related to the authorisation process. The NRAs must be able to cover all costs, such as fees for participating in international organisations and groups, and other duties that fall on the authority. In other words, that it can perform all its duties under EC (e.g. costs

⁶⁰ DG Information Society Working Documents - An initial response from the United Kingdom from the Department of Trade and Industry, The Department of Culture, Media and Sport, the Office of Telecommunications and the Radiocommunications Agency, May 2000, at pp. 20-21.

incurred due to obligations according to the R&TTE Directive) and national law, implemented according to each Member State's constitution. The [Proposed Authorisation Directive] should allow for this".⁶¹

However, although the Commission recognises the need to finance the activities of the NRAs in managing and enforcing authorisation schemes and rights of use, it proposes that the administrative charges should be limited to the minimum necessary, i.e. covering only the actual administrative costs for these activities.⁶² This will contribute towards lighter national licensing regimes. Moreover, the target of increasing transparency is satisfied by requiring NRAs to publish annual overviews of the total sum of the charges collected and of the administrative costs incurred. In addition, the Proposed Authorisation Directive stipulates that an adjustment of charges has to be made in the following year if the total sum of the charges collected exceeded the expenditure of the NRAs.⁶³

It seems therefore that the aforementioned proposals can facilitate market entry and stimulate the development of competition. Further incentive to market entry is given by the provision that administrative charges should be distributed in proportion to the turnover on the relevant services of the undertakings concerned as calculated within the last accounting year.⁶⁴ In addition to that, small and medium-sized companies – i.e. undertakings with an annual turnover for the relevant services referred to in paragraph 1(b) which do not exceed EUR 10 million – are exempted from paying administrative charges.⁶⁵

As an exception to general authorisations, fees for the rights to use radio frequencies, numbers or rights of way can be imposed by the NRAs – in addition to administrative charges – in order to ensure the optimal use of such

⁶¹ Comments of the National Post and Telecom Agency in Sweden (PTS) on the DG Information Society Working Documents, May 2000, at p. 6.

⁶² Proposed Authorisation Directive, Article 12(1)(a).

⁶³ *ibid.*, Article 12(3).

⁶⁴ *ibid.*, Article 12(1)(b). For the opposite view, i.e. that fees should not be proportional to turnover, see: Response of the Norwegian Government to the DG Information Society Working Documents, 19 May 2000, at p. 7; comments of the Finnish Ministry of Transport and Communications on the DG Information Society Working Documents, May 2000, at p. 3; Royal KPN N.V. comments to the Working Documents of DG Information Society, May 2000, at p. 16; Ministry of Foreign Affairs, Japan, comments on the DG Information Society Working Documents, May 2000, at p. 1; Hellenic Telecommunications Organisation (OTE) comments on the Working Documents of DG Information Society, May 2000, at p. 3; Telecom Austria comments to the Working Documents of DG Information Society, May 2000, at pp. 8-9.

⁶⁵ Proposed Authorisation Directive, Article 12(2).

resources.⁶⁶ This discretion of NRAs to impose additional charges for the use of frequencies finds its application in the form of competitive biddings (auctions). It should be stressed that there are widespread concerns about the fact that auctions can result in excessive charges for the players involved and that these charges are passed on to the consumer.⁶⁷ The Commission's objective of ensuring the efficient use and allocation of radio frequencies cannot be achieved since the imposition of such high charges is driven by national budgetary thinking, i.e. a policy with the sole aim being to maximise revenue. Therefore, the provision that such fees must be objectively justified and respect the principles of non-discrimination, transparency, and proportionality cannot be considered as adequate safeguards in this case.

4.7. Modification of rights and obligations

The Proposed Authorisation Directive stipulates that Member States may need to amend rights, conditions, procedures, charges and fees relating to general authorisations and rights of use where this is objectively justified. However, in order to create the necessary transparency, Member States will have to respect the principle of proportionality and to give timely notice of their intention to proceed to such amendments so that interested parties will have adequate time – at least four weeks – to express their views.⁶⁸

Nevertheless, it is obvious that the way Article 14 is drafted gives Member States complete discretion to alter the rights, conditions, procedures, charges and fees concerning general authorisation and rights of use. This can potentially prevent appropriate checks from taking place, especially when a

⁶⁶ *ibid.*, Article 13.

⁶⁷ See for instance: Motorola's response to the EC Green Paper on Radio Spectrum Policy, 7 April 1999, at p. 3; Norwegian Administration's response to the questions in the Green Paper on Radio Spectrum Policy, April 1999, at p. 5; comments of the Telecommunications Administration Centre of Finland (TAC) on the Green Paper of Radio Spectrum Policy, 13 April 1999, at p. 8; response by the European Telecommunications Platform (ETP) to the Commission's Green Paper on Radio Spectrum Policy, 10 April 1999, at p. 13; European Public Telecommunications Network Operators' Association (ETNO) - Reflection Document on the EC Green Paper on Radio Spectrum Policy, April 1999, at p. 8; Telia's comments on the EC Green Paper on Radio Spectrum Policy, 15 April 1999, at pp. 8-9.

⁶⁸ Proposed Authorisation Directive, Article 14.

Member State decision on amendment of rights and obligations departs from the principles set out in the EU regulatory framework and thus raises serious doubts with regard to the compatibility of the decision with Community law. Therefore, Article 14 should explicitly state that the consultation and transparency mechanism set out in Article 6 of the Proposed Framework Directive should be followed prior to any amendments being imposed. This means that – apart from giving interested parties the chance to comment – the Member States’ decisions to amend rights, conditions, procedures, charges and fees relating to general authorisations and rights of use will have to be notified to the Commission and will be published in draft. Normally, these measures that Member States intend to take will go into effect one month from the date of receipt of the aforementioned notification by the Commission.⁶⁹ In addition, Member States will be required to publish their national consultation procedures;⁷⁰ when they communicate their draft measure to the Commission, they will have to state the reasons and the grounds on which the measure in question is based;⁷¹ and the Commission will be able, if necessary, to require Member States to amend or withdraw the draft measure in question.⁷²

Finally, Article 14 should make clear that Member States are required to ensure that a provider of electronic communications networks and services will have the right to appeal – at the end of the consultation process of Article 6 of the Proposed Framework Directive – against decisions by Member States to amend rights and obligations. Details regarding the appeal process and the nature of the appeal body can be found in Article 4 of the Proposed Framework Directive.

⁶⁹ Proposed Framework Directive, Article 6(4).

⁷⁰ *ibid.*, Article 6(1).

⁷¹ *ibid.*, Article 6(2).

⁷² *ibid.*, Article 6(4).

5. CONCLUSIONS

1. It has been confirmed by the vast majority of the comments received in the course of the public consultation that, in view of the emergence of convergence, common principles should apply to all communications infrastructure and associated services, irrespective of the types of services carried over them. In other words, networks should be governed by a single set of technologically neutral rules.⁷³ This objective of a horizontal approach to all infrastructure and associated services will certainly be achieved with the introduction of the Proposed Authorisation Directive, which states that it will apply “to all authorisations relating to the provision of electronic communications services and networks”.⁷⁴ Thus for instance, in relation to authorisation of transmission networks, there will be no discrimination between telecommunications networks and broadcasting networks.⁷⁵ However, it has already been illustrated and explained why, when Member States decide that the granting of use for radio frequencies needs to be limited, priority should be given to public broadcasting as well as to all those services and applications of high social significance which safeguard public interest objectives.

⁷³ DG Information Society Working Document, Subject: A common regulatory framework for electronic communications networks and services, 27 April 2000, Chapter I, at p. 5; Communication from the Commission, “The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework”, COM (2000) 239 final, 26.4.2000, at pp. 8 and 20; Communication from the Commission “Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review”, COM (1999) 539, 10 November 1999, at pp. 3 and 6; Commission Communication reporting on the Results of the Public Consultation on the Convergence Green Paper, COM (1999) 108 EN final, 10.3.1999, at pp. 2 and 9; Working Document of the Commission, summary of the results of the public consultation on the Convergence Green Paper, SEC (98) 1284, 29.7.1998, at p. 30.

⁷⁴ Proposed Authorisation Directive, Article 1(2).

⁷⁵ It should be remembered here that, according to the Proposed Framework Directive: “electronic communications network means 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;

2. In general, the Proposed Authorisation Directive will succeed in limiting to a great extent the large variations between the national licensing regimes. In particular, it will contribute towards light licensing regimes by abolishing individual licences and making all electronic communications networks and services subject to general authorisations, with specific rights of use being limited to the assignment of radio frequency and numbers only. Furthermore, the fact that administrative charges will be limited to the minimum necessary, i.e. covering only the actual administrative costs, will also play an important role in promoting lighter licensing regimes.

It will also simplify the licence application process by subjecting the providers of electronic communications networks and services to limited procedural requirements only. Thus no explicit decision and prior approval by the national regulatory authority can be required; a notification of the intention to enter the market suffices while the information which NRAs may request under the notification procedure must be kept to what is strictly necessary. In addition, a systematic and regular verification of compliance with conditions attached to authorisations will be needed only when this is objectively justified and will be limited to those conditions identified in the proposed Directive.

The aim of transparency is achieved by introducing a further limited and exhaustive list of the conditions which may be attached to the general authorisation for the provision of electronic communications services or networks and to the specific rights of use for radio frequencies and numbers. Moreover, the target to increase transparency is met by requiring NRAs to publish annual overviews of the total sum of the charges collected and of the administrative costs incurred.

Furthermore, it provides security for market players by setting up time limits and other procedural demands (such as those laid down in Articles 5, 7, and 10) in order to prevent NRAs from treating undertakings in a discriminatory way and to ensure that no excessive delays are introduced on account of bureaucratic procedures.

However, as already illustrated, some provisions can lead to excessive

electronic communications service means 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". See the Proposed

regulatory intervention and thus to legal uncertainty for market players. In particular, Article 7 allows NRAs to limit the granting of rights to use radio frequencies. Article 10 allows NRAs to adopt interim measures immediately – even when as a result of those measures undertakings are deprived of their rights to operate – when there is an urgent need to act in order to prevent a serious threat to public safety, security or health. Article 14 also gives NRAs complete discretion to alter the rights, conditions, procedures, charges and fees concerning general authorisation and rights of use.

Therefore, the Commission has to state explicitly that the aforementioned provisions will have to follow the consultation and transparency mechanism set out in Article 6 of the Proposed Framework Directive. This means that the Commission will require NRAs to amend or withdraw any draft measures which are not in accordance with Community law and in particular the provisions of Article 7 of the Proposed Framework Directive;⁷⁶ and, if NRAs have adopted measures on the grounds of exceptional circumstances (such as those referred to in Article 10(4) of the Proposed Authorisation Directive), they will immediately communicate them, alongside the full reasoning on which those measures were taken, to the Commission and the other national regulatory authorities. If the Commission cannot consider those measures to be justified and compatible with the provisions of Article 7 of the Proposed Framework Directive, it will require the NRAs in question to amend or abolish them.⁷⁷

This will provide not only the necessary legal certainty but will also ensure the same interpretation across Member States of the principles and objectives which underlie the EU communications regime, something which will prevent the fragmentation of the internal market.

It is submitted that, if the Commission can monitor effectively the implementation and enforcement of this Directive, the cumbersome national licensing regimes will become things of the past. This in turn will strengthen the internal market, facilitate market entry, stimulate competition, and encourage further investment and commercial initiative in the telecommunications and multimedia sectors.

Framework Directive, at Article 2.

⁷⁶ Proposed Framework Directive, Article 6(4).

⁷⁷ *ibid.*, Article 6(5) sub-paragraphs 2 and 3.

GENERAL CONCLUSIONS OF PART IV

Part IV of this thesis examined the **fourth phase** of the transition from a regime of a State-run monopoly to an effectively competitive market. As already illustrated, the role of this fourth phase is to secure that the new EU electronic communications regime can work satisfactorily in the converging environment by being flexible enough and capable of coping with rapid market developments.

Part IV concluded that the new regulatory framework is in line with the main policy objectives of achieving legal certainty, flexibility, continuity, and transparency. In particular, it was shown that the decision to construct the definition of 'significant market power' along the lines of the competition law concept of dominant position is crucial in the attempt to render the new regulatory framework sufficiently flexible to allow the development towards the new communications markets. Moreover, it was illustrated that the new technology-neutral regime is based on market concepts, as opposed to the current ONP framework which is based on a technology-determined approach. Furthermore, the importance of the application of the principle of proportionality has been highlighted, especially given the Commission's determination that the degree of regulatory intervention must be proportionate to the level of competition in the market. In addition, it was shown that the target of disengaging from detailed regulation can be achieved with the increasing use of complementary non-binding regulatory measures (soft-law), something which can play an important role in achieving the desired flexibility in these dynamic and fast-moving markets.

It is submitted that the structure of the new regulatory framework is the appropriate one in order to enable effective competition to emerge. More importantly, when effective competition is finally present in the communications sector, regulators will be in a position to sustain competition in the market without having to significantly alter the structure of the regime. Indeed, where competition is self-sustaining, they will simply use the mechanisms provided by the new framework in order to ensure the gradual phasing-out of sector-specific regulation and rely on the application of competition law which can

effectively handle the issues appearing in the converging markets. As a result, regulation will be decreasingly used as effective competition develops and the national regulatory authorities will have the ability to cope with changes in market structure over time. This in turn will strengthen the internal market, stimulate further competition, allow a more sound basis for long term planning in the industry and set the environment for massive investment and commercial initiative in the European electronic communications sector.

CONCLUSIONS

The introduction of real competition implies much more than the translation into national law of Directives abolishing legal monopolies in the Member States. Full liberalisation would be meaningless without the vigorous enforcement of the rules of competition. Alongside the measures taken by the national regulatory authorities, therefore, the application of competition law comes to the forefront in order to ensure that, once removed, the legal barriers will not be replaced by new anti-competitive market structures and de facto monopolies.

This thesis has focused on specific abusive behaviour of the incumbents aimed at preserving their position against newcomers, and examined how competition law can deal with such cases. In particular, it discussed the jurisprudence of the ECJ and the European Commission's cases involving cases of refusal to supply and essential facilities, and attempted to define to what extent Article 82 (ex 86) of the Treaty is applicable to the control of bottlenecks.

It showed that the introduction of the essential facilities doctrine is particularly important in the run-up to the complete liberalisation of the telecommunications sector. It also highlighted how the doctrine demonstrates the Commission's concern to prevent national operators from gaining a competitive advantage over new market entrants. Yet the Commission's efforts to fight the abusive behaviour of the incumbents against newcomers and to ensure that market foreclosure is avoided would serve little purpose if an uncritical and over-interventionist approach was chosen. Indeed, the Commission recognises that an over-liberal application of the essential facilities doctrine could undermine the incentive to invest in alternative infrastructure. The 1998 Access Notice reflects the Commission's approach in balancing these two important considerations and so it attempts to take a step towards the creation of a legal environment that will facilitate entry and promote technical innovation while, at the same time, ensuring that the incentive to invest in alternative networks is not affected.

In addition, this thesis examined the Commission's policy on strategic horizontal alliances between several telecommunications operators, which hold strong positions in their respective domestic markets. It was shown that the Commission assumed a positive attitude and rewarded those strategic

alliances whose parents prefer to adapt to the new environment in order to respond to the requirements of multinational enterprises rather than trying to protect themselves artificially against outside competition. The Commission has recognised that certain restrictions on competition between the parent companies can be justified under certain circumstances. However, the Commission has also made it clear that those restrictions on competition must be kept to a minimum in order to ensure that the clearing of the strategic alliances will not lead to re-monopolised market structures. To address the aforementioned concerns, the Commission has taken from the parent companies a number of necessary undertakings as a pre-condition to let the deals go through. It was shown that, especially when the strategic alliances involve incumbents, the liberalisation of home markets is an indispensable criterion by which the restrictions on competition are made acceptable. This shows the link between competition cases and implementation of the liberalisation timetable and illustrates how the Commission can impose conditions, not only on governments, but also on the parties to the agreement, in the form of non-discriminatory treatment of their competitors regarding access to the network.

This thesis also attempted to analyse EU competition policy on the strategic alliances and mergers which are spurred on by the accelerating change of markets with the convergence of the telecommunications, media and information technology sectors. Indeed, EU competition policy – after its success in liberalising the telecommunications markets and after dealing with those alliances with a more horizontal nature – had a new challenge to confront: potential anti-competitive behaviour generated by this rapid change, and the new possibilities for vertical integration between market players who try to occupy the key bottleneck positions and control market developments.

The Commission has shown that it seeks to achieve the balance between risks and benefits in its application of EU competition rules. Thus it takes a positive attitude to the creation of strategic alliances which promote technical innovation, offer new products and services and, therefore, contribute to the development of multimedia markets. At the same time, the Commission's target is to maintain open and competitive market structures in the untested multi-media markets. This can be achieved by preventing the gatekeepers from further strengthening their positions (or forming new super-monopolies) or preventing dominant telecommunications operators from moving into related

fields such as Internet or digital television. Otherwise, market foreclosure can hinder innovation, hold back market development and have an enormous impact on the future competitive structures of the EU communications sector.

The thesis has shown that the current ONP regime cannot work satisfactorily in the future converging environment. There are two main reasons: (1) the inability of the regime to address the issues from a wider point of view (and not just from a strict telecommunications one); and (2) because the regime has become obsolete, since the emergence of new converged services requires a technology-neutral regulation which is based on market concepts and not one like the current ONP framework, which is based on a technology-determined approach. The regulatory framework in its current form is not flexible enough and thus not capable of predicting and coping with rapid market developments.

So the acceptance that the current ONP framework is not sufficient to address the issues of a fully converged market – especially the access issues – raises the question of whether competition law alone can be an effective instrument for the realisation of that target.

From a market perspective, sole reliance on competition law would be sufficient if effective competition was introduced and established in the distinguishable markets and then in the converged environment. It was confirmed, however, that the telecommunications sector – and especially the local access market – is not being exposed to competitive forces since the incumbents control almost all local access by virtue of their monopoly background. Thus it was established that sole reliance on competition law during an intermediate stage can neither encourage market entry, nor ensure efficient and non-discriminatory access to networks and, therefore, cannot promote the development of open and competitive markets. Moving directly to the application of competition rules alone could lead to new forms of integrated dominance and to new multimedia market monopolies. Therefore, since the market is still developing, adequate regulatory safeguards are required in order to promote and establish effective competition.

Beyond the market perspective, it was established that a series of social objectives cannot be ensured by means of only competition law. It was submitted that the justification for regulatory intervention is associated with a social policy aim involving issues such as the need for universal access to networks – achieved through universal service obligations. Regulation is also required in order to meet public interest objectives such as media plurality and

diversity, taste and decency, impartial information, dissemination of culture and languages, education, and the need to protect consumers, especially minors, from 'inappropriate' material – i.e. positive and negative obligations within the audiovisual sector which are usually linked with public service broadcasting.

From the above points, it was concluded that sector-specific regulation will continue to be necessary. The role of economic regulation in particular will be to provide the temporary measures in order to guarantee equal and fair conditions to all market players until the converged market has matured. Then, its role will also be associated with the social policy aim of securing certain public interest objectives.

Thus, at this transitional stage of development, sector-specific regulation should be divided into two different regulations (economic and social) and, accordingly, specific rules should focus on two general areas:

- rules to provide temporary measures in order to prevent market failures from restricting or distorting competition. These rules will have to mimic the effect of competition and address issues such as access to networks and interconnection, access to digital gateways, standards and interoperability, pricing, and the establishment of objective licensing criteria for ensuring an equitable distribution of limited resources (like frequencies and numbering);
- rules to ensure public interest objectives (including the universal service obligation in the telecommunications industry and the public service mission conferred on public broadcasters) and rules of content.

The reality of technological convergence strengthened the view which supported the change from a sectoral organisation of regulation towards a more horizontal approach. The first important step towards horizontal regulation was the decision to separate the regulation of content provision from that of service provision and infrastructure for all three sectors of the convergence.

The agreement on the separation of infrastructure and content regulation resulted in the acceptance of the notion that similar regulatory conditions should apply to all network infrastructure and associated services, irrespective of the types of services carried over them. In other words, networks should be governed by a single set of technology-neutral rules.

It was submitted that the shift towards the horizontal regulation of networks should not change the nature of the services which are carried through this

infrastructure. In other words, services must be regulated independently of the form of distribution. Regulation will have to reflect the distinctive nature and characteristics of a given service.

Based on the general agreement that a single set of technologically neutral regulatory rules should apply to all transport network infrastructure irrespective of the types of services carried over them, and on the fact that the regulatory regime for ensuring access in the telecommunications sector is far more mature and comprehensive than in the neighbouring sectors, the application of ONP-type open provision rules seems the most reasonable, practical and efficient approach. It was concluded, therefore, that for a number of years – and until effective infrastructure competition has finally become established – the regulatory model of infrastructure in the converging environment should resort to the existing European regulation, namely the ONP regime and interconnection regulation of the telecommunications sector.

As a consequence, the scope of the new infrastructure ONP style regulatory regime will become broader. It will not be confined to the telecommunications sector but will apply to all forms of cable- and radio-based infrastructure (including cable TV and broadcast infrastructure, Internet etc.), and to any operator with significant market power across sectors. In addition, it will cover issues such as access agreements between private networks and service providers and it will not distinguish between fixed-network and mobile communications network/services.

The crucial point is that this expansion of ONP telecommunications rules to the other sectors contradicts the Commission's stated target for dis-engaging from detailed regulatory intervention. Therefore it becomes obvious that, in order to pursue the goal of a light regulatory approach, convergence enforces reconsideration of the present regulatory regime's basic principles and tools. So a large majority of the prescriptive regulations currently in place will need to be replaced by a harmonised framework of very light and general principles and overall targets which can identify and monitor barriers to competition within a converging market and can ensure equal and fair conditions for market players.

These specific regulatory rules are incorporated into the current EU Communications Reform Package which includes five harmonisation Directives, namely a Framework Directive and four specific Directives on access and interconnection, authorisation, universal services and user rights,

and data protection in telecommunications services. In addition, it comprises a Regulation on the unbundling of the local loop, a Decision on Community radio spectrum policy, and a draft consolidated and simplified Liberalisation Directive.

This thesis has attempted to assess whether the Commission's proposal to simplify the current regulatory regime goes beyond merely reducing the number of Directives. It has identified the Commission's decision to construct the definition of 'significant market power' along the lines of the competition law concept of dominant position as central in its attempt to render the forthcoming regulatory framework sufficiently flexible to allow the development towards the new multi-media markets.

Taking account of the transitional nature of the sector-specific measures and of the overall objective that regulation should be kept to the minimum where competition is self-sustaining, it was noted that it is necessary to develop mechanisms to ensure the gradual phasing-out of sector-specific regulation. It was submitted that the principle of "forbearance" and an increasing use of complementary non-binding regulatory measures could play a significant role in order to dis-engage from detailed regulation and achieve the desired flexibility in the new dynamic and fast-moving markets. It was also concluded that the Commission's proposals (the comments and suggestions received) can contribute towards a new regime characterised by transparency, legal certainty and predictability. This in turn will provide the right climate to encourage further investment and commercial initiative in the telecommunications and multimedia sectors. The final conclusion of this thesis is that the Commission's latest reform package looks pragmatic and, therefore, likely to be successful. It will, however, be judged ultimately by results.

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- *C.L.S.R.* – Computer Law & Security Report
- *C.M.L. Rev.* – Common Market Law Review
- *C.T.L.R.* – Computer and Telecommunications Law Review
- *EC C.P.N.* – European Commission Competition Policy Newsletter
- *E.C.L.R.* – European Competition Law Review
- *Eur. Access* – European Access
- *Eur. Counsel* – European Counsel
- *G.C.R.* – Global Competition Review
- *I.B.L.* – International Business Lawyer
- *I.J.C.L.P.* – International Journal of Communications Law and Policy
- *IT L.T.* – IT Law Today
- *U.L.R.* – Utilities Law Review
- *W. Comp.* – World Competition

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