

# EU Competition Law in the Telecommunications, Media and Information Technology Sectors

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## I INTRODUCTION

1. The application of EU Competition Law to the telecommunications, media and information technology sectors must be seen in the general context of the rapid evolution of markets and therefore policies in this area. The competitive behaviour of companies is largely conditioned by the positioning of companies in reaction to the rapid change of markets and regulatory conditions. Potential anti-competitive behaviour generated by this rapid change poses new challenges for EU competition policy. At the same time, the required adjustment of the competitive framework and in particular the role played by EU competition rules in the lifting of the remaining monopoly conditions are giving a new dimension to EU competition policy in the sectors concerned.
2. It is this combination of the two dimensions of EU competition policy - the key role in creating a competitive framework and promotion of pro-competitive market structures on the one hand, and ensuring competitive behaviour of economic actors on the other - which has initiated a new phase in the application of EU competition policy to this sector and which is testing some current EU competition policy concepts in a number of aspects. These developments go far

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beyond the traditional role played by EU competition rules across the telecommunications, media and information technology sectors. With the convergence of telecommunications, media and information technologies, the markets in this area have begun to move rapidly on both sides of the Atlantic and actors are now positioning themselves to take advantage of the new opportunities . EU Competition Commissioner Karel van Miert has made it clear that the European Commission will take up the challenge for EU competition law which these developments imply.

It is in the field of telecommunications and in the new convergent - and overlapping - fields of communications and media that these trends have developed furthest. The Paper will therefore concentrate on those recent developments which are determining the dynamics of the application of competition law to these areas.

## **II BACKGROUND**

3. The overarching EU framework for the combination of telecommunications, media and information technology is now provided by the Information Society concept. The current application of EU competition policy to this sector cannot be understood without reference to this concept which, since the Delors White Paper on Growth, Competitiveness, and Employment<sup>2</sup> and the Bangemann Report<sup>3</sup> of last year, has become one of the central lines of EU Policy<sup>4</sup>.

On the one hand, the general framework of this concept requires new legal measures of a general nature for the sectors in question, to which some reference will be made later ; on the other hand it determines the priorities for the application of EU competition law to the sector, to the extent that the Commission has a measure of discretion under competition law in initiating action.

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<sup>2</sup> European Commission - Growth, Competitiveness, Employment - the Challenges and ways forward into the 21st Century, White Paper, COM(93)700, 5 December 1993.

<sup>3</sup> Europe and the Global Information Society, Report of the High Level Group on the Information Society, Brussels, May 1994 (the "Bangemann Report").

<sup>4</sup> See Comm'n, XXIV Report on Competition Policy, COM(95)142, p.2 (1995).

4. The information sector today represents some 450 bn ECUs (nearly 600 bn US\$) in the European Union alone. Some estimates forecast that worldwide it will represent a 3 trillion dollar market by the end of the decade. The conglomerate sector of information is being shaped by the convergence of the telecommunications sector, information technology and software and the “content industries” of television / broadcasting and publishing. All of these markets are subject to radical movement, in the European Union as in the United States.
5. According to EU estimates, by the year 2000 more than 60% of all jobs in the European Union will be strongly information-based and therefore closely linked to communications. Some implications of the potential for growth over the next few years may be gathered by comparing the EU’s current situation with that of the United States; for example, in the United States some 35% of private households are now equipped with computers, whereas in the EU, the figure is still around 10% (although it is increasing rapidly).

The mobile communications markets tells a similar story. In the United States, the ratio of new mobile connections to fixed telecommunications network connections is now around 1 to 2. In some European countries, mobile take up has already exceeded the role of fixed-wire networks. 60 % of private households in the United States are linked by TV-cable networks in a process which has started in the 1960s. In Europe, we have achieved similar cable density in a number of countries, and nearly 100% density in others (such as the Benelux countries), yet four EU Member States still hardly have a cable network. Again, this only emphasizes the massive potential for growth in Europe.

6. A wave of mega mergers and joint ventures is taking place in Europe just as in the United States, spurred on by three main developments:
  - personal communications - developing hybrid network solutions for the alliance of fixed and mobile telecommunications networks, the phone networks of the future;
  - multi-media - concerning the vertical integration of content producers and various distributors and carriers, and also a horizontal convergence between the telecommunications, cable and computer networks. This includes publishers and software producers moving into new fields such as online services. The dramatic moves in this area during recent months and weeks are on everybody’s mind;

- and globalisation - the new global partnerships such as BT/MCI, Worldpartners/AT&T, Deutsche Telekom/France Telecom/Sprint are defining alliances on a new global scale, as do the new global satellite ventures.
7. These radical developments imply a transformation of the core of our economies comparable only to the industrial revolution which shaped the nineteenth Century. It may well lead to similar shifts of global economic and market conditions, but it is also likely to do so much more rapidly and dramatically, achieving a significant transformation within a time-frame of perhaps as little as 10 years. The new information revolution has the potential to cut substantially deeper and faster than any previous transformation of our economies and markets during this century.
8. General consciousness of this rapid transformation has been promoted by Vice President Al Gore's initiatives - the information superhighway, more traditionally called the NII and GII - the National and Global Information Infrastructure<sup>5</sup>.

Since then, awareness rapidly spread world-wide<sup>6</sup>. The development climaxed in the special G7 Ministerial meeting in Brussels in February 1995 which gave recognition to the concept of the global Information Highway. A growing general awareness and rapid growth of global phenomena such as Internet have done the rest.

9. In Europe, the Bangemann Report and the consequent European Action Plan in July of last year<sup>7</sup> has set down the framework for action in the context of the information society. The Action Plan can be summarized as follows:

- Recognition of priority for private initiative and market mechanisms as the guiding principles for the transformation. In concrete terms, the Action Plan gave in particular a high priority to

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<sup>5</sup> See The National Information Structure - Agenda for Action, US Department of Commerce, Washington D.C. (1993).

<sup>6</sup> As regards Japan, see MPT Telecommunications Council, Reforms towards the Intellectual Creative Society of the 21st Century, Tokyo (May 1994).  
As regards Canada, The Canadian Information Highway, Ottawa (April 1994).

<sup>7</sup> European Commission, Europe's way to the Information Society - An Action Plan, COM(94)347 (1994)

the accelerated liberalisation of telecommunications as a core area of the information society, and therefore the application of EU competition law was given a central role to ensure that this liberalisation was speedy and effective.

- Creation of the necessary broader framework for developing the future information world, concerning in particular issues such as data security, privacy and data protection, intellectual property rights, and open access to media.
- Acceleration of public programmes in the interface between the public and private sector. This concerns in particular education and distance learning, distance work, traffic management, environment protection and related systems, and other areas of public / private concerns.
- Focus on discussion and investigating the social consequences of the new technologies.

10. At the EU level, the main consequences of this drive during the last few months have been a substantial acceleration of the liberalisation programme for the telecommunications sector towards full scale voice telephony and public network liberalisation by 1<sup>st</sup> January 1998 and a substantial increase in attention to media issues. This has meant stepping up the application of EU competition law to the sector - in particular in the field of liberalisation of telecommunications networks - and this will be examined more below. It has also meant accelerating measures for defining the broader future information environment. As planned, a Green Paper on Copyright<sup>8</sup> was published and the EU Broadcasting Directive TV without frontiers was reviewed<sup>9</sup>. These issues will be revisited below.

A number of programmes were adopted in fields such as Trans-European Networks, and the promotion of media programming and of advanced multi-media applications<sup>10</sup>. At the same

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<sup>8</sup> European Commission, Green Paper on Copyright and related rights in the Information Society, COM(15)382 (1995).

See also European Commission Press Release : Green Paper on copyright and related rights in the Information Society, (IP/95/798).

<sup>9</sup> See below, point 25.

<sup>10</sup> European Commission, Communication on a methodology for the implementation of Information Society applications and proposed Decision on a series of guidelines for trans-European telecommunications networks, COM(95)224, 31.5.1995.

time, a number of EU programmes in the field of Research & Development have been stepped up<sup>11</sup> for the sector. A number of fora for discussing the social aspects were also created<sup>12</sup>.

11. The clearest general expression of the evolving regulatory framework, against which a future-oriented application of competition law in the sector must be set, is given by the principles spelt out by the Brussels G7 Ministerial meeting on the Information Society<sup>13</sup>. Eight core principles were set forth for the global information society :

- promoting dynamic competition ;
  - encouraging private investment ;
  - defining an adaptable regulatory framework ;
  - providing open access to networks ;
- while
- ensuring universal provision of open access to services ;
  - promoting equality of opportunity to the citizen ;
  - promoting diversity of content, including cultural and linguistic diversity ;
  - recognizing the necessity of world-wide cooperation with particular attention to less developed countries.

The conclusions go on :

(..continued)

See also European Commission Press Releases : Media II: More Resources devoted to the Audiovisual Industry (IP/95/114) ; Info 2000 - programme proposal stimulating multimedia information content for business, administrations and citizens in the European Information Society (IP/95/722).

<sup>11</sup> See European Commission Press Release, Green light for first projects in the new ACTS, ESPRIT and Telematics Applications Programmes : EU funding helps speed the transition to the Information Society (IP/95/850).

<sup>12</sup> See European Commission Press Release : Information Society Forum : Inaugural meeting sets up working groups, starts discussing social, societal, and cultural issues (IP/95/757).

<sup>13</sup> Conclusions of G7 Summit "Information Society Conference", European Commission, Doc. 95/95/2 (1995).

“These principles will apply to the global information infrastructure by means of :

- promotion of interconnectivity and interoperability ;
- developing global markets for networks, services, and applications ;
- ensuring privacy and data security ;
- protecting intellectual property rights ;
- cooperating in R&D and the development of new applications ;
- monitoring of the social and societal implications of information society.”

These general principles show essentials of the future framework :

- a growing role for the competition rules on the one hand
- at the same time, the maintenance and build up of public interest legislation, particularly concerning media issues, and therefore the increased requirement to set competition rules in relationship to the general legislation safeguarding interests such as universal service, privacy, and copyright and media pluralism.

12. We are therefore likely to see a steep rise in the importance of competition law to the sector on the one hand, due to deregulation and the dynamics of convergence and globalisation ; while, on the other hand, there will have to be continued and increasing attention paid to general legislation. This legislation will be generated by the concern to safeguard public service goals in the telecommunications sector during the transition to deregulated markets ; another major concern will be the increasingly sensitive issues, such as the safeguarding of cultural and linguistic diversity, raised in the media sector, with a transformation of the system of media regulation in Europe becoming inevitable with digitization and the resulting multiplication of television channels, as well as the convergence of traditional media, publishing and communications in a multimedia context.
13. In practical terms, this means that application of competition rules in the sector will have to be considered carefully with regard to general telecommunications and media policies at both State and EU level, with a delicate balance to be struck between competition authorities and sector oriented media and telecommunications authorities and with a weighting between the three varying according to national situations, particularly in the field of media legislation. Before analysing in some more detail application of EU competition law to leading cases and State measures during the recent months, it is therefore necessary to briefly review the general development of EU telecommunications and media policy.

### III EU TELECOMMUNICATIONS POLICY

14. Although telecommunications policy has now developed into a major EU policy, it is a relatively recent phenomenon. It was not until 1983 that the European Union first published policy concepts for the sector. A first telecommunications action programme was put forward by the European Commission in 1984<sup>14</sup>.
15. Subsequently, EU telecommunications policy developed rapidly, mainly as a consequence of three factors :

- the growing digitisation of the European telecommunications networks which was beginning to transform telecommunications networks into multi-purpose information infrastructures. The opportunities offered by telecommunications networks and services started to extend into markets far beyond the traditional telephone service for which the allocation of exclusive and special rights to the traditional telephone monopolies - at the time called PTTs - had been intended. As a result, the traditional monopoly concepts in the telecommunications sector started to be questioned in most EU Member States, and there was a growing conviction that without a loosening of monopoly rights in this traditionally highly regulated sector, it could neither be assured that new markets could be developed, nor that the new technologies and service offerings could be incorporated sufficiently rapidly<sup>15</sup>.
- In *British Telecommunications*<sup>16</sup>, the Court of Justice confirmed that EU competition rules applied to the sector. This is referred to in more detail later.

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<sup>14</sup> European Commission, Progress Report on the thinking and work done in the field of telecommunications and initial proposals for an action programme, COM(84)277(1984).

<sup>15</sup> The 1987 Telecommunications Green Paper (see below) stated that "telecommunications took 140 years to develop from a single service to a dozen services in the early eighties. The new technological capabilities will now lead to explosive growth and multiplication of services and applications within a single decade".

<sup>16</sup> *British Telecommunications*, OJ L 360/36 (1983), on appeal in *Italy v Comm'n*, Case 41/83 1985 ECR 873 (C.J.).



- The impact of the AT&T divestiture agreement and the resulting transformation of the US market began to be felt in Europe. At the same time, progressive deregulation of the sector and the privatisation of BT in the United Kingdom since 1982 had made Europe more receptive to the concept of market deregulation. The combination of these factors resulted in the issuing by the Commission of the 1987 Telecommunications Green Paper which set for the first time a comprehensive policy framework for EU action in the telecommunications sector<sup>17</sup>

16. The main changes envisaged by the Green Paper were the following :

- Full liberalisation of equipment and progressive introduction of competition for services with the exception of public voice telephony. As we will see later, EU competition law played an essential role in this area.
- Separation of regulation and operations. This progressively led in all Member States to profound organisational reform, resulting in the first stage in a transformation of State bodies into normal companies of the traditional PTTs (now referred to as TOs - Telecommunications Organisations), and in the second stage in privatisation, now under way in most EU-Member States<sup>18</sup>.

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<sup>17</sup> European Commission, Towards a Dynamic European Economy - Green Paper on the Development of a Common Market for Telecommunications Services and Equipment, COM(87)290 (1987).

For a comprehensive review of developments up to the issuing of the Green Paper and the Green Paper's policy concepts, see H. Ungerer, Telecommunications in Europe - Free choice for the user in Europe's 1992 market, the European Perspectives' Series, Office for Official Publications of the European Communities, Luxembourg, 1990, ISBN 92-826-1640-1.

<sup>18</sup> The privatisation of Deutsche Telekom during the first half of next year will be the largest transaction ever to have taken place on the German stock market. Besides the privatisation of British Telecom (BT) (completed in 1992), privatisations have taken place or are under way in the Netherlands, Denmark, Portugal, Sweden, Finland, Spain, Italy, Greece, Belgium, Ireland.

- Harmonisation of EU-telecommunications regulations, in particular regarding access conditions (the “Open Network Provision” concept<sup>19</sup>) as well as attachment conditions of terminal equipment to the telecommunications networks and procurement procedures of equipment for such networks<sup>20</sup>

17. In a further stage, the Commission issued Green Papers to extend the principles of the Telecommunications Green Paper to satellite communications<sup>21</sup> and mobile communications<sup>22</sup>.
18. Finally, a Review<sup>23</sup> carried out in 1992 led to agreement on full liberalisation of the EU telecommunications market, including public voice telephony and telecommunications network infrastructure / facilities which had been set aside by the 1987 Telecommunications Green Paper.

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<sup>19</sup> See in particular Council Directive 90/387/EEC on the Establishment of the Internal Market for Telecommunications Services through the Implementation of Open Network Provision, OJ L 192/1 (1990).

<sup>20</sup> See in particular Council Directive 91/263/EEC on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, OJ L 128/1 (1991)

Council Directive 90/531/EEC on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors OJ L 297/1 (1990).

Those measures have been subsequently amended in a number of aspects. The Commission issues regularly an up-to-date compendium of EU legislation in the telecommunications sector ("European Commission, Official Documents, Community Telecommunications Policy").

<sup>21</sup> European Commission, 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 (1990).

<sup>22</sup> European Commission, Towards the Personal Communications Environment - Green Paper on a Common Approach in the Field of Mobile and Personal Communications in the European Community, COM(94)150 (1994).

<sup>23</sup> European Commission, 1992 Review of the situation in the telecommunications services sector, SEC(92)1048 (1992);  
Communication to the Council and the European Parliament on the Consultation on the Review of the situation in the telecommunications services sector, COM(93)159 (1993).

This Review led to agreement by the EU Council of Ministers to :

- Full liberalisation of public telephone services by 1 January 1998<sup>24</sup> ;
  - Publication of a Green Paper on Network Infrastructure Liberalisation ;
  - Adjustment of the ONP framework and the establishment of a regulatory framework for interconnection of services and networks.
19. The two parts of the Infrastructure Green Paper<sup>25</sup> were published in November 1994 and January 1995, and led to the inclusion of the liberalisation of Telecommunications Network Infrastructure into the 1 January 1998 schedule.

At the end of April 1995, the Commission concluded the consultations. It submitted the outline of the reform package for the future regulatory framework of a fully liberalised EU telecommunications market in its Communication on the results on the consultation<sup>26</sup>. The Communication includes the detailed timetable for planned measures.

20. The main components of this package are :

- establishing the dates for lifting all remaining exclusive and special rights for both public voice telephony and network competition in a binding form by Article 90 measures under EU Competition Law ;
- ensuring the financing of universal service and clarifying interconnection of access conditions, via further development of the ONP framework ;
- further development of the regulatory framework at national and European level, including discussion of future interaction of national and EU-regulation in this sector.

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<sup>24</sup> An additional transitional period of five years was granted to Greece, Ireland, Portugal and Spain; Luxembourg was granted two years.

<sup>25</sup> European Commission, Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks Part I, COM(94)440 (1994), and Part II COM(94)682 (1995).

<sup>26</sup> European Commission, Communication on the consultation on the Green Paper on the liberalisation of Telecommunications Infrastructure and Cable Television Networks, COM(95)158 (1995).

The Council of Ministers confirmed the results of the Green Paper consultation at a meeting on 13<sup>th</sup> June 1995. Major parts of the reform package were adopted by the Commission on 19<sup>th</sup> July, the rest of the package is due before 1<sup>st</sup> January 1996<sup>27</sup>.

21. The application of EU competition law, and in particular Article 90, plays a central role in the reform of the fundamental regulatory conditions foreseen up to the full deregulation by 1998.

This will be discussed in detail later

At this point, two comments should be made :

- First, the development of the policy framework was from the start based on comprehensive Green Papers, published by the European Commission , setting forth the proposed overall concept and leading to broad consultations and subsequent adoption by resolutions of the EU Council of Ministers and the European Parliament. These Resolutions set a framework with regard to the general competitive conditions sought<sup>28</sup>.  
The telecommunications sector was - with the exception of the television sector, see below - the first sector where this method of proposing comprehensive policy

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<sup>27</sup> See European Commission Press Release : Commission confirms measures ensuring full competition in telecoms by 1998 ( IP/95/765).

The package of measures comprised :

- . Draft Commission Directive amending Commission Directive 90/388/EEC regarding the Implementation of Full Competition in Telecommunications Markets. This will be revisited in detail below ;
- . Proposal for an EP and Council Directive on Interconnection in Telecommunications - ensuring Universal Service and Interoperability through Application of the Principles of Open Network Provision (ONP), (COM(95)379).

<sup>28</sup> See in particular:

- Council Resolution of 22nd July 1993 on the Review of the situation in the telecommunications sector and the need for further development in that market OJ C 213/1 (1993).
- Council Resolution of 22nd December 1994 on the principles and timetable for the liberalisation of telecommunications infrastructures, OJ C 379/4 (1994).
- Council Resolution of 18th September 1995 on the Implementation of the future Regulatory Framework for Telecommunications. Not yet reported..

blueprints and broad consultation was extensively used. Subsequent to the problems encountered by the European Union during the ratification of the Maastricht Treaty<sup>29</sup>, the European Commission has emphasized transparency of policy formulation and broad consultation, and this method is now widely used in other areas of EU policy<sup>30</sup>;

- Secondly, in the course of implementing the policy concepts, application of European competition law under Art. 90 gained primary importance from the beginning, with the adoptions of the Telecommunications Terminal Directive in 1988<sup>31</sup>. In December 1989, a basic policy compromise defined the respective role of Art. 90 measures and harmonisation (i.e. internal market legislation based on Art. 100a<sup>32</sup> of the EU Treaty). The compromise which was reached between the Commission and the Member States on the occasion of the adoption of the Telecommunications Services Directive<sup>33</sup> and the ONP Framework Directive<sup>34</sup> established the principle of a complementary role of liberalisation under Art. 90, EU Competition Law, and harmonisation under Art. 100a<sup>35</sup>.

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<sup>29</sup> Treaty on European Union.

<sup>30</sup> See, for example, the planned Green Paper on vertical constraints under EU Competition Law.

<sup>31</sup> See below.

<sup>32</sup> Article 100a EC Treaty determines, inter alia, that the Council shall ... "adopt the measures for the approximation for the provisions laid down by law, regulation, or administrative action in Member States which have as their object the establishment and functioning of the internal market"....

<sup>33</sup> See below.

<sup>34</sup> Ante.

<sup>35</sup> See also European Commission Press Release, Dawn of a new era in European telecommunications. Member States notified of two new Directives. IP/90/589  
The Commission stated, inter alia, ... "the two measures relate together. Liberalisation will, for the first time, open up unlimited opportunities for the telecommunications industry, for business users and for

22. This definition of respective application of EU Competition law and EU Internal Market legislation laid the ground work on the basis of which, particularly during the last twelve months, application of Art. 90 measures were stepped up, within the general policy framework to deregulate the communications sector in time for 1998.

#### **IV MEDIA POLICY**

23. EU Media Policy initially developed largely independently from EU Telecommunications Policy. During the early years of the European Union, television and broadcasting in the Community was generally governed by national public structures strictly controlled under State law, aimed at ensuring public service goals in the sector, with substantial variation of these structures between the Member States.

The Community was cautious in adopting a comprehensive policy regarding broadcasting and electronic media given their specific cultural and social implications<sup>36</sup>. Community action in the media sector to date has focused on four broad areas: the creation of the internal market for the sector, the promotion of advanced TV-technologies, the support of content production and the issue of the impact of media concentration.

24. As regards the internal market aspect, the Court of Justice confirmed as early as 1974 that television / broadcasting falls under the scope of the EC Treaty and in particular under its provisions concerning the freedom to provide services<sup>37</sup>, but the Court also accepted that, in the absence of harmonised legislation at Community level, national legislation, like for example

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the individual consumer as the range of services expands, made possible on a Community basis by the harmonisation of use and access conditions. The Directives are : The Open Network Provision (ONP) Framework Directive which facilitates access of private companies to the public networks and certain public telecommunications services ; - the Art. 90 Telecoms Services Directive which establishes the right for independent undertakings to offer new services on the telecommunications network".

<sup>36</sup> A specific provision on culture was only introduced into the EC legal framework by the Treaty of Maastricht; the Treaty however never contained a general "cultural exception".

<sup>37</sup> Giuseppe Sacchi, Case 155/73, 1974 ECR 409 (C.J.)

copyright laws, could continue to be applied except where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States.<sup>38</sup> Therefore, the Commission submitted in June 1984 a Green Paper on “Television without frontiers”<sup>39</sup> which developed the requirements for the introduction of a common market for television broadcasting on the basis of a harmonised regulatory framework. Subsequently, the Community adopted a number of directives aiming at the harmonization of certain aspects of broadcasting. In particular, Directive 89/552/EEC on ‘television without frontiers’ set out a number of harmonised provisions concerning inter alia advertising, sponsoring and the protection of minors.<sup>40</sup>

This directive was complemented with regard to copyright and related rights in the field of satellite broadcasting and cable re-transmission in a directive of 27 September 1993.<sup>41</sup>

25. On the basis of a review of the “Television without frontiers” directive of 22 March 1995 and already in the context of the new global Information Society concept, the Commission adopted a proposal for an amendment of this directive which aims in particular at solving a number of problems in its application.<sup>42</sup> The Commission chose to strengthen implementation but not to

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<sup>38</sup> See in particular *Coditel v. Cin  Vog Films*, Case 62/79, 1980 ECR 881 (C.J.)

<sup>39</sup> Bull. EC, Suppl. 5/84

<sup>40</sup> Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ L 298/1 (1989).

<sup>41</sup> Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248/15 (1993).

<sup>42</sup> Report on application of Directive 89/552/EEC and proposal for a European Parliament and Council directive amending Council Directive 89/552/EEC, COM (95)86 (1995). The provisions of the Directive in favour of European content of programming replacing the Member States national regulations promoting domestic and European production (a "majority proportion" of programmes of European origin, "wherever practicable" and with absolute minimum requirements) and the extent to which the provisions of the Directive were to apply to new multimedia services were a major issue in this context. With regard to the first, the amendment proposal establishes a compromise proposal establishing legal certainty by eliminating the "where practicable" clause, but allowing special interest channels opting out for a minimum investment in European programmes and limiting the duration of the provisions to a ten year period.

extend the scope of the directive to new interactive audiovisual services, such as video-on-demand, distance learning, tele-medicine, tele-shopping, and leisure services. Since these services raise regulatory problems that are substantially different from those regarding traditional television broadcasting, the Commission decided to carry out in-depth studies and a broad consultation of interested parties before defining its position in a future Green Paper on new audiovisual services<sup>43</sup>. As regards the copyright aspects of these new services the Commission recently launched a broad discussion by submitting, according to the Information Society Action Plan, a Green Paper on “Copyright and related rights in the information society” which should help to develop an action programme in the area.<sup>44</sup>

With regard to broadcasting technologies, the Commission has taken action to promote the development and introduction of digital television, and in particular the 16/9 format, in the European Union.<sup>45</sup>

26. Issues relating to content provision and promotion of programme production were addressed by the Commission in a Green Paper on audiovisual services of 1994.<sup>46</sup> Subsequent to

(..continued)

<sup>43</sup> At the time of writing, this Green Paper was not yet published. It is intended to address the safeguarding of general interest in the development of these services, cultural and linguistic diversity, and encouragement of new services.

<sup>44</sup> European Commission, COM(95)382 (1995), ante.

<sup>45</sup> See for example:

- Council Resolution of 22 July 1993, OJ No C 209 (1993), on the development of technology and standards in the field of advanced television standards;
- Council Decision No 93/424/EEC, OJ L 196 (1993), on an Action Plan for the Introduction of Advanced Television Services in Europe.
- Communication from the Commission to the Council and the European Parliament, COM(93) 557 (1993): Digital Video Broadcasting: A framework for Community policy.
- Commission Proposal for a European Parliament and Council Directive on the use of standards for the Transmission of Television Signals, COM(93) 556 final (1993).

<sup>46</sup> European Commission, Strategic Options to strengthen the European programme industry in the context of the audiovisual policy of the European Union, Green Paper, COM(94)96 (1994); see also the



consultations held on the Green Paper the Commission proposed to extend and reinforce the MEDIA programme which is aimed at supporting the European audiovisual industry, in particular in the areas of training, development and distribution. Recently, the Community also decided to support the development of content for multimedia services in the framework of its INFO 2000 programme. Both points enter into the Information Society framework<sup>47</sup>.

27. The broader issues of the cultural and societal consequences of concentration in the media sector were addressed by the Commission in a Green Paper on media concentration<sup>48</sup> and in a communication on the follow-up to this Green Paper<sup>49</sup>.

The European Parliament in particular, has concluded that the existing divergences in national legislation with regard to media concentration could jeopardise the functioning of the internal market, notably as concerns the freedom to provide services and the freedom of establishment, and invited the Commission to submit proposals for a harmonised framework.<sup>50</sup>

28. As regards the consequences for the application of EU Competition Rules, the following should be noted :

- From the beginning, the Commission's policy in this sector was primarily directed towards ensuring the free transborder reception and redistribution of television programmes throughout the Community<sup>51</sup>.

(..continued)

"Report by the Think-Tank on Audiovisual Policy in the European Union", Luxembourg 1994, established in preparation for the Green Paper.

<sup>47</sup> Ante.

<sup>48</sup> Green Paper on Pluralism and Media Concentration in the Internal Market - An assessment of the need for Community Action, COM(92) 480 final (1993).

<sup>49</sup> Communication on Pluralism and Media Concentration, COM(94)353 (1994).

<sup>50</sup> European Parliament Resolution of 15 June 1995, OJ C 166 (1995).

<sup>51</sup> This was the basic thrust of the Television without Frontiers Green Paper. The subsequent Directive (ante) were based on the provisions of the Treaty for the free movement of services and right of establishment. Although not a legal basis, the Directives also referred to freedom of expression as enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by

- The initial structure of public broadcasters providing service to the public under strict national regulation and funded directly by the audience via licence fees is being rapidly eroded in a process which began in the late 1980s with the progress of private broadcasters in a number of Member States and emergence of advertising revenue as a second major - and for private broadcasters, in many cases, only - revenue source. Commercial television is now starting to look for pay-TV subscription or pay-per-view revenues as a third main revenue source<sup>52</sup>.

The diversification of supply, a resulting squeeze on fee-income for the public broadcasters, increasing competition for advertising revenues under a growing number of market participants and the search for new revenue sources are introducing intense competition in the European television sector.

- Competition will be amplified by the entering of digitisation in the television sector which may have similar effects in the television sector in the nineties as the introduction of digitisation had in the telecommunications sector in the eighties. Its first consequence is further multiplication of channels and supply<sup>53</sup>. A second is convergence with telecommunications and software services, in the context of the Information Society concept.

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all Member States. Also note that the Court of Justice has recognised that the broadcast of television services can constitute a service of general economic interest within the meaning of Art. 90 (see below) - Case 155/73/Sacchi, ante.

<sup>52</sup> The number of national and cross-border television channels in the European Union has grown from 77 in 1988 to 129 in 1993. Much of the increase is due to the appearance of a growing number of satellite channels, many of them catering for special interest and all of them financed by advertising or subscription.

Income from television advertising increased by 50% between 1989 and 1992 (see Report on application of Directive 89/552/EEC, ante).

<sup>53</sup> The first digital television services will enter the market in Europe in Spring 1996. It is estimated that digital compression will allow a multiplication of channels by a factor of at least 5.

The resulting new opportunities of packaging of offerings across sectors, particularly in fields like video-on-demand, special interest offerings and on-line services is leading to repositioning and alliances across technologies and markets in the move towards multi-media. The media sector is undergoing substantial restructuring in Europe as in the United States.

These developments are to a large extent escaping the existing regulation at State level concerning media concentration, and particularly over the last twelve months have led to a dramatically increased role of EU Competition Law for the sector. This will be examined below.

#### **IV INFORMATION TECHNOLOGY**

29. EU policies with regard to information technologies - computers, software, consumer electronics, components - throughout the eighties were mainly dominated by the discussions of a threatening gap in the European position with regard to the United States and Japan, and attempts to counteract this perceived trend. The main result was the start of major research and development programmes in the field at EU level during the mid-eighties, in which most European industrial groups participated in shared research projects<sup>54</sup>.
30. A major milestone in the development of a general policy position with regard to the sector was the adoption by the Commission of a new industrial policy, where Commissioner Bangemann introduced a strong market orientation into the approach of the EU to industry in general<sup>55</sup>, later reflected in the Bangemann report<sup>56</sup>.

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<sup>54</sup> The EU Research & Development framework programmes began in 1984. The ESPRIT programme (the European Strategic Programme for Research in Information Technologies) has been a major flagship programme in this context.

<sup>55</sup> European Commission, Communication on industrial policy in an open and competitive environment, COM(90)556; Bull EC, Supp 3/91, p7-23

<sup>56</sup> Ante.

31. In the information technology sector, this basic orientation gave rise to a general policy statement<sup>57</sup> which sets the ground rules for the EU policy approach to the sector : reliance on competition as the main driver of restructuring, accompanying measures for stimulating demand (now subsumed into the Information Society projects<sup>58</sup>), intensification of R&D programmes, promotion of training, ensuring market access for European industry to third country markets ; and a number of measures for facilitating operation of enterprises.
32. Both the fact that, in contrast to the telecommunications and media markets, the information technology markets have developed in an open market environment - with this orientation emphasized by EU policy in this area - as well as the fact that markets have tended to be dominated at the global level by very large enterprises, have given EU Competition Rules an important role in the development of this sector. The major case in this context was without doubt the IBM Undertaking<sup>59</sup>; with the growing importance of personal computers, software, and networking in the information technology markets, attention is shifting to these areas<sup>60</sup>.

## **V APPLICATION OF EU COMPETITION RULES TO STATE MEASURES : ARTICLE 90**

33. As the Commission has recently recalled, the Commission's "prerogatives on the competition policy front are wider than those of other competition authorities. Like other competition authorities, the Commission can monitor the conduct of firms, but, in addition to that, it is able to take action against Member States themselves. The scope to do so stems from the institutional structure of the Union. The Commission, being completely independent of the Member States, can be an impartial referee monitoring their action. The Commission is therefore in a position to

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<sup>57</sup> European Commission, The European electronics and information technology industry: state of play, issues at stake and proposals for action, SEC(91)565, Bull EC, Supp 3/91, p25-40.  
Council Resolution concerning electronics, information and communication technologies, OJ C 325/2 (1991).

<sup>58</sup> Ante.

<sup>59</sup> Reported in EC-Bulletin, 10-1984 point 3.4.1.

<sup>60</sup> See below.

implement a comprehensive competition policy, preventing all restrictions of competition, whatever their origin”<sup>61</sup>.

34. The first instrument for doing so is application of EU competition rules to state aids<sup>62</sup>. The second, which will be treated here is application of Art. 90 of the EC Treaty.

Art. 90 has developed into a cornerstone of the Commission’s telecommunications policy since the issuing of the Telecommunications Green Paper<sup>63</sup>. The Article entrusts the Commission with the duty to ensure application by the Member States of existing obligations under the EC Treaty, as regards regulations adopted or maintained relating to public undertakings or undertakings enjoying special or exclusive rights<sup>64</sup>.

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<sup>61</sup> European Commission, XXIV Report on Competition Policy (1994), p. 93.

<sup>62</sup> Art. 92-94 of the EC Treaty. This aspect will not be addressed in this paper.

State aids have recently played a growing role in the sector, particularly with regard to State transactions in the context of the privatisation of companies (see Case TeleDenmark A/S reported in XXIV Report on Competition policy, p. 510) and cases related to financial transfers to public enterprises in the broadcasting sector.

It should also be noted that there can be close interaction between state aid aspects and issues related to Art. 90. The objective of the first Directive issued under Art. 90 concerned transparency of financial relations between Member States and public undertakings, in order to verify that public undertakings do not receive hidden aids from public authorities (Directive 80/723/EEC, OJ L195 (1980), amended by Directive 85/413, OJ L229 (1985)).

<sup>63</sup> Ante.

<sup>64</sup> The article reads:

- "1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

35. In practice and particularly subsequent to the “compromise of 1989”<sup>65</sup>, the whole liberalisation of European telecommunications markets was largely based on a systematic use of these provisions in Commission directives based on Article 90 (3), as well as individual cases. At the same time, the essential developments with regard to application of this part of competition rules centred on this area<sup>66</sup>. We will therefore focus here on telecommunications.

### ***The first phase: the British Telecommunications case***

36. In the early 1980s the Commission dealt with a series of individual cases concerning the extent of the legal monopolies of the national public telecommunications operators<sup>67</sup>, but only the widely known case British Telecommunications led to a Commission Decision and, ultimately, to a Judgment of the Court of Justice. It can be argued that this case did not only lay the foundations

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3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

<sup>65</sup> Ante.

As has been made clear by the European Court of Justice, Art. 90(3) of the Treaty empowers the Commission only to lay down general rules specifying the obligations arising from the Treaty which are already binding on the Member States as regards public undertakings and undertakings with special or exclusive rights (see in particular France vs. Commission, Case C-202/88, discussed below). It cannot create entirely new obligations as e.g. under Art. 100(a) EC Treaty.

The 1989 compromise (i.e. liberalisation under Art. 90 and harmonisation under Art. 100(a)) was therefore central towards creating a comprehensive regulatory framework. See ante.

<sup>66</sup> Note however, that a number of Court Rulings important for these developments originated from cases in the broadcasting sector. See for example Sacchi, Case 155/73, 1974 ECR 409 (C.J.) and Centre Belge d'Etude de Marché - Télémarketing v. CLT/IPB, Case 311/94, 1986 ECR 3261 (C.J.).

<sup>67</sup> Some of these cases are discussed in the Telecommunications Green Paper of 1987 at p. 124 - 126. See also Commission, XV Report on Competition Policy, page 205 (1985).

for applying the competition rules to the telecommunications sector in general, but can also be seen as the point of departure for the use of Article 90 in the telecommunications sector<sup>68</sup>.

In its Decision of 1982<sup>69</sup> which was confirmed by the Court of Justice in its Judgment of 20 March 1985,<sup>70</sup> the Commission found that British Telecommunications (BT) abused its dominant position in the markets for telecommunications systems by taking measures to prevent certain private message forwarding agencies from offering a service, new to the UK, whereby telex messages could be received and forwarded on behalf of third parties at prices lower than those charged by BT for its international telex service.

37. Although the Commission's decision was based on Article 86, the case implicitly raised an issue relating to the interpretation of Article 90. As BT claimed that the application of the competition rules would obstruct it in the performance of its duties, the Commission had to discuss the applicability of Article 90(2) in this case. In its Decision the Commission accepted that BT was entrusted with the operation of services of general economic interest within the meaning of Article 90(2) which consisted of the provision of telecommunications systems throughout the United Kingdom. However the Commission stated that, in order to justify an exemption from the competition rules, it is not sufficient that compliance with those rules makes the performance of the duties more complicated. It held that BT was not obstructed in the performance of its duties, given that it would even be in BT's interest to allow the operation of the services offered by private message forwarding agencies, as their activities would have the effect of attracting international telex traffic onto BT's network.<sup>71</sup>

38. In its Judgment the Court confirmed the Commission's assessment holding that, "the employment of new technology which accelerates the transmission of messages constitutes

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<sup>68</sup> For details, see e.g. P. Ravaioli and P. Sandler, *The European Union and Telecommunications : Recent Developments in the Field of Competition* (Part 1), the *International Competition Lawyer*, Vol. 2 (1994) p. 2-24 (3).

<sup>69</sup> *British Telecommunications* 82/861/EEC, OJ L 360/36 (1982) (Comm'n).

<sup>70</sup> *Italian Republic v. Commission*, Case 41/83, 1985 ECR 873 (C.J.).

<sup>71</sup> *British Telecommunications*, ante, see N/ 41, 43, 18

technical progress in conformity with the public interest and cannot be regarded per se as an abuse” and the applicant, “had totally failed to demonstrate that the results of the activities of those agencies in the United Kingdom were, taken as a whole, unfavourable to BT, or that the Commission’s censure of the schemes at issue put the performance of the particular tasks entrusted to BT in jeopardy from the economic point of view.”<sup>72</sup>

Furthermore the Court stressed in this context that, “the application of Article 90(2) is not left to the discretion of the Member State which has entrusted an undertaking with the operation of a service of general economic interest”, but that, “Article 90(3) assigns to the Commission the task of monitoring such matters, under the supervision of the Court.”<sup>73</sup>

39. Thus the Court not only confirmed the Commission’s view that the competition rules of the Treaty apply to public telecommunications operators, but also clarified two aspects in respect of the application of Article 90 of the Treaty which were of major relevance for the subsequent developments in the telecommunications sector:

- First, the Court made clear that it is up to the Commission to decide, subject to judicial review by the Court, on any derogations to be granted from the application of the competition rules on the basis of Article 90(2).
- Secondly, the Court made clear that it would favour a narrow interpretation of the scope of the derogation under Article 90(2) in the telecommunications sector, in particular taking into account possible delays in the development of new technologies in the public interest.

The Court also clarified that the operation of a public telephone network could be considered as a service of general economic interest in the sense of Art. 90<sup>74</sup>.

40. As a consequence, the Judgment of the Court in the British Telecommunications case could be read as encouraging the Commission to reinforce its activities aimed at ensuring the application

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<sup>72</sup> Italy v. Commission, ante, see N/ 26, 33.

<sup>73</sup> No 30.

<sup>74</sup> Later confirmed in RTT v. GB-Inno-BM, Case C-18/88, (C.J.) ; the broadcast of television services had been recognised as a service of general economic interest within the meaning of Art. 90 in Sacchi, ante.



of the competition rules with regard to public undertakings and undertakings which were granted special and exclusive rights. At the same time, the judgement clarified the basic concepts.

***The second phase: the Terminal Equipment Directive and the Services Directive***

41. Based on the positions set out in the Telecommunications Green Paper of 1987<sup>75</sup> the Commission adopted two directives based on Article 90(3) with a view to implementing the major liberalisation goals of the Green Paper. On 16 May 1988 it adopted a Telecommunications Terminal Directive(88/301/EEC)<sup>76</sup> which opened the markets for telecommunications terminal equipment on which most European telecommunication administrations enjoyed monopoly rights at that time. The Directive set out in particular the obligations for the Member States to withdraw all special and exclusive rights with regard to terminal equipment and to ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment.
42. The reasons for imposing conditions on the provision of terminal equipment were limited to a small number of essential requirements (user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm, interworking of terminal equipment).

In addition, Member States had to ensure that equipment type-approval is entrusted to a body independent of undertakings supplying goods and/or services in the telecommunications sector and that the specifications for termination points of the public network were published.

As regards the legal justification of these obligations<sup>77</sup>, the recitals of the Directive built on the Treaty provisions concerning the freedom to provide goods and the freedom to provide services on the one hand and on the provisions aiming at ensuring undistorted competition on the other.<sup>78</sup>

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<sup>75</sup> Ante.

<sup>76</sup> Commission Directive 88/301/EEC, on competition in the markets in telecommunications terminal equipment, OJ L 131/73 (1988)

<sup>77</sup> Member States should also ensure the possibility for customers to terminate long-term lease or maintenance contracts regarding terminal equipment for which special or exclusive rights existed when the contracts were concluded.

Furthermore the Directive states that the conditions set out in Article 90(2) for a derogation from the Treaty rules were not fulfilled, as only the provision of the public telecommunications network could eventually be considered as a service of general economic interest.

44. The opening of the telecommunications services market was initiated by a second Directive, the so-called Services Directive of 28 June 1990.<sup>79</sup> This Directive has a structure which is very similar to the Terminal Equipment Directive. It provides for the removal of special and exclusive rights granted by Member States for the supply of all telecommunications services other than voice telephony. By defining the term “voice telephony” for the purposes of this Directive very narrowly<sup>80</sup> the Directive also liberalised telephony services other than those provided for the general public, eg voice services for corporate communications or so-called closed user groups. The consequences of this definition for the implementation of the Services Directive in the Member States are set out in detail in a communication adopted by the Commission last April.<sup>81</sup>
45. Similar to the Terminal Equipment Directive, the Services Directive allows Member States to impose restrictions on the provision of services only in order to ensure compliance with specific “essential requirements” (security of network operations, maintenance of network integrity, interoperability of services, data protection).<sup>82</sup>

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<sup>78</sup> Art. 37, EC Treaty requires adjustment of State monopolies of a commercial character (applies to goods only).

<sup>79</sup> Commission Directive 90/388/EEC, on competition in the markets for telecommunications services, OJ L 192/10 (1990).

<sup>80</sup> According to the Directive 'voice telephony', "means the commercial provision for the public of direct transmission 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."

<sup>81</sup> European Commission, Communication to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services, COM(95) 113 final, (1995).

<sup>82</sup> The Directive provides that in the case of public data services "trade regulations relating to the conditions of permanence, availability and quality of the service"; and

Furthermore, the Directive also requires the separation of regulatory and operational functions with regard to service provision, in particular as regards issues like the grant of operating licences, the control of type approval and mandatory specifications, frequency allocation and the surveillance of usage conditions<sup>83</sup>.

46. Both the Telecommunications Terminal Directive and the Telecommunications Services Directive, quite apart from their importance for the telecommunications sector as such, have contributed substantially to the clarification of the legal doctrine with regard to the application of Art. 90 and in particular the acceptance of Art. 90(2) and the powers conferred to the Commission under Art. 90(3). It is therefore worthwhile to have a closer look at the legal arguments underlying them.

The justification given in the recitals of the Services Directive builds on the provisions of the EC Treaty concerning the freedom to provide services as well as on the competition rules.

47. The Court of Justice had confirmed in a number of judgments that the very existence of a legal monopoly does not per se constitute an infringement of the Treaty.<sup>84</sup> Therefore, the legal reasoning justifying the obligations imposed on the Member States in the recitals of both directives was not based on the assumption that a legal monopoly as such is incompatible with the Treaty. The Commission justified the Directives on the basis of the argument that under the given circumstances the legal monopolies concerned necessarily led to a violation of provisions of the Treaty. In the Terminal Equipment Directive it was argued that special or exclusive rights for the

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"measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization for the provision of switched data services, if the performance of that task is likely to be obstructed by the activities of private sector providers" are also permitted.

<sup>83</sup> Finally, the Services Directive also contained a provision obliging Member States to ensure that users of liberalised telecommunications services could terminate long-term contracts for the supply of telecommunications services.

<sup>84</sup> For an overview of the pertinent case-law of the Court, see e.g. G. Marengo, Legal Monopolies in the case-law of the Court of Justice of the European Communities, Fordham Corporate Law Institute, 1991, P. 197-222 [199-202].

provision of terminal equipment as such were preventing users from choosing the equipment that best suits their needs, regardless of its origin, and thus constituting an infringement of Articles 30 and 37. Equally, special or exclusive rights for the maintenance of terminal equipment are necessarily restricting the freedom to provide cross-border services contrary to Article 59.

In addition, the Commission stated that special or exclusive rights for the provision of terminal equipment would be incompatible with Article 86 of the Treaty, in particular because such rights would “limit outlets and impede technical progress since the range of equipment offered by the telecommunications bodies is necessarily limited and will not be the best available to meet the requirements of a significant proportion of the users”.

48. Similarly, the Commission based the obligation to withdraw special or exclusive rights with regard to telecommunications services on the reasoning that the existence of such rights necessarily constitutes a restriction on the freedom of nationals of one Member State to provide services to persons in other Member States which is contrary to Article 59 of the Treaty. As regards Article 86, the Commission held that the special or exclusive rights granted to the telecommunications organisations led to the abuse of a dominant position, in particular as such rights “prevent or restrict access to the market for these telecommunications services by their competitors, thus limiting consumer choice, which is liable to restrict technical progress to the detriment of consumers.”<sup>85</sup>

49. As regards the derogation granted by Article 90(2), the Directive explicitly recognized the provision and exploitation of a universal telecommunications network as the particular task within the meaning of Article 90(2) entrusted to the telecommunications organisations, in line with the previous rulings. It states that currently the revenue from the voice telephony service is ensuring the financing of this network and could therefore at that time be reserved for the telecommunications administration. Thus, the directive stated by implication that for all other services the derogation could no longer be requested.

50. Given the political significance of these directives as regards their substance, but perhaps even more as regards the nature of the legal act taken, both decisions were challenged in the Court

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<sup>85</sup> For a recent review of approaches to Art. 90, see e.g. D. Edward/M. Hoskins, Article 90: Deregulation and EC Law, Reflections arising from the XVI FIDE conference, Common Market Law Review [1995]. See also *Höfner v. Macrotron*, Case C-41/90 1991 ECR 1979 (C.J.); *Porto di Genoa*, Case C-179/90 I ECR 5889 (1991) ; *La Crespelle*, Case C-323/93 5 October 1994, (C.J.) not yet reported.

of Justice by a number of Member States. In its Judgment of 19 March 1991 on the Terminal Equipment Directive<sup>86</sup> and its Judgment of 17 November 1992 on the Services Directive<sup>87</sup> the Court largely confirmed the legality of the Directives<sup>88</sup>.

From the Commission's point of view two conclusions could be drawn from these Judgments as regards the further development of European telecommunications regulatory policy:

51. First, the Court had confirmed the Commission's power to adopt directives under Article 90(3) in order to clarify obligations of the Member States deriving from this article. It had also confirmed that the Commission could clarify the obligations of the Member States in a specific sector and that this power could go as far as requiring Member States to withdraw special and exclusive rights.

Secondly, the Court had confirmed that where the withdrawal of special or exclusive rights can be required, the Commission could also set out the conditions in order to make the abolition of special and exclusive rights effective. Examples for such conditions in the Services Directive are the provisions concerning the authorization of services or the provisions on publication requirements. In political terms such conditions make it possible to link the liberalisation measures into the general policy measures for the sector and ensure the creation of a coherent framework at Community level.

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<sup>86</sup> France v. Comm'n, Case C-202/88, 1991 ECR I-1259 (C.J.)

<sup>87</sup> Spain v. Comm'n, Joined Cases C-271/90, C-281/90 and C-289/90, 1992 ECR I-5833 (C.J.)

<sup>88</sup> It should be added that the Court declared the Directives void as far as the provisions on special rights were concerned, holding that the Directives did not define the rights concerned and did not specify in what respect the existence of such rights is contrary to the Treaty. Also the provisions contained in both directives concerning the termination of long-term contracts were declared void. In this respect the Court held that the Directives failed to demonstrate that telecommunications administrations were compelled or encouraged by state regulations to conclude long-term contracts and that therefore the provisions could not be adopted under Article 90 of the Treaty.

52. The situation after the publication of the Telecommunications Terminal and Services Directives and the 1989 compromise on liberalisation under Art. 90 and harmonisation under Art. 100(a) within the general policy framework<sup>89</sup> was summarized by the Commission as follows :

“Regulated sectors and those in which companies enjoy exclusive rights will have to be subject to the rules of competition if the internal market is to function properly. Whilst the Commission recognises that account must be taken of the need to supply services of a general economic interest, this must be done in a manner least restrictive to competition. With the aim of opening up the possibility for competition, the Commission will apply the rule of proportionality in deciding whether these services of a general economic interest can be effectively provided in any other way than by granting exclusive rights to particular suppliers... Exclusive rights ... should not be allowed to extend into other areas which are not essential to the provision of the service in question and for which competition is possible.”<sup>90</sup>

***The third phase: the amendments for satellite, cable and mobile communications***

53. In a third step the Commission moved to build on this established base. It adopted, during the last twelve months, an amending directive concerning satellite communications as well as two draft proposals for amending directives concerning cable and mobile communications.

Following the consultation on the Green Paper on satellite communications of November 1990<sup>91</sup> the Commission Directive 94/46/EC of 13 October 1994<sup>92</sup> amended the Terminal Equipment Directive and the Services Directive with regard to satellite communications. The amending directive required Member States in particular to withdraw special and exclusive rights for satellite earth station equipment and for the provision of satellite communications services. In addition, the Directive

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<sup>89</sup> Ante.

<sup>90</sup> XX Report on Competition Policy (1990), p.12.

<sup>91</sup> Ante

<sup>92</sup> Commission Directive 94/46/EC amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268/15 (1994).

introduced a definition of special rights in the Terminal Equipment Directive and the Services Directive in order to take account of the Court judgments on these Directives.

54. At the same time, the Commission established, in an effort to create similar transparency as in the application of Competition Law to enterprises, new procedures of public consultation and consultation of the Council, European Parliament and the other EU institutions<sup>93</sup>

Within this framework, on 21<sup>st</sup> December 1994 the Commission adopted for public consultation a draft Art. 90 Directive concerning the liberalisation of telecommunications use of cable-TV networks<sup>94</sup>. The objective of this amendment is to open already existing or licensed Cable-TV networks across the European Union for the provision of telecommunications services other than voice telephony by 1 January 1996 at the latest. The draft Directive does not address the issue of licensing of new cable-TV networks but leaves this under the authority of the national regulators.

55. The Cable-TV Directive also requires a minimum level of accounting separation of telecommunications and cable-TV networks where the same operator offers both networks. The Directive does finally announce a review of the market impact of such cross ownership at the latest by 1<sup>st</sup> January 1998. This is of particular importance in some EU-Member States, such as Germany and Denmark, where the public telecommunications operators are the main owners of cable-TV networks.

The liberalisation of such use of cable networks is expected to lead, on the one hand, to a rapid upgrading and development of existing Cable-TV networks, in order to make the transmission of voice services technically possible in time for 1998. It should also substantially facilitate investments in new cable networks, in particular in EU countries where cable-TV networks still do not exist to any

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<sup>93</sup> After adoption by the Commission of a draft, Draft Art. 90 directives are now published for a two month consultation period in the EC Official Journal. They are also transmitted to Council, European Parliament, Economic and Social Committee, and the Committee of Regions.

<sup>94</sup> Draft Commission Directive amending Commission Directive 90/388/EEC regarding the abolition of the restrictions in the use of cable television networks for the provision of telecommunications services, OJ C 76 (1995).

See also J.L. Buendia, Liberalisation and state intervention, application of Art. 90 EC, Main developments between 1st April and 31st July 1995, Competition Policy Newsletter, European Commission, Volume 1, N/ 5, 1995.

major extent. At the same time the liberalisation required by the Directive will allow beginnings of true multi-media use of Cable-TV networks.

56. The comments received in response to the publication of the draft were generally positive.

The Directive was finally adopted by the Commission on 11<sup>th</sup> October<sup>95</sup>.

57. On 21<sup>st</sup> June, the Commission adopted the draft Article 90 Directive for consultation concerning the liberalisation of mobile communications<sup>96</sup>. The Directive requests the abolition of remaining exclusive and special rights in the sector and establishes full liberalisation for mobile and personal communications by 1<sup>st</sup> January 1996. It opens the use of own and third party infrastructure for mobile operators and therefore establishes a new base for their operations. Moreover, it will allow the combination of cordless technologies with digital mobile communications by 1<sup>st</sup> January 1996 and of GSM /DCS 1800 mobile technologies<sup>97</sup> at the latest by 1<sup>st</sup> January 1998 and therefore lays the foundation for the development of truly personal communications services. Personal communications services were envisaged in the Mobile Green Paper to be based on a combination of those mobile technologies and, ultimately, fixed networks.

58. The mobile amendment was published by the Commission on 1 August 1995 for consultation. Comments could be made within the two month publication period, ie until the end of September.

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<sup>95</sup> Not yet reported. See European Commission Press Release : The Commission opens Cable-TV networks to liberalised telecoms services (IP/95/1102).

The European Parliament in its resolution on the draft had requested that rights for public telecommunications network operators to convey television programmes via their network, be included in the Directive, thus ultimately lifting the distinction between public telecommunications networks and cable networks and opening the way for both towards evolution into the future distribution and transmission networks of the multi-media world.

The Commission decided not to include the provision in this Directive. It said however that "the question will certainly need to be addressed in the context of the measures surrounding the 1998 date for full telecoms liberalisation".

<sup>96</sup> Draft Commission Directive, amending Directive 90/388/EEC with regard to mobile and personal communications, OJ C197/5 (1995).

<sup>97</sup> GSM is the digital Global System for Mobile Communications. DCS 1800 is a closely related digital standard of higher frequency bands (in U.S. DCS1900).



The Commission is currently analysing the comments received and preparing the final adoption of this amendment which can be expected for the month of November.

59. As regards the legal basis of the Directive, the Cable Amendment builds on the same line of reasoning used in the previous directives. In particular it is argued that in breach of Article 90 when read in conjunction with Article 59, restrictions on the provision of telecommunications services over cable TV networks are restricting the free provision of services to the benefit of the national telecommunications organization. At the same time, the exclusive right of telecommunications organisations to provide telecommunications services over their telecommunications networks is in breach of Article 90 when read in conjunction with Article 86, in particular because the existence of this exclusive right is delaying the emergence of new services which could only be provided on broadband networks.

60. In the mobile amendment the main argument for the removal of special or exclusive rights for mobile communications services is that they necessarily entail a restriction of the freedom to provide mobile communications services contrary to Article 59. In addition to this argument Article 86, and in particular Article 86(b) is invoked again. However, a further argument was also used which followed the line of reasoning adopted by the Court of Justice in the Telemarketing and RTT/GB INNO cases:

“The exclusive rights that currently exist in the mobile communications field were generally granted to organizations which already enjoyed a dominant position in creating the terrestrial networks, or to one of their subsidiaries. In such a situation, these rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position, which, according to the case-law of the Court of Justice, constitutes an abuse of a dominant position contrary to Article 90.”<sup>98</sup>

61. The three Directives can therefore be seen as a logical extension of the original Telecommunications Services Directive, brought forward, however, in a rapid sequence and liberalising substantial parts of the EU telecommunications market. They also represent a major step in developing the procedural framework for this part of EU Competition Law by establishing the principle of public comment. They have therefore laid the ground work for formalisation of these procedures at a later stage.

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<sup>98</sup> Recital 10.

#### ***The fourth step: implementation of full competition***

62. An additional step had to be taken, and also a new one in terms of the legal approach used; the adoption of a Directive providing for full competition required by the full liberalisation of the EU telecommunications sector for 1998, according to the published programme, see ante. The particular issue to be dealt with was the abolition of the derogation under Art. 90(2) for the public telecommunications network.
63. Article 90(2) allows derogation from Community Law where it would obstruct, either in law or in fact, the performance of the particular task assigned to undertakings entrusted with tasks of general economic interest. In its 1990 Directive, the Commission granted a temporary exemption under this Article in respect of exclusive and special rights for the provision of voice telephony. The argument was that financial resources for the development of the network still derived mainly from the operation of the telephony service. The opening-up of that service could, at that time therefore, threaten the financial stability of the existing telecommunications organisations and obstruct the performance of the task of general economic interest assigned to them: “This task consists in the provision and exploitation of a universal network, i.e. one having general geographic coverage, and .... provided to any service provider or user upon request within a reasonable period of time”<sup>99</sup>.
64. The Directive contained a review clause. Subsequent to the review and the public consultation organised by the Commission in 1992 on the situation in the telecommunications sector<sup>100</sup>, the Council unanimously called for the liberalization of all public voice telephony services by 1 January 1998. In its resolution, the Council therefore recognised that there are less restrictive means than the granting of special or exclusive rights to ensure this task of general economic interest.
65. The Council subsequently unanimously recognized that the provision of telecommunications infrastructure should also be liberalised by 1 January 1998<sup>101</sup>. Furthermore, the Council

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<sup>99</sup> Commission Directive on competition in the markets for telecommunications services, 90/388/EEC, ante, Recital 18.

<sup>100</sup> Ante.

<sup>101</sup> Subject to the same transition periods as agreed for the liberalisation of voice telephony, Council Resolution of 22 December 1994, ante.

established basic guidelines for the future regulatory environment<sup>102</sup>. Subsequent to these statements by the Council, the Commission adopted on 19<sup>th</sup> July the draft Art. 90 Directive for consultation concerning full liberalisation<sup>103</sup> of the EU's telecommunications sector - including interexchange and local networks. The draft withdraws the Art. 90(2) derogation for public voice and underlying network infrastructure and sets out the framework for the overall reform process in the EU Member States up to 1998.

- the lifting of all remaining exclusive and special rights in the sector, in particular for public voice telephony and network infrastructure at the latest on 1 January 1998, with additional transition periods for Greece, Ireland, Portugal, Spain (five years), and Luxembourg (two years) ;
- defines the less restrictive means which can be used to safeguard the services of general economic interest for which a derogation is therefore no longer required. This means the setting up of a universal service fund financed by all market participants or supplementary (access charges) to competitors by the incumbent Telecommunications Organisations but under strict control of the national authority and the Commission.
- the draft specifies in general terms the conditions which can be included in national licences. The draft directive stipulates that as regards voice telephony and the provision of public telecommunications networks, Member States may include in licensing or declaration procedures only those conditions aimed at compliance with: essential requirements as specified in the Directive; public service specifications relating to permanence, availability and quality of service; financial obligations with regard to universal service.
  - a firm time schedule for the required national reforms, in order to allow market participants to plan for market entry<sup>104</sup>.

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<sup>102</sup> Council Resolution, of 18 September 1995, ante.

<sup>103</sup> Draft Commission Directive amending Commission Directive 90/388/EEC regarding the implementation of full competition in telecommunications markets, OJ C 263/6 (1995).

<sup>104</sup> Member States must :

- . notify required licensing or declaration procedures no later than 1 January 1997 to the Commission;
- . ensure publication of these procedures no later than 1 July 1997;

The Directive has been published in the EU Official Journal for the two month public comment period<sup>105</sup>.

### *Comments*

67. The rapid progress in the EU's telecommunications sector over the last few months has allowed the full testing of the (up to now) largely unused territory of the application of Art. 90 EC<sup>106</sup>.

This is, therefore, a sector where :

- a general political framework has been established and a political consensus developed that full liberalisation is needed to build the Information Society;
- a consistent line of Directives and Court Rulings has been built up;

(..continued)

- . ensure availability of adequate numbers for all telecommunications services before 1 July 1997; and
- . publish interconnection terms no later than 1 July 1997

<sup>105</sup> Ante.

<sup>106</sup> The Commission has also recently initiated a number of individual Art. 90 procedures in the telecommunications field which have greatly advanced the introduction of competition into the EU's mobile communications market (Italy, Belgium, Ireland, Spain, Austria). See Commission Press Release : As GSM mobile communications market is opened to competition the Commission screens the licensing procedures (IP/95/959).

In the case of Italy, the Commission recently adopted an Art 90 Decision on 4th October 1995 (Omnitel, not yet published). See European Commission Press Release : GSM Italy : Commission asks fair treatment for Omnitel (IP/95/1093).

In addition, a number of individual Art. 90 Decisions have been taken in other fields:

- Public insurance in Greece, OJ L 152/25 (1985) (Comm'n).
- Flight tariffs in Spain, OJ L 194/28 (1987) (Comm'n)
- Dutch express courier, 90/12/EEC, OJ L10/47 (1989) (Comm'n). This Decision was subsequently annulled on 12.2.1992 on procedural grounds.
- Spanish express courier, 90/456/EEC, OJ L 233 (1990), (Comm'n).
- Port of Rpdby, 94/119/EC, OJ L55 (1994) (Comm'n)
- Zaventem, OJ L 216/9, (1995) (Comm'n)

- high priority has been given for rapid action in response to market requirements.

68. In legal terms the essential steps have been :

- recognition of the Commission's power to act ;
  - confirmation by the Court that pursuant to Article 90 special and exclusive rights cannot only be modified, but abolished as far as they cause enterprises by their mere existence to infringe basic Treaty rules, e.g. freedom to provide services or abuse of dominant market power<sup>107</sup>;
- confirmation by the Court that the derogation given under Art. 90(2) from Treaty rules must be interpreted in a narrow manner. The undertaking in question must show that its entrusted task is made impossible, not merely more difficult or more complicated.

69. In the case of the telecommunications sector, the latter justification is provided by a framework developed on a broad political basis. The recent developments have made the application of competition rules the spearhead of deregulation of the EU telecommunications sector and with this, of a core sector of the information society. At the same time, the development has demonstrated that the full effect of EU competition law in this respect can only be achieved by carefully correlating the measures with the development of the general regulatory framework. The political compromise reached in this sector ("liberalisation and harmonisation") is indicative of this requirement.

70. The basis of action in the telecommunications sector was that the Commission recognised the universal service objectives in the sector, but that there was general conviction in the sector that this task could be secured by less restrictive means than retention of monopoly rights, e.g. by financial contributions or the creation of a universal service fund. Competition and public service goals can therefore be complementary and mutually reinforcing.

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<sup>107</sup> The Court has stated "... any measure by a Member State which maintains in force a statutory provision that creates a situation in which (an undertaking) cannot avoid infringing (the Treaty) is incompatible with the rules of the Treaty", *Höfner v. Macrotron* 1991 ECR 1979 (C.J.).

The Court has also confirmed that the grant of exclusive or special rights can in itself be a measure by a Member State and thus can be contrary to the Treaty according to this test. See also *France v. Commission*, case C-202/88, ante, and *Porto di Genoa*, case C-179/90, ante.

71. Conditions in sectors differ. Therefore the experience in the telecommunications sector cannot be generalised in an automatic manner. Each sector has its own specific considerations.
72. Another important result of the work of the last few months is a clarification of procedures.

The Commission has taken steps to ensure measures in this area have a similar degree of transparency as other measures in the competition field. Particularly, the introduction of a two month public comment period and extensive consultations with the Member States and the European Parliament have been welcomed.

73. Enhanced transparency and accountability in this area also seem to be the appropriate response to the comments raised by some<sup>108</sup> with regard to action by the Commission under Art. 90 in the run-up to the Intergovernmental Conference of next year.

Weakening of the Commission's action under Art. 90 cannot be the right answer to the problem that action in the field of highly regulated sectors will inevitably touch on very substantial State interests. As the Commission has pointed out, weakening the EU competition law with regard to State measures would leave the European Union without a means of resolving competition conflicts in these areas and therefore without the only satisfactory means of ensuring that telecommunications in Europe were modernised effectively. The experience in the telecommunications sector shows that the right response is viewing competition measures in the global political context, while at the same time increasing transparency and accountability, without however weakening the strength of the instrument.

## **VI APPLICATION OF EU COMPETITION LAW TO ENTERPRISES : ART. 85 AND 86 AND MERGER REGULATION**

74. The deregulation of the core telecommunications market, the increasing dynamics created by the privatisation of the former monopolies which goes with deregulation in Europe, and the rapid development of new segments such as mobile communications is spurring substantial activity in the core sectors of the information market. At the same time, the diversification of television and broadcasting, with the expansion of private broadcasters and the transformation of the original

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<sup>108</sup> See for example, the proposal by the European Centre of Public Enterprises (CEEP) for modification of Art. 90 and a European Charter for services of general economic interest; and comment, European Commission, Competition Policy Newsletter, Number 4, Volume 1.

public broadcasting entities which is now beginning, combined with the entry of new actors from the publishing and software industries into the market (a consequence of convergence) is contributing to a substantial acceleration in the overall development. In many instances, the new possibilities for horizontal or vertical integration, the small number of powerful actors holding bottleneck positions allowing them to control market development, and the rush by market actors to occupy the major growth positions, all generate a high potential for anti-competitive behaviour which has become a major challenge for EU competition policy during recent months. The Commission must try to ensure that the current restructuring process will lead to competitive and growth oriented market structures<sup>109</sup>.

The following does not intend to provide a systematic survey of cases in the telecommunications / media information technology field: the intention is to review the most important leading cases to establish general trends<sup>110</sup>.

The Commission is dealing with (broadly) two kinds of cases, which deserve separate analysis. First, cases concerning the restructuring of market forces, notably through the creation of transnational ventures, commonly referred to as 'strategic alliances', between Telecommunications Operators (TOs) as they move into global markets.

75. This first group of cases is generally of a more horizontal nature. A second group of cases concerns issues of convergence, particularly in the overlap of telecommunications and media: these cases tend to include strong vertical elements.

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<sup>109</sup> The dynamics of the situation are emphasized by the fact that the mergers and acquisitions in the European Information sector reached unprecedented levels in the first half of 1995. Financial Times, 27. 9.1995:

"Merger and acquisition activities were being driven by trends towards larger strategic deals, by the opening up of Eastern European markets and by moves to prepare for the liberalisation of European telecommunications".

Total value for the first six months of 1995 amounted to 17.5 bn US\$, compared with 7.4 bn US\$ in the first half of 1994. The four largest deals all involved telecommunications companies.

<sup>110</sup> For recent developments, see European Commission, XXIII, XXIV Report on Competition policy. A comprehensive overview of the application of EU competition law to the telecommunications sector including case decisions and relevant publications is given in European Commission, Official Documents, Community Competition Policy in the Telecommunications Sector, July 1995.

As regards the application of Articles 85 and 86<sup>111</sup> to the telecommunications sector, the Commission's policy has been spelled out in special Guidelines<sup>112</sup> with an aim to increase the level of legal certainty for companies and to deal with a number of case situations. The Guidelines seek to deal, e.g. with the problem of network operators discriminating in favour of their own joint ventures in the terms and conditions for access to the networks, and the obvious consequential effects of the threat of such discrimination on market entry. Access and interconnection issues are of primary importance and relevant cases are discussed below. The definition of the relevant market is of primary importance as in any competition case, but is particularly difficult here, given the high dynamics of markets in the convergence of different sectors. In addition, the relevant geographical market will vary substantially depending on the products and customers involved. Thus, whereas a definition along national lines may well still be appropriate for the sale of network services to service providers, the provision of global, seamless, end-to-end services directly to end-users will naturally tend towards a more global market definition.

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<sup>111</sup> Art. 85 EC Treaty deals with agreements or concerted practices between undertakings. Art. 86 deals with the abuse of dominant positions.

Procedures for the application of Art. 85 and 86 are set out in Council Regulation N° 17/62 - First Regulation implementing Articles 85 and 86 of the Treaty and subsequent implementation and amendment regulations.

<sup>112</sup> Guidelines on the application of the competition rules of the EC Treaty to the telecommunications sector, OJ No C 233/2 (1991). For a detailed description, see Ravaioli, Sandler, ante.



As far as alliances are concerned, the determination of the “cooperative” or “concentrative” nature of an alliance is of major importance from the procedural point of view. In the first case Articles 85 / 86 as implemented by Regulation 17 apply; in the second case the Merger Regulation<sup>113</sup>. Recently, the Commission has refined the distinction between cooperative and concentrative joint ventures<sup>114</sup>. This will be revisited later.

### *Strategic alliances*


76. Strategic alliances have topped the agenda for the last two years<sup>115</sup>.

The Commission’s efforts to liberalise the telecommunications sector would clearly serve little purpose if new cartels were allowed to develop and to suffocate emerging competition on liberalised markets or if incumbent Telecommunications Operators were at liberty to engage in abusive behaviour aimed at preserving their positions, which will, for some time to come, continue to be dominant. Incumbent monopolists will not lose their dominant positions merely through the elimination of their monopoly rights, but only if either there is a change of corporate structures or competition erodes the incumbents’ market share.


The economic and competitive benefits of emerging global players, both on the demand side and the supply side, have been analyzed in depth. This paper shall therefore focus rather on the potential threats and on how the Commission may address these, bearing in mind the evolving

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<sup>113</sup> Council Regulation N/ 4064/89 on the control of concentrations between undertakings, OJ L 395/1 (1989); corrected in OJ L257/13 (1990), and subsequent implementation regulations.

<sup>114</sup>  Notice on the distinction between concentrative and cooperative joint ventures - OJ C 385/1 (1994)

See also :

 Notice on the notion of a concentration - OJ C 385/5 (1994).

 Notice on the notion of undertakings concerned - OJ C 385/12 (1994).

 Notice on calculation of turnover - OJ C 385/21 (1994).

<sup>115</sup> See also European Commission, Competition Policy Newsletter N/ 4, volume 1, 1995, M.A. PeZa-Castellot, The application of the competition rules in the telecommunications sector : strategic alliances. The article defines strategic alliances as wide arrangements between companies which do not reach the level of a full merger of all the activities, but that go beyond a limited agreement to jointly undertake activities.

nature of the telecommunications market. In general, alliances may be classified as horizontal, vertical or conglomerate.

77. Strategic horizontal alliances between several Telecommunications Operators will almost certainly be caught by Article 85(1)<sup>116</sup> as the parents' strong position in their respective domestic markets, financial means and technical skills will normally allow each parent to enter the relevant new markets individually; thus, the parents must be considered to be at least potential competitors. It follows that joint market entry may restrict the individual parent's independent R&D activities, production and distribution of services, all of which reduces current and future choice of alternative suppliers and services.
78. If alliances moreover include a vertical component, instead of or in addition to a horizontal dimension, the vertical risks add to a potential foreclosure of competitors, notably regarding the latter's access to bottleneck infrastructures, networks and/or services, ie that are indispensable for the development of the competitors' activities. To avoid such discrimination is one of the main areas of activity given the importance of the negative effects of such discrimination on the development of effective competition in the marketplace.
79. The term conglomerate alliances may be reserved to agreements concluded either between companies with no prior presence in the telecommunications market, but which benefit from

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<sup>116</sup> Art. 85(1) provides :

"The following shall be prohibited as incompatible with the common market : all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which :

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions ;
- (b) limit or control production, markets, technical development or investment ;
- (c) share markets or sources of supply ;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage ;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

A provision analogous to Art. 85 was included in the European Economic Area (EEA) Agreement which the EU concluded with the Member States of the European Free Trade Agreement (EFTA) (Art. 53 EEA). With the joining of the EU of the EFTA members Austria, Finland, and Sweden on 1 January 1995, this Agreement remains in force for Norway and Iceland.

synergies through market entry (eg electricity utilities or banks that have substantial internal networks as well as financial means and know-how), or between the latter and Telecommunications Operators. These alliances open state-of-the-art networks to competitive utilisation and therefore are of growing importance.

Conglomerate alliances may not be caught by Art. 85(1) if parents are neither actual nor potential competitors in the relevant market. Inversely, “negative clearance” will not be available whenever conglomerate alliances involve companies that hold dominant positions in markets which, albeit currently separate from telecommunications, are in a process of convergence.

The Commission has looked into a number of alliances since the early precedent of Infonet<sup>117</sup> (notified at a time when liberalisation was still in its early stages) .

In the following, major aspects are discussed based on the example of the recent BT-MCI and IPSP cases which can be considered as leading cases in this area.

### ***Case BT - MCI***

80. The first major strategic alliance the Commission had to deal with in the telecommunications sector was the operation notified by British Telecommunications plc. (BT) and MCI<sup>118</sup>. This very complex operation was first notified as a concentration under the Merger Regulation, and then converted into a notification for negative clearance and/or exemption under Regulation 17/62<sup>119</sup> (cooperative joint venture). The operation actually comprised two main transactions:

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<sup>117</sup> See Notice pursuant to Article 19(3) of Council Regulation No 17 concerning Infonet, Case No IV/33.361: OJ C 7/3 (1992).

<sup>118</sup> BT - MCI, OJ L 223/36, (1994) (Comm'n). See also European Commission Press Release: Commission clears transactions concluded between BT and MCI in the telecommunications sector under the competition rules of the EC Treaty and the EEA Agreement (IP/94/767); reported in European Commission XXIV Report on Competition Policy (1994), p. 384.

<sup>119</sup> In addition, following the entering into force of the European Economic Area (EEA) Agreement, the parties requested the Commission to extend the notification to cover Article 53 of the EEA Agreement.

- i) BT was to take a 20 % stake in MCI, worth \$ 4.3 billion. By so doing, BT would become the largest single shareholder in MCI, with proportionate board representation and investor protection. Several provisions were however included in the relevant agreements to impede BT from controlling or influencing MCI.
- ii) the creation of a joint venture company, Concert, for the provision of enhanced and value-added global telecommunications services to multinational (or large regional) companies. The Parties contributed their existing non-correspondent international network facilities and Syncordia, BT's existing outsourcing business, to Concert.

In addition, in the framework of Concert, the parties rationalised their respective holdings in other telecommunications operators (TO) and groupings in the world. In this respect, MCI acquired most of BT's existing business in North America.

i Negative Clearance

81. The acquisition by BT of a 20% stake in MCI was considered in the Decision to be entitled to negative clearance under the competition rules, in particular because given the way in which the transaction had been constructed and the market context of the case, there was no risk that the competitive behaviour of the parties would be coordinated or influenced<sup>120</sup>.

In addition, those parts of the two transactions affecting only America (including both North and South America) were also entitled to negative clearance, on grounds that given the current state of development of the overall market for telecommunications, they were considered not to produce any appreciable effect within the EEA.

The same conclusion, was reached in respect of two provisions in the agreements (namely a non-compete obligation on BT and MCI as regard the activities to be undertaken by Concert and an obligation on BT and MCI, as exclusive distributors of the Concert's services, to obtain from Concert all of their requirements for global telecommunications services) on grounds that such provisions were ancillary to the creation and successful initial operation of Concert.

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<sup>120</sup> See paragraph 44 of the Decision: "... In this respect, the [Investment Agreement] has been drafted in such a way that BT does not have the possibility to seek to control or influence the company. This is particularly so in the case of the obligations found in Articles 7(1) (not to increase shareholding for 10 years) and 7(3) (not to seek to control or influence the company)."

- ii Exemption under both Article 85(3)<sup>121</sup> of the EC Treaty and Article 53(3) of the EEA Agreement

82. The creation of Concert was found to fall under the scope of both Article 85(1) of the Treaty and Article 53(1) of the EEA Agreement in particular because BT and MCI were, and for the foreseeable future would continue to be, at least potential competitors not only in the overall market for telecommunications, but also in the enhanced and value-added global telecommunications services segment of that market to be addressed by Concert.

However, it was ascertained that Concert satisfied all the conditions for receiving an individual exemption, which will apply until 15 November 2000. In particular, Concert would be able to offer a set of new services of a global nature to customers more quickly, cheaply and of a more advanced nature than either BT or MCI would be capable of providing alone under their existing technologies. By creating Concert, each parent will also substantially reduce the costs and risks inherently associated with the offering of such services at the scale and with the particular features required by multinationals and other big international users.

The development of those services, and of the platform over which they are to be provided, are the responsibility of Concert: the development of a comprehensive portfolio of services on the market would require five years. In addition, the services will be offered on an end-to-end and seamless basis. This was considered to be a real advantage over existing international services that are provided by interconnecting incompatible national networks.

83. In addition, two provisions of the agreements (namely the appointment of BT as exclusive distributor of Concert within the EEA and a provision intended to dissuade MCI from entering the

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<sup>121</sup> Article 85(3):

"The provisions of paragraph 1 may, however, be declared inapplicable in the case of :

- any agreement or category of agreements between undertakings ;
- any decision or category of decisions by associations of undertakings ;
- any concerted practice or category of concerted practices ;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not :

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives ;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

EEA market as regards some sectors of the telecommunications market not to be addressed by Concert) were also found to fall under the scope of both Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement given that both provisions tried to isolate the entire EEA from competition by companies located outside the EEA. Although a number of arguments were given by BT and MCI to justify those provisions, an exemption (until 16 November 2000, in the first case, and for 5 years from the date of adoption of the decision, in the second) was only granted by the Commission once it had been ensured that, first, despite the appointment of BT as exclusive distributor in the EEA, a user in the EEA, without any significant presence in the Americas, could get Concert's services through MCI instead of BT, and secondly, once the parties had agreed to limit the provision on MCI to five years in so far as the territory of the EEA is concerned.

The BT - MCI case gives guidance to the future application of the Competition Rules in similar situations: the Commission accepted that the creation of Concert, ie a certain restriction of competition between the parents, was indispensable for quickly overcoming the shortcomings of existing networks and services, and the inadequacies associated with the provision of such global services under the existing framework of correspondent relationships between telecommunications operators. That restrictions were kept to a strict minimum was a significant factor in the case.

In its assessment of this case, particular attention was paid by the Commission to the fact that competition in infrastructure in BT's home market limited the effect of the restrictions of competition on that market.

#### International Private Satellite Partners (IPSP) - ORION

84. IPSP was also considered under Regulation 17 ("cooperative joint venture").

IPSP<sup>122</sup> was created as a limited partnership under US law, first to provide international business telecommunications services<sup>123</sup> and secondly to offer transmission capacity on the satellites to other users to the extent capacity will not be fully utilized by IPSP and its partners<sup>124</sup>.

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<sup>122</sup> International Private Satellite Partners (IPSP), OJ L 354/75 (1994) (Comm'n).

<sup>123</sup> Including, internal corporate networks, bulk data transfer, data collection and transport, fax and electronic document distribution, and network services to multinational companies on a "one-

As part of the agreements, the General Partner (OrionSat) was given exclusive responsibility for the management and control of IPSP and, subject to certain limited rights of review and approval by the limited partners, has broad authority to carry out the development, operation, marketing and promotion of IPSP's services. As regards the latter elements, IPSP markets and distributes its services with the assistance of a number of local marketing and operating companies nominated by IPSP as representative agents or distributors. Apart from STET, which is the exclusive distributor for Italy and the exclusive representative agent for a group of countries collectively referred to in the agreements as "Eastern Europe", such agents or distributors work on a non-exclusive basis.

85. In its Decision, the Commission concluded that partners of IPSP were not to be considered actual or potential competitors in the two relevant markets to be addressed by IPSP. It was accepted that none of the partners, most of them active in different segments of the aerospace industry, was in a position to obtain all the necessary authorizations and licences to provide the services in all the countries within the footprints of the satellites and that only through cooperation in a venture like this one, will they be able to arrange for the financing, construction, launch and operation of two satellites. In addition, most of the IPSP Partners did not have the experience required in providing communication services to other companies on a competitive basis (although some of them have gathered some experience by managing their own internal networks).

Finally, none of the IPSP partners could reasonably be expected to make the investment, and assume the substantial risk associated with it, required to enter the two markets concerned. The very high barriers to entry, the substantial amount of market power in the hands of the

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stop-shopping", "end-to-end" basis covering North America and Europe through its own satellite system and associated infrastructure and using very small aperture terminals (VSAT).

<sup>124</sup> For so doing, OrionSat acting as General Partner, applied for and obtained a licence from the Federal Communications Commission. Under the terms of the FCC's licence, IPSP or its customers were not allowed to interconnect the IPSP satellite facilities with a switched telephone network for the purpose of providing telecommunications services. However in December 1993 the FCC adopted a new policy allowing separate satellite systems (like IPSP) to apply to carry up to 1,250 64-kbps equivalent circuits of public switched traffic. In this respect IPSP is now an own facilities-based alternative carrier to established operators.

incumbent telecommunications operators in the overall telecommunications market and of the International Satellite Organizations in the satellite transmission market, the advanced technologies involved, the substantial inherent risk of failure associated with space operations and the broad geographic area covered, together with the amounts required and the bargaining power of customers (in particular the big multinational corporations), make this venture very risky. In view of the above, it was not realistic to consider that, from an economic point of view, any of the partners would enter the telecommunications market alone.

In conclusion, the implementation of IPSP, one of the first private ventures to enter the evolving telecommunications market, was concluded not to have as object or effect the prevention, restriction, or distortion of competition and therefore to fall outside the scope of both Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement. The same conclusion was reached in respect of a few provisions in the agreements (including a non compete obligation on the General Partner and the preference to be given to partners for contracts by IPSP) that were considered to be directly related and necessary to IPSP, and that did not exceed what was required by the creation and operation of IPSP.

Finally, several provisions in the agreements concerning STET's role as exclusive distributor of the services in Italy and in Austria were considered as non-appreciable restrictions of competition.

86. The IPSP - ORION case and its clearance under Art. 85 (1) - and not exemption under Art. 85 (3) - is an example of the positive attitude which the Commission takes with regard to the entry of new joint ventures which will tend to increase competition in the market and therefore can be considered as basically pro-competitive.

The same line of reasoning has been taken in a number of similar situations for joint ventures in the context of the Merger Regulation<sup>125</sup>.

### ***MSG Media Services GmbH - MSG***

87. MSG was considered under the Merger Regulation (concentrative joint venture).

This case concerned the German companies Bertelsmann AG, Deutsche Bundespost Telekom and Taurus Beteiligungs GmbH (Taurus), a company of the Kirch-group (Kirch)<sup>126</sup>. They

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<sup>125</sup> See below, point 97.



proposed to create a joint venture called MSG Media Service GmbH (MSG), where each parent would hold one third of the share-capital and voting rights. The object of MSG was the technical, business and administrative handling of payment-financed television and other communication services. The relevant market affected was that for technical and administrative services for pay-TV and other TV services financed through subscription or payment by viewers in Germany.

The most interesting element of the case was that a public telecommunications operator, holding a monopoly for telephone network services and owning nearly the totality of TV-cable networks in a Member State would combine its future activities in the joint venture's market with those of the leading pay TV suppliers.

The joint venture would have been created by companies that were likely to be important in the pay-TV sector. Bertelsmann and Kirch are active in the audiovisual sector and, jointly with Canal+, run the only existing pay-TV channel in Germany, Premiere. Kirch, the main supplier of films and TV programmes, would have continued to secure the dominant position of Premiere in the German pay-TV market. This argument would hold also after the possible introduction of digital television that would make a much larger programme diversity technically possible. Finally, Deutsche Telekom holds the legal monopoly for providing the cable infrastructure in Germany and it had recently acquired a holding in SES-ASTRA, the main European satellite operator.

88. The Commission considered it unlikely that competitors would enter MSG's market.

Therefore, the creation of a lasting dominant position could be expected<sup>127</sup>. Furthermore, the monopolistic position of MSG as a supplier of services would give the parent companies control over their competitors in the pay-TV market. The conclusion of the Commission investigation was that the proposed operation would create or aggravate a dominant position on the market for administrative and technical services for pay TV, where MSG would obtain a lasting dominant

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<sup>126</sup> MSG Media Services GmbH (MSG), OJ L 364 (1994 (Comm'n)).

<sup>127</sup> See Merger Regulation, ante, and subsequent implementation Regulations and interpretative Notices. According to the Merger Regulation, concentrations with a Community dimension are appraised by the Commission with a view to determining whether "they are compatible with the common market". The basic test is whether the concentration would "create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it".

position. Consequently, Bertelsmann and Kirch would have a dominant position on the German market. Furthermore, the dominant position of Deutsche Telekom on cable infrastructure would be protected and strengthened by MSG. The Commission considered in particular that in view of the position of Telekom, the effects of a possible liberalisation of cable infrastructure would be limited by the creation of MSG. The Commission therefore declared the joint venture incompatible with the common market.

MSG centered on the development of the cable-TV market and is representative of a new generation of cases in the media field which are directly linked to multi-media, and the convergence phenomena mentioned above. The Commission demonstrated its determination that, while it favoured re-structuring, it could not accept that markets would be closed before they started to develop.

The assessment of the impact of the venture on the market, as well as impact on future market evolution, was vital in this Decision. At the same time, the case demonstrates that new media cases - characteristic of the general transformation of the media market discussed earlier - tend to escape the traditional national legislation aimed at the control of media and the assurance of pluralism, thus giving Community competition policy as an inherently Europe-wide mechanism a central role.

### ***Nordic Satellite Distribution (NSD)***

89. NSD was also considered a “concentrative joint venture”.

The Commission prohibited the NSD joint venture in July 1995<sup>128</sup> following a five-month investigation of the case. NSD intended to transmit satellite TV programmes to cable TV operators and households receiving satellite TV on their own dish (“direct-to-home” market). However, the Commission concluded that the establishment of NSD in its current form would have led in effect to a concentration of the activities of its parents<sup>129</sup>, creating a highly vertically integrated operation extending from production of TV programmes (through operation of satellites and cable TV networks) to retail distribution services for pay-TV and other encrypted channels.

NSD’s parents were important companies in TV transmission and media in the Nordic area. NT is the main cable TV operator in Norway with about 30% of household connections and controls the satellite capacity on one of the two allocated Nordic satellite positions, and it is an important pay-TV distributor in Norway through its company Telenor CTV. TD is the largest cable TV operator in Denmark with about 50% of household connections, and will retain a privileged position for its cable TV operations possibly until 1 January 1998, the deadline for liberalization of the telecommunications markets. In addition, TD, together with Kinnevik, controls most of the satellite capacity on the other Nordic satellite position. Kinnevik is a Swedish conglomerate with interests in TV programming, magazines and newspapers as well as in steel, paper, packaging and telecommunications, and is the most important provider of Nordic satellite TV programmes including the most popular channels. The company is the largest pay-TV distributor in the Nordic countries through its Viasat companies and also has an important stake in Kabelvision, the second largest cable TV company in Sweden, as well as in TV4, the largest advertising-financed Swedish channel.

90. The Commission concluded that the creation of the NSD joint venture would have resulted in the creation or strengthening of a dominant position on three markets:

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<sup>128</sup> Not yet reported. See European Commission Press Release : Commission decides not to authorise NSD in its current form, but remains open to examine new proposals ( IP/95/801).

<sup>129</sup> Norsk Telekom A/S (NT), TeleDanmark A/S (TD) and Industriförvaltning AB Kinnevik (Kinnevik)

- the market for provision of satellite TV transponder capacity to the Nordic region (Denmark, Norway, Sweden, and Finland) - this would have meant the creation of a dominant position for NSD itself.
- the Danish market for operation of cable TV networks - this would have strengthened the dominant position already held by TD.
- the market for distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households - this would have created a dominant position for NSD.

The operation was vertically integrated, and thus the downstream market positions (cable TV operations and pay-TV) and those upstream (satellite transponders, provision of programmes) would have been mutually reinforcing. The parties would have achieved such strong positions that they would have been able to foreclose the Nordic satellite TV market for competitors. Essentially NSD would have obtained a “gatekeeper” function for the Nordic market for satellite TV broadcasting.

The affected markets are currently in a transitional phase, since telecommunications markets are about to be liberalized and new technologies and services are currently under development and are about to be introduced. In this situation the decision of the Commission took on a particular importance, since this is the period during which future market structures are being defined.

91. The NSD Decision to a large extent re-affirms the line taken in the MSG Decision. However, the Commission also re-stated that joint ventures, particularly transnational joint ventures, could be instrumental in developing the media and telecommunications sectors to their full potential. The policy of the Commission was to take new developments into account and the Commission therefore remained open to examine new proposals from the NSD parties.

### ***The Microsoft Undertaking in 1994***

92. The Commission received a complaint from Novell, a competitor to Microsoft in the operating system software market, alleging that Microsoft was blocking competitors out of the market by a variety of licensing practices. One allegation maintained that the structure of Microsoft’s standard agreements for licensing software to PC manufacturers excluded competitors from selling their products as manufacturers were required to pay royalties to Microsoft based on the number of PCs shipped regardless of whether such PCs contained preinstalled Microsoft software, a competitor’s software or no software at all.

Microsoft gave an undertaking to the Commission<sup>130</sup> (as well as a parallel consent decree with the US Department of Justice<sup>131</sup>) that it would not enter into licence contracts with a duration of more than one year, it would not impose minimum commitments on licensees and would not use per processor clauses in its contracts<sup>132</sup>. Per system licences would only be allowed if licensees were clearly given flexibility to purchase non-Microsoft products and to avoid payment of royalties to Microsoft in such instances. Any existing provisions of licence contracts which were in breach of those provisions would not be enforced, and licensees had an option to end existing contracts. On the basis of this undertaking, Novell withdrew their complaint.

93. The Commission demonstrated with this case that while favouring technology exchange and transfer, it would carefully see that markets would not be foreclosed by the actors in the software / services field, continuing the basic line taken in the IBM undertaking<sup>133</sup>. The Microsoft case deserves special attention, given the role of software systems in the restructuring of the global infrastructure society market and current developments in this area.

### *Other Cases*

94. With the dramatic transformation of the telecommunications, media and information technology sectors, the Commission is treating, particularly during recent months, a growing number of cases. This trend is continuing.

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<sup>130</sup> See European Commission Press Release, Following an undertaking by Microsoft to change its license practices, the European Commission suspends its action for breach of the competition rules, IP/94/653.

<sup>131</sup> "Microsoft agrees to end unfair monopolistic practices", Department of Justice Press Release, 16 July 1995 (94-387).

<sup>132</sup> This case is also significant for its demonstration of the increasing importance of cooperation between competition authorities in this sector.

<sup>133</sup> See European Commission, XXIV Annual Report, Point 77. In July 1994, IBM withdrew the undertaking.

In the field of strategic telecommunications alliances, the Phoenix / Atlas case (Deutsche Telekom / France Télécom / Sprint) stands out, as well as Unisource (and its Uniworld alliance with AT&T).

95. As regards the first<sup>134</sup>, this is a pending case. However, in the announcement made when the agreement was notified, the Commission made it clear that it would apply to this second case of a “Global Player” to be dealt with under EU competition law (“cooperative joint venture”), the same principles as applied to BT-MCI.

As was also made clear in those statements, the main differences will also play a crucial role: the home markets of the parties in this case (France and Germany) are less liberalised than the home markets of BT and MCI ; the domestic elements of the services intended are much stronger relative to the global elements.

96. In the case of the second, Unisource / Uniworld, the Commission opened an own initiative investigation in April<sup>135</sup>. In the meantime a number of components of the project have been notified.
97. A second group of cases concerns market entrance in the newly liberalised markets, as well as into the new markets created by convergence.

While in MSG and Nordic Satellite Distribution the Commission had made it clear that it would carefully screen developments, in order to avoid foreclosure of markets<sup>136</sup>, the general approach

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<sup>134</sup> European Commission Notice on Atlas, OJ C 377/9 (1994).  
European Commission Notice on Phoenix, OJ C 184/11 (1995).

See also European Commission Press Releases : Commission examines a third strategic alliance in the telecommunications sector (IP/95/288), Telecommunications - Atlas project : statement by Commissioner Karel Van Miert (IP/95/524), Commissioner Van Miert details conditions under which Atlas Telecommunications venture could be acceptable under the competition rules (IP/95/791).

<sup>135</sup> European Commission Press Release : Commission examines a third strategic alliance in the telecommunications sector (IP/95/288).

<sup>136</sup> See also European Commission Press Release : "Global European Network" Project for Optical-Fibre Transmission of Data: Mr Van Miert seeks clarification of infrastructure prices (IP/95/443).

has been to recognize the potentially pro-competitive effect of market entry and restructuring, both in services and equipment. This line has been consistently followed under both Regulation 17, as for example with the IPSP case, as well as under the Merger Regulation<sup>137</sup>.

98. A third group of cases concerns access issues. In the telecommunications field, the central issue to date has been access to the dominant (in many cases still monopoly) incumbents' facilities<sup>138</sup>. In the field of media, there were a series of cases where the issue was access to

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<sup>137</sup> See e.g.

- Mannesmann, RWE, Deutsche Bank, European Commission Press Release : Commission cleared a joint venture between Mannesmann, RWE - Deutsche Bank in the telecommunications sector (IP/93/1241)
- Telenordia (BT/TeleDenmark/Telenor)., European Commission Press Release : Commission approves creation of Swedish telecoms joint venture (IP/95/426).
- Cable&Wireless and Veba, European Commission Press Release : Commission approves establishment of Cable and Wireless and Veba telecommunications joint ventures (IP/95/922)
- BT/Italy, European Commission Press Release : Commission finds Banca Nazionale del Lavoro / BT Telecoms joint venture Albacom to be outside the jurisdiction of the merger regulation (IP/95/984).
- Banco Santander / BT, European Commission Press Release : Commission finds Banco Santander / BT Telecom Agreement to be outside the jurisdiction of the merger regulation (IP/94/263)

In the two latter cases the notified concentrative joint ventures were found to represent an acquisition which therefore did not require a Decision under the Merger Regulation.

In the equipment market, see e.g. Siemens / Italtel, European Commission Press Release : Commission clears proposed joint venture between Siemens and Italtel in the sector of telecommunications equipment (IP/95/149).

In the media field:

- Bertelsmann / News International / Vox, European Commission Press Release : Commission approves News International stake in Vox (IP/94/821) ;
- CLT / Disney / Super RTL, European Commission Press Release : Commission clears establishment of super RTL between CLT and Disney (IP/95/535) ;
- Kirch / Richemont / Telepiu : European Commission Press Release : The Commission clears the joint acquisition of Telepiu by Richemont and Kirch (IP/94/783).

<sup>138</sup> See below

programme content<sup>139</sup>. With the development of pay-TV and the convergence towards multi-media, conditional access systems and access to set top boxes start to play a major role<sup>140</sup>. This was the case in both the MSG and NSD Decision<sup>141</sup>.

99. There have also been a number of cases where the Commission has made it clear that it would use the Art. 85(3) exemption to favour the exchange and transfer of technology<sup>142</sup>. A more general case in this context concerned the issues raised about licensing rights in the context of standards development by the European Telecommunications Standards Institute (ETSI)<sup>143</sup>.

### ***Access and Interconnection Issues***

100. As has become clear from the cases discussed, the issue of access (and the related issue of network interconnection) is bound to become a central issue in the telecommunications / media / information technology market.

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<sup>139</sup> See e.g. acquisition of films by German television stations, OJ L 248/36 (1989), (Comm'n); European Broadcasting Union - 1993, joint acquisition of rights for sports events and use / access opportunities for non-Members, OJ L 179/23 (1993), (Comm'n); BBC / BSky B / sports events ;European Commission Press Release : Commission clears agreements concerning exclusive television coverage of English football matches (IP/93/614)

<sup>140</sup> See also Canal+ and Bertelsmann, OJ C 168 (1995) - a strategic alliance concerning the pay-TV business.

<sup>141</sup> Ante

<sup>142</sup> See eg. Olivetti/Digital, exchange of technology, OJ L 309/24 (1994) (Comm'n), and European Commission Press Release : The Commission has approved a cooperation agreement between Olivetti and Digital in the field of risk technology-based computer system products (IP/94/1040); Fujitsu/AMD, joint manufacture of advance microchips, OJ L 341/66 (1994) (Comm'n), and European Commission Press Release: The Commission has approved a joint venture agreement and five related agreements entered into by Fujitsu and Advanced Micro Devices in the field of semiconductors (IP/95/1203).

<sup>143</sup> See ETSI: Notice pursuant to Article 19(3) of Regulation No 17/62 ETSI, OJ C 76/5 (1995).



In the media context to date, access to content has been a major issue (though with the emergence of pay-TV and multi-media, conditional access systems and set top boxes are now also moving to the top of the agenda), while in the telecommunications field access and interconnection to facilities and services of (single or jointly) dominant operators are becoming a major issue.

101. In the case of **Infonet**<sup>144</sup> which was owned at the time of the notification by a large number of Community and non-Community telecommunications operators, the notification related to the organisation of Infonet and its shareholders in relation to the supply by Infonet of telecommunications services (global value added network services, or VANS) in a number of countries around the world, including all of the Community Member States at that time.

Infonet's data communications services - the largest part of its business - was operated on the basis of an international packet-switched network, constructed with lines leased from the TOs and other operators, and nodes belonging to Infonet. This was at a time when a number of its shareholders had exclusive or special rights for the leasing of lines to telecommunications services suppliers. Infonet did, however, have a small market share in the Community, and its products were being distributed on a *non-exclusive* basis in the 12 Member States.

This arrangement was nevertheless of concern, and the Commission therefore required undertakings from the parties, relating to non-discrimination - that they would apply the same terms and conditions to Infonet as to other service providers "for the provision of reserved services (eg the provision of leased lines)". The Commission noted that these terms and conditions included "price, quality of service, usage conditions, timing of installation of facilities, repairs and maintenance", and emphasised that this and other undertakings were required "to eliminate the risk that [Infonet] is granted more favourable treatment in relation to access and use of the public telecommunications network or reserved services [than other service suppliers]". The Commission also required undertakings relating to cross-subsidisation, together with recording and reporting requirements.

102. In **Eirpage**<sup>145</sup>, the Commission exempted a joint venture agreement between Bord Telecom Eireann (BTE) and Motorola Ireland Limited for the formation and operation of a nationwide

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<sup>144</sup> Ante.

<sup>145</sup> Eirpage, OJ L 306/22 (1991) (Comm'n).

paging system - BTE had statutory exclusive rights over the public telecommunications network to which the paging system was to be interconnected. In view of this, the Commission required an undertaking from BTE that BTE would supply any other potential operator (who satisfied the relevant licensing and financial requirements) on the same terms as Eirpage.

103. Both cases can be seen as leading up to a much more general situation, which will evolve, as, with full lifting of remaining exclusive and special rights, former monopoly incumbents turn into dominant operators, and as, with converging markets, companies may acquire control of essential segments which others need to benefit from the full value chain. The post-monopoly and future multimedia environment is likely to be characterised by situations where firms single or jointly control facilities - such as networks, conditional access systems or critical software interfaces - which may provide an essential route to customers.

The issue of access and interconnection agreements will therefore be a central issue for future application of EU competition law to the sector<sup>146</sup>. Access and interconnection agreements may, in principle, be seen as pro-competitive because they aim at enlarging the service offer which is available to the customer. However, these agreements can also generate substantial collusive behaviour and market foreclosure, as well as abuse of dominant positions, raising concerns under Art. 85 and/or Art. 86<sup>147</sup>.

The central problem will without doubt be that, given the evolving market structure, the telecommunications / media / information technology sector will in many areas depend on

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<sup>146</sup> The G7 conclusions and the Telecommunications Infrastructure Green Paper emphasize the central importance of interconnection agreements for the regulatory environment of the future telecommunications market. Ante.

<sup>147</sup> See:

Coudert Bros, Competition aspects of interconnection agreements in the telecommunications sector, Report to the European Commission, June 1995.

Wilmer, Cutler & Pickering, Competition aspects of network access by service providers, Report to the European Commission (DGIV), still not published.

Types of issues capable of raising competition concerns in interconnect agreements under Art. 85 and/or Art. 86 include e.g. : number and location of points of connection, costs/charges of providing interconnection, service delivery and quality, numbering and number portability, access to premises or equipment, directory services, intellectual property and exchange of technical and commercial information.

ensuring access to bottle-neck / essential facilities - such as networks - which are essential for reaching customers and can not be replicated in a reasonable manner by other means.

104. The concept of access to essential facilities and the evolving doctrine in this respect in EU competition law has been discussed in-depth in a more general context<sup>148</sup>. It is worthwhile to quote from this analysis:

“EU-competition law says that where a dominant company owns or controls a facility access to which is essential to enable its competitors to carry on business, it may not deny them access, and it must grant access on a non-discriminatory basis, in certain circumstances”<sup>149</sup>

Roughly speaking, this requirement becomes the stronger, the weaker competition is in the downstream market<sup>150</sup>.

The issue of access and interconnection in the telecommunications, media, and information technology sector will become without doubt a major test for the application of the essential facilities doctrine under EU competition law.

105. Another test will be the definition of the relationship of the application of EU competition law to regulation of access under the EU’s Open Network Provision regulations. As mentioned<sup>151</sup>,

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<sup>148</sup> See John Temple Lang, Defining Legitimate Competition, companies' duties to supply competitors and access to essential facilities. 21st Fordham International Antitrust Law and Policy Conference, 1994.

<sup>149</sup> John Temple Lang, ante.

The paper also says that .... "important sectors of industry .... are being deregulated or at least liberalised by the European Union. These measures would be of little value if the companies concerned, most of which are dominant in their own areas, were free to integrate forward and to discriminate in favour of their own downstream operations ... ; .... regulated or State-owned companies often own facilities which are essential for all or most of their downstream competitors. The essential facilities principle is, in effect, the follow-up of Art. 90 EC Treaty" (emphasis added).

<sup>150</sup> See also Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities, Magill: Cases C-241/91P and C-242/91P, 6 April 1995, not yet reported (C.J.): the ruling has strengthened the argument that essential facilities are recognised under EU competition law.

an ONP interconnection Directive has been proposed, within the context of the overall general telecommunications reform for 1998, to regulate access to and interconnection with public networks<sup>152</sup>.

### *Comment*

106. As is shown by the cases discussed, the Commission recognises that enterprises must be allowed to adjust to the dramatically changing market structures, as these structures evolve out of de-monopolisation and convergence. At the same time the Commission must aim to avoid the foreclosure which would slow down market development if allowed to progress unchecked.
107. In terms of Art. 85(3), this balance may be expressed as follows (plainly this list is not exhaustive):

*Improvement of production and distribution and the promotion of technical or economic progress:* Alliances intending to offer new global services with features already required by, in particular, large corporations (e.g. seamlessness, end-to-end, one stop shopping and billing, etc.) will in general improve the quality and the availability of advanced telecommunications services<sup>153</sup>, and will also contribute to the creation of trans-European networks, which is one of the aims of the EC Treaty (Article 129B).

*Benefits to consumers:* Global alliances allow consumers, including large multinational companies, to benefit from more advanced global services and efficiency gains which improve

(..continued)

<sup>151</sup> ONP Interconnection directive, ante. The Commission's Communications of 3.5.1990 also announced amendment Directives for the original ONP Framework Directive of 1990 and subsequent specific Directives.

<sup>152</sup> In a number of aspects the concept of public networks ("networks used primarily for services for the general public") is comparable with the common carrier concept in the United States.

<sup>153</sup> See, however, Astra, OJ L 20/23 (1993) (Comm'n), where restrictions of competition in the markets for the provision of satellite transponder capacity for the distribution of television channels and for uplink services did not merit an exemption under Article 85(3) as the restrictions, "did not bring about any improvements and benefits on the market in question, and were not indispensable in order to ensure SES's entry into the market for the provision of space segment capacity" (para 31 of the Decision).

their competitive position both globally and within the EU: it is often the case that such global services could not be provided by any one company - this leads to a generally positive approach to large-scale alliances (“Global Players”).

But also:

*Indispensability of restrictions* : The Commission must always assess the indispensability of each joint venture and each restrictive provision in an agreement. For instance, non-competition obligations beyond the scope of the venture, provisions that impair the entry of parents into the EEA, agreements on prices and/or on other conditions regarding the provisions of services, exclusivity in dealing or undue preference in respect of services the provision of which depends on infrastructure owned by companies involved in a strategic alliance, will not in principle be acceptable and will thus require deletion or amendment.

*Elimination of competition of a substantial part of the products or services in question* : this requirement in particular demands assessment of the current and foreseeable market structure, as well as of the prospective position in that structure of the alliance, of its parents and of actual or potential competitors. The Commission must analyse the venture with regard to the existing market environment, where relevant markets are largely shaped by regulatory conditions and their change. It is this last condition which is at the heart of current evaluation of global alliances such as Phoenix / Atlas. The Commission may not allow parties to obtain power to eliminate competition, either now or in the future.

108. Application of EU competition law to enterprises therefore closely interacts with national regulatory reform and with application of EU competition law to State measures, which to a large extent, set the rhythm of regulatory reform, as discussed above. At the same time, the desire of governments to create the right base in their States for allowing enterprises to participate in global alliances, may prompt early relaxation of national constraints. Following the principles set in BT/MCI, the Commission has stated in the Phoenix/Atlas case that deregulation of alternative infrastructure was a condition to create a market environment allowing approval<sup>154</sup>. Roughly speaking, the more competitive the home market, the more easy approval under EU competition law. (The Commission also adopted this approach in the air transport sector).

The developments in the telecommunications / media / information technology sector at the same time test a number of EU competition law concepts and may prompt their further

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<sup>154</sup> European Commission Press Release : Commissioner Van Miert details conditions under which Atlas telecommunications venture could be acceptable under the competition rules (IP/95/791).

development, principally because of the unprecedented speed of market change, convergence of different sectors and the inherently global character of the Information Society.

109. First, the sector tests the consistency of the approach under EU competition policy to the analysis of the alliances / joint ventures. In concrete terms, this means that inevitably many of these projects will be situated on or near the subtle distinction between cooperative and concentrative joint ventures, i.e. between the application of Art. 85 and Regulation 17, and the application of the Merger Regulation, and these cases will test the clarity of the distinction refined last December in the Notice<sup>155</sup>. The difficult distinctions involved have been shown by the fact that cases have been transferred between the two procedures<sup>156</sup>.

In practical terms, the distinction means determining the balance between the risk of coordination between parents - and retaining the ongoing scrutiny of these risks, if necessary coupled with behavioural conditions, which only Regulation 17 offers - or giving priority to the concept of a joint venture as a new autonomous entity (“full function”) which should principally be considered in its own right as to market impact, as provided for under the Merger Regulation. While Article 85 concepts originally derive from the prevention of cartels and, therefore, are focused on analysing constraints, the concentrative nature of ventures critically depends on the evaluation of the risk of coordination or adjustment of the practices of the parents or of re-entry by them into the markets concerned<sup>157</sup>, which is difficult to establish or disprove in an environment of rapid regulatory change, changing alliances and convergence of markets.

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<sup>155</sup> Commission Notice on the distinction between concentrative and cooperative joint ventures under Council Regulation (EEC) N/ 4064/89 of 21.12.1989 on the control of concentrations between undertakings, OJ C 385/1 (1994).

<sup>156</sup> Case BT/MCI, ante, was originally notified as a concentrative joint venture. The Commission determined that it was to be considered a cooperative joint venture. More recently, the Omnitel case (Italian mobile consortium) was notified as a concentrative joint venture and subsequently determined to be of cooperative nature. European Commission Press Release : The Commission has considered that the creation of Omnitel - Pronto Italia is not a concentration and has to be assessed under Article 85 (IP/95/312).

<sup>157</sup> The Notice on concentrative and cooperative joint ventures states that the following is an important criterion:

In practice, large global alliances will normally entail the risk of coordination. Most of them have, in fact, been notified as being of a cooperative nature. Smaller joint ventures and new market entrants have mostly been determined to be of a concentrative nature, mainly due to the still existing separate national markets and the fact that parents are active in different States or come from unrelated sectors.

While, undoubtedly, the discussion of the cooperative / concentrative distinction will re-open the confrontation between the “freedom of action” supporters of EU competition law and the “market impact” protagonists<sup>158</sup>, well known to Fordham conferences - and I would not exclude that the developments in this sector will contribute to the advancement of concepts in this field - we have to confront a number of issues in day-to-day operations, as a consequence of the different procedures applicable :

- the Merger Regulation requires notification if the criteria are met, whereas there is no such obligation under Articles 85 : this could lead to a different intensity and timing in the screening of the market.
  - there are high thresholds<sup>159</sup> for Community intervention under the Merger Regulation, whereas there is a relatively low, and certainly less precise, trigger for Community action under Regulation 17<sup>160</sup>.

(..continued)

"- coordination can normally be excluded where the parent companies are not active in the market of the joint venture or transfer to the joint venture all their activities in this market or where only one parent company remains active in the joint venture's market. The same is true where the parent companies retain only minor activities in the market of the joint venture,"

<sup>158</sup> The first school focuses generally on an analysis of constraints and tends to view any constraint limiting the freedom of action of the parties as a potential restriction of competition, while the second school gives preference to an analysis of the impact of the agreement on the overall competitive structure of the market.

<sup>159</sup> World-wide turnover test (5 bn ECUs) ; Community-wide turnover test (250 mio ECUs) ; Two-thirds test.

<sup>160</sup> See also Commission Notice on agreements of minor importance OJ C231/2 (1986).

- evaluation under the Merger Regulation emphasizes market position and impact, whereas evaluation under Regulation 17 traditionally emphasizes potentially anti-competitive effects of constraints and effects on the behaviour of parents of joint ventures: there can therefore be a problem of consistency of results in similar cases.

The first issue can be partly balanced by more actively using the own initiative provisions for opening procedures under Regulation 17. The Commission has opened a series of such procedures on its own initiative during recent months in the fields of strategic alliances<sup>161</sup>, global satellite consortia<sup>162</sup> and Online services<sup>163</sup>. Own initiative cases will continue to be necessary: not all important alliances are the subjects of notifications or complaints<sup>164</sup>.

The second issue is of general concern in the context of the Merger Regulation. It is well known that the Commission has considered a lowering of the thresholds. In the telecommunications / media / information technologies context, high current thresholds may allow important arrangements to escape Community scrutiny altogether.

The third issue requires particular care to ensure coherence of analysis under current circumstances.

110. A second challenge for EU competition law in this sector will be its ability to ensure that open structures emerge in the media field, where new developments tend to escape traditional

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<sup>161</sup> Unisource / Uniworld, ante.

<sup>162</sup> Iridium / Globalstar / Odyssey, European Commission Press Release : Commission launches investigations into global mobile satellite systems (IP/95/549)

<sup>163</sup> Europe Online, European Commission Press Release : The Commission surveys the European online market (IP/95/1001). Europe Online is the joint venture of a number of European publishing companies and AT&T. The Commission has also stated that it would follow carefully other activities in this field (for example, Bertelsmann / America Online and Microsoft).

<sup>164</sup> Thus the Commission has recently opened a series of proceedings with regard to the extension of Telecommunications Organisations into cable-TV networks. In one case, the proceeding is based on a complaint (Telefonica/Prisa); in two other cases procedures are based on the Commission's own initiative (Telecom Eireann/Cablelink and Telecom Italia). See European Commission Press Release (IP/95/1102), ante.



national legislation for the control of media concentrations and the guarantee of pluralism of media. The fact that three negative Decisions were taken recently under the Merger Regulation<sup>165</sup> does not indicate a negative position on media developments but rather is indicative of the fact that the new joint ventures outgrow the framework of traditional national media legislation and control<sup>166</sup>.

The Commission is addressing this issue in the current consultation subsequent to the Green Paper on media pluralism<sup>167</sup>.

111. A third major challenge is defining the relationship between application of EU Competition law and specific legislation established to regulate the sector. An immediate issue is application of Competition Rules to access issues relative to the EU's Open Network Provision framework in the telecommunications sector, as mentioned<sup>168</sup>.

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<sup>165</sup> Besides MSG and NSD, ante, Veronica, European Commission Press Release : Holland Media Group - Dutch TV joint venture cannot be cleared in its current form - Commission and parties positively discuss solutions, Van Miert says (IP/95/995).

<sup>166</sup> Most Member States have media laws in place relating to issues of media ownership and programme content. In general, this legislation must be placed in the context of the Constitutional provisions relating to freedom of expression and the media. These rules in general limit both the number of broadcasting companies which can be owned, and the maximum interest which any company (or individual) can have in each broadcaster, with limits commonly between 20% and 30%.

<sup>167</sup> Ante. The Merger Regulation provides that "Member States may take appropriate measures to protect legitimate interests ... Plurality of media .... shall be regarded as legitimate interests" "The Member States' right to plead the plurality of the media recognises the legitimate concern to maintain diversified sources of information for the sake of plurality of opinion and multiplicity of views". Notes on Council Regulation (EEC)4064/89, Annex to the Regulation.

<sup>168</sup> A similar issue emerges for conditional access systems in the media field, where a Directive has been adopted: see Commission Directive of 24 July 1995, on the use of television transmission standards, not yet reported.

More generally, the complementary role of Competition Rules and EC internal market Regulations for public services, established particularly to ensuring interconnection and universal service in the field of public networks, but also to safeguard other public interests goals such as protection of privacy, will have to be established more clearly<sup>169</sup>.

112. A fourth challenge will be the global nature of the new ventures in the telecommunications / media / information technology field. This makes it desirable not only to try to ensure consistency between decisions of national and Community authorities<sup>170</sup> but also to try to ensure that similar results are reached at more or less the same time. This can be done if the parties agree to a settlement: it may not be possible if a case was litigated through either the US federal courts or the Community Courts. In BT / MCI, cooperation was established between the Commission and the Justice Department with the consent of the parties. Phoenix / Atlas will be the first major case to which the US/EC cooperation agreement<sup>171</sup> will fully apply. Other cases of a clearly global nature may be ahead, such as in the field of global satellite and online-ventures.

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<sup>169</sup> See also Competition Guidelines, ante.

The Court has given guidance on the matter in Ahmed Saeed, Case 66/86, 1989 ECR 803 (C.J.) where it has established that standards / conditions set by general EU legislation can be referred to in Decisions under EU Competition Law for the purpose of determining what would constitute abusive conduct.

More generally, while EC Competition Law is rooted in the EC Treaty and its basic content cannot therefore be changed by Council measures, Council measures may be regarded as setting harmonised conditions, e.g. for reasonable interconnection and access to public networks.

Conversely, while competition measures can only be taken to pursue competition objectives, the express wording of Art. 90 makes it clear that the provisions of this Article (though included in the competition chapter of the Treaty) can be used to apply and enforce other existing principles of the Treaty, within the limits set out.

<sup>170</sup> Forrester Norall & Sutton, Efficient cooperation with the national Telecommunications Authorities, Report to the European Commission, not yet published.

<sup>171</sup> EC/US Agreement on competition policy. See European Commission Press Release (IP/95/393)

113. Finally, the sector will act as a driving force for further developing certain concepts in EU competition law - the essential facility concept is one of the concepts most likely to be elaborated - or litigated - soon.

## **VIII CONCLUSIONS**

114. The European telecommunications, media and information technology market now amounts to some 10% of the European Union's GDP, growing at a rate of two to four times the average growth rate of the economy (depending on the particular segment of the market).

In markets which grow at high speed and where liberalisation and interpenetration of markets create market opportunities of new dimensions, market participants will try to gain maximum market strengths in the new segments, either by building on their incumbent positions or by concluding alliances whereby together they can provide the required strength.

The European Commission - and European competition law - is therefore faced with a double task: on the one hand, allowing re-structuring for making the development of the information society possible, and on the other hand, making sure that markets are not closed off before they have even opened or come into existence.

It is this double objective which runs as a common thread through the application of EU competition law to the sector, both as regards application to State measures, as well as to enterprises. The task is not made any easier by the fact that in Europe, firmly rooted monopolies in the telecommunications sector must be ended within a very short time; nor by the fact that companies in the media and publishing field are at the same time re-positioning their activities in Europe and in the United States, outrunning to some extent the national control measures established to ensure pluralism of media.

The European telecommunications reform for full liberalisation in 1998 is at the core of the EU programme for the Information Society. European telecom reform can be regarded as a parallel to the telecom reform Bills currently pending in the US Congress. EU competition law, as shown, plays a central role in Europe.

The application of EU competition law to the sector must however be seen in the context of the much broader objectives of the EU for the Information Society - reaching from ensuring competitive markets, while ensuring an open media environment, to avoiding as far as possible the danger of a split between information haves and have-nots, both in Europe and with regard to the developing countries - all goals confirmed by the G7 countries in the February 1995 declaration.

Liberalisation in Europe therefore will go hand in hand with legislation to safeguard universal service. Domestic market opening must be accompanied by third country market access. Reform of public regulation must be matched by re-organisation - and in many cases privatisation - of enterprises.

115. As regards EU Competition Rules, the developments in this sector have made, in my view, three major contributions:

First, it has firmly established and strikingly shown that the application of EU competition law under Article 90 is a third, and essential, pillar of EU-competition law (the application of EU competition law to enterprises and to State aids being the first two pillars). EU competition law is built on these three pillars. Weakening one of them, or failure to use one of them fully and correctly, would weaken the whole construction. The liberalisation and modernisation of the European telecom industry could not have been done satisfactorily without the use of Article 90.

Secondly, the two principal procedures under EU competition law - Regulation 17 and the Merger Regulation - touch on each other in this area, due to the high dynamics of markets which make the distinction between cooperation and concentration a moving target.

Experience in this sector may contribute to future clarification of the problems, and we will have to be open and flexible in the development of future concepts.

Thirdly, the telecommunications, media, information technology markets are inherently global. Global alliances and operations which respond to these requirements need inevitably closer cooperation between anti-trust authorities. The sector therefore is also a proving ground for testing the effectiveness of the agreements, such as the US/EC Agreement on anti-trust cooperation. More broadly speaking, the more common ground that exists on the basic principles applied by anti-trust authorities to the sector the easier it will be to arrive at similar results in all jurisdictions. This is particularly true for US anti-trust and EU competition law, which have developed in different environments, often with different concerns, and which are subject to different influences, but which often in practice reach similar conclusions.

Inevitably, international competition must be accompanied by progress on fair access to each other's markets and a fair give and take in this respect. The GATS' negotiations on basic telecommunications services which are now getting seriously underway in Geneva will be of major importance, and will give opportunities for anticipating and solving some of the problems which can already be foreseen.

116. Let me then sum up a few concrete conclusions which I would like to emphasize concerning the application of EU competition law to the sector :

- 1) The application in the sector of telecommunications has proven that Article 90 can be applied fully in a competition context, but can and ultimately must be linked into the general policy framework for its potential to be used to full effect;
- 2) The creation of transparent procedures for adopting Article 90 Directives (in particular, publication of drafts and wide consultations) has been important in this context. Developments in the telecommunications sector have been instrumental in developing such procedures.
- 3) The application of Article 85/86 and the Merger Regulation to the sector will further increase in importance in the post liberalisation environment, driven particularly by globalisation and multi-media developments. Cases will centre on joint venture and access issues.
- 4) Ventures must be screened against the regulatory framework. There is a clear link here to progress being achieved on liberalisation: the more competitive the home market, the more easy approval will be under EU competition law. The Commission has shown in recent cases that this principle will be consistently applied.
- 5) On top of application of competition rules, there will be substantial public interest legislation in both telecommunications and in media. Main concerns will be universal service for the first, maintenance of media pluralism for the second.

Relationships will have to be worked out both at the legal level, and in day-to-day operations.

- 6) As regards joint ventures, projects tend to be on the limit between cooperation and concentration : the sector therefore will also serve as a testbed for the principles in this area.
- 7) Access / Interconnection is likely to become one of the most important groups of future cases. The concept of essential facilities will become central, in parallel to and complementary with public interest legislation in the field of public networks, such as the EU Open Network Provision concept developed in the telecommunications sector.
- 8) The definition of the relationship between competition authorities and telecom and media authorities will become a major task in the multi-media world in Europe, where these functions have traditionally been separated.
- 9) As regards EU/US relations in the field, it might become necessary for the European Commission to develop links, on the lines of those which it has with the US Department of Justice and the Federal Trade Commission, with other US Federal authorities.

10) Globalisation will require a closer relationship world-wide between national authorities both anti-trust and sector specific. The EU/US Agreement on anti-trust cooperation may be seen as a starting point in this context.

117. The transformation of our economy into an information-based economy is a fundamental transformation which reaches far beyond economic aspects and touches deeply on social values, reaching from maintaining basic concepts about public service to every citizen, to freedom of speech, and protection against intrusion into privacy. A fundamental economic transformation of society such as this, deeply challenges existing market structure principles. Anti-trust was born in the United States during the great industrial revolution of the second half of the last century. Anti-trust and competition law on both sides of the Atlantic are now facing a major new test and will have to be ready to adapt to radically changed circumstances, as we move into the information revolution at the end of this century.