

EC Competition Law in the  
Telecommunications, Media, and Information  
Technology Sectors

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## **Abstract**

The application of European Community (“EC”) competition law to the telecommunications, media, and information technology sectors must be examined in the general context of the rapid evolution of markets and, therefore, policies in these sectors. The competitive behavior of companies is largely conditioned by the positions companies have taken in response to the rapid changes in market and regulatory conditions. Potentially anticompetitive behavior generated by these rapid changes poses new challenges for EC competition policy. In addition, the required adjustment of the competitive framework and, in particular, the role played by EC competition rules in eliminating existing monopolies, are creating new challenges for EC competition law and policy in these sectors. These two challenges for EC competition law and policy: first, creating a competitive framework and promoting pro-competitive market structures and second, ensuring the competitive behaviour of economic actors, have initiated a new phase in the application of EC competition rules to the telecommunications, media, and information technology sectors and are testing some current EC competition policy concepts in a number of aspects. As a result of these developments, EC competition rules now play a role far beyond their traditional boundaries in the telecommunications, media, and information technology sectors. With the convergence of telecommunications, media, and information technologies, the markets in these sectors have begun to develop rapidly on both sides of the Atlantic and economic actors are now positioning themselves to take advantage of the new opportunities. Recognizing that these developments have been most dramatic in the field of telecommunications and in the new convergent and overlapping fields of communications and media, this Article concentrates on those recent developments that are determining the dynamics of the application of competition law to these sectors.

# EC COMPETITION LAW IN THE TELECOMMUNICATIONS, MEDIA, AND INFORMATION TECHNOLOGY SECTORS

*Herbert Ungerer\**

## INTRODUCTION

The application of European Community<sup>1</sup> ("EC") competition law to the telecommunications, media, and information technology sectors must be examined in the general context of the rapid evolution of markets and, therefore, policies in these sectors. The competitive behavior of companies is largely conditioned by the positions companies have taken in response to the rapid changes in market and regulatory conditions. Potentially anticompetitive behavior generated by these rapid changes poses new challenges for EC competition policy. In addition, the required adjustment of the competitive framework and, in particular, the role played by EC competition rules in eliminating existing monopolies, are creating new challenges for EC competition law and policy in these sectors.

These two challenges for EC competition law and policy: first, creating a competitive framework and promoting pro-competitive market structures and second, ensuring the competitive behaviour of economic actors, have initiated a new phase in the application of EC competition rules to the telecommunications, media, and information technology sectors and are testing some current EC competition policy concepts in a number of aspects.

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1. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

As a result of these developments, EC competition rules now play a role far beyond their traditional boundaries in the telecommunications, media, and information technology sectors. With the convergence of telecommunications, media, and information technologies, the markets in these sectors have begun to develop rapidly on both sides of the Atlantic and economic actors are now positioning themselves to take advantage of the new opportunities. EC Competition Commissioner Karel van Miert has made it clear that the European Commission will face the challenges posed for EC competition law that these developments imply.

Recognizing that these developments have been most dramatic in the field of telecommunications and in the new convergent and overlapping fields of communications and media, this Article concentrates on those recent developments that are determining the dynamics of the application of competition law to these sectors.

### I. *BACKGROUND*

The overarching EC framework for the telecommunications, media, and information technology sectors is now provided by the Information Society<sup>2</sup> concept. The current application of EC competition policy to these sectors cannot be understood without reference to this concept which, since the Delors White Paper on Growth, Competitiveness, and Employment<sup>3</sup> and the Bangemann Report<sup>4</sup> of 1994, has become one of the pillars of EC policy in this field.<sup>5</sup>

The general framework underlying the concept of the Information Society requires new legal measures of a general nature for the sectors in question, to which some reference will be made later. The Information Society concept also determines

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2. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH REPORT ON COMPETITION POLICY 1991 (1994).

3. Commission of the European Communities, Growth, Competitiveness, Employment — The Challenges and Ways Forward into the 21st Century: White Paper from the Commission to the Council, COM (93) 700 Final (December 1993) [hereinafter White Paper].

4. Commission of the European Communities, Europe and the Global Information Society, Report of the High Level Group on the Information Society, Brussels, May 1994 [hereinafter The Bangemann Report].

5. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH REPORT ON COMPETITION POLICY 1991 (1994).

the priorities for the application of EC competition law to these sectors, to the extent that the Commission has a measure of discretion under competition law in initiating action.

The information sectors today represent ECU450 billion, nearly US\$600 billion, in the European Union ("EU") alone. Some estimates forecast that, worldwide, this market will grow to US\$3 trillion by the end of the decade. As a conglomerate, the information sector is being shaped by the convergence of the telecommunications, information technology, and software industries, and the "content industries" of television/broadcasting and publishing. All of these markets are subject to radical change, in both the European Union and the United States.

According to EU estimates, by the year 2000 more than sixty percent of all jobs in the European Union will be strongly information-based and, therefore, closely linked to communications. The potential for growth in the information sectors over the next few years may be gathered by comparing the European Union's current situation with that of the United States. In the United States, for example, some thirty-five percent of private households are now equipped with computers, whereas, in the European Union the figure is still around ten percent, although household computer ownership is increasing rapidly.

The mobile communications markets tell a similar story. In the United States, the ratio of new mobile connections to fixed telecommunications network connections is of an order of approximately 1 to 2. In some European countries, mobile takeup has already exceeded the role of fixed-wire networks. Sixty percent of private households in the United States are linked by cable television networks, a process that was started in the 1960's. In Europe, we have achieved similar cable density in a number of countries, and nearly 100 percent density in others, such as the Benelux<sup>6</sup> countries. Yet, four EU Member States still hardly have a cable network.<sup>7</sup> Again, this only emphasizes the massive potential for growth in Europe.

A wave of mega mergers and joint ventures is taking place in Europe just as in the United States, spurred on by three princi-

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6. See II OXFORD ENGLISH DICTIONARY 112 (2d ed. 1989). The Benelux countries are defined as "the customs union of Belgium, the Netherlands, and Luxembourg formed in October, 1947."

7. The four states are Greece, Italy, Portugal, and Spain.

pal developments: (1) growth in personal communications, developing hybrid network solutions for the alliance of fixed and mobile telecommunications networks, the phone networks of the future; (2) growth in multimedia,<sup>8</sup> particularly concerning the vertical integration of content producers, various distributors and carriers, and a horizontal convergence between the telecommunications, cable, and computer networks;<sup>9</sup> and (3) globalization in the form of new global partnerships, such as BT/MCI, Worldpartners/AT&T, Deutsche Telekom/France, and Telecom/Sprint, are defining alliances on a new, global scale, as are the new global satellite ventures.

These radical developments imply a transformation of the core of our economies comparable only to the Industrial Revolution that shaped the nineteenth century. These developments may well lead to similar shifts of global economic and market conditions and are likely to do so much more rapidly and dramatically, achieving a significant transformation within a timeframe of perhaps as little as ten 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.

A general consciousness of this rapid transformation was initially promoted, in 1993, by U.S. Vice President Al Gore's initiatives on the information superhighway, the National and Global Information Infrastructure, more commonly called the NII and GII.<sup>10</sup> Since then, awareness has rapidly spread worldwide.<sup>11</sup> The development climaxed in the special G-7 ministerial meeting in Brussels in February 1995, which recognized the concept of the Global Information Highway. A growing general aware-

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8. X OXFORD ENGLISH DICTIONARY 82 (2d ed. 1989). Multimedia is defined as "designating or pertaining to a form of artistic, educational, or commercial communication in which more than one medium is used."

9. Multimedia includes publishers and software producers moving into new fields such as online services.

10. See U.S. DEP'T OF COMMERCE, INFORMATION INFRASTRUCTURE TASK FORCE, THE NATIONAL INFORMATION INFRASTRUCTURE — AGENDA FOR ACTION (Sept. 15, 1993).

11. See MINISTRY OF POSTS AND TELECOMMUNICATIONS, TELECOMMUNICATIONS COUNCIL, *Reforms Toward the Intellectual Creative Society of the 21st Century*, Tokyo (May 1994) (discussing Japan); MINISTRY OF POSTS AND TELECOMMUNICATIONS, TELECOMMUNICATIONS COUNCIL, *The Canadian Information Highway*, Ottawa (April 1994) (discussing Canada).

ness and rapid growth of global phenomena such as the Internet have done the rest.

In Europe, the Bangemann Report and the European Action Plan, introduced in July 1994,<sup>12</sup> established a framework for action by developing the concept of the Information Society. The Action Plan can be summarized as follows. First, the Action Plan recognized a priority for private initiatives and market mechanisms as the guiding principles for the transformation. The Action Plan gave, in particular, a high priority to the accelerated liberalization of telecommunications as a core area of the Information Society and, therefore, the application of EC competition law was assigned a central role for ensuring that this liberalization was speedy and effective. Second, the Action Plan called for the creation of a broader framework for developing the future information world, concerning, in particular, issues such as data security, privacy, and protection, intellectual property rights, and open access to media. Third, the Action Plan called for the acceleration of public programs in the interface between the public and private sector. This third element concerns, specifically, education and distance learning, distance work, traffic management, environmental protection and related systems, and other areas of public/private concern. Finally, the Action Plan called for discussions and investigations of the social consequences of the new technologies.

At the EU level, the principal consequences of this initiative have been, first, a substantial acceleration of the liberalization program for the telecommunications sector, towards full-scale voice telephony and public network liberalization by January 1, 1998, and, second, a substantial increase in attention to media issues. These developments have led to an accelerated application of EC competition law to the telecommunications sector, in particular through the liberalization of telecommunications networks, a process that will be examined more below. It has also led to accelerating measures for defining the future information environment. As planned, a Green Paper on Copyright<sup>13</sup> was published and the EC Broadcasting Directive on Television

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12. Commission of the European Communities, *Europe's Way to the Information Society, An Action Plan: From the Commission to the Council and the European Parliament*, COM (94) 347 Final (Oct. 1994).

13. Commission of the European Communities, *Copyright and Related Rights in the Information Society: Green Paper from the Commission to the Council*, COM (15)

Without Frontiers<sup>14</sup> was reviewed. These issues will be revisited below.

A number of programs were adopted in areas such as trans-European networks and the promotion of media programming and advanced multimedia applications.<sup>15</sup> At the same time, a number of EC programs in the field of research and development have been stepped up for the information sectors.<sup>16</sup> A number of forums for discussing the social aspects of these new technologies have also been created.<sup>17</sup>

The clearest general expression of the evolving regulatory framework, against which a future-oriented application of competition law in the sector must be devised, are the principles spelled out by the Brussels G-7 ministerial meeting on the Information Society.<sup>18</sup> Eight core principles were set forth for the global information society: (1) promoting dynamic competition; (2) encouraging private investment; (3) defining an adaptable regulatory framework; (4) providing open access to networks; (5) ensuring universal provision of open access to services; (6) promoting equality of opportunity to citizens; (7) promoting diversity of content, including cultural and linguistic diversity; and (8) recognizing the necessity of worldwide cooperation with particular attention to less developed countries.

The Conclusions of the G-7 Summit Information Society Conference go on to state that these principles will apply to the

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382 (1995) [hereinafter *Green Paper on Copyright and Related Rights*]; Commission Press Release, IP (95) 798 Final (1995).

14. EU Broadcasting Directive on Television Without Frontiers, O.J. L 298/23 (1989).

15. Commission of the European Communities, *Towards the Information Society: Communication from the Commission to the Council, European Parliament, the Economic and Social Committee and the Committee of the Regions*, COM (95) 224 (May 1995) [hereinafter *Towards the Information Society*]; Commission Press Release, *Media II: More Resources Devoted to the Audiovisual Industry*, IP (95) 114 (1995); Commission Press Release, *Info 2000: Programme Proposal Stimulating Multimedia Information Content for Business, Administrations and Citizens in the European Information Society*, IP (95) 722 (1995).

16. See 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 (1995).

17. See Commission Press Release, *Information Society Forum: Inaugural Meeting Sets Up Working Groups, Starts Discussing Social, Societal, and Cultural Issues*, IP (95) 757 (1995).

18. *Conclusions of G-7 Summit Information Society Conference*, European Commission, Doc. 95/95/2 (1995).



global information infrastructure through: (1) promotion of interconnectivity and interoperability; (2) developing global markets for networks, services, and applications; (3) ensuring privacy and data security; (4) protecting intellectual property rights; (5) cooperating in research and development and the development of new applications; and (6) monitoring the social and societal implications of the Information Society.

These general principles present the essential features of the future framework, which will include, on the one hand, a growing role for the competition rules and, on the other, the establishment and maintenance of public interest legislation. The latter issue is of particular importance insofar as it concerns media issues and the increased requirement to develop competition rules in light of general legislation safeguarding interests such as universal service, privacy, copyright, and media pluralism.

Competition law is, therefore, likely to become increasingly important for the telecommunications sector, due primarily to deregulation and the dynamics of convergence and globalization. At the same time, increasing attention will have to be given 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 issue of safeguarding cultural and linguistic diversity in the media sector. This concern will become more evident as a transformation of the system of media regulation in Europe becomes inevitable, with digitization and the resulting multiplication of television channels, and the convergence of traditional media, publishing, and communications in a multimedia context.

In practical terms, these developments mean that the application of competition rules in the telecommunications sector will have to be considered carefully with regard to general telecommunications and media policies at both the Member State and EU levels. A delicate balance will have to be struck between competition authorities, sector-oriented media, and telecommunications authorities according to national situations. This will be especially true in the field of media legislation. Before analysing in more detail the recent application of EC competition law to Member State measures, it is necessary to briefly review the

general development of EC telecommunications and media policy.

## II. *EU TELECOMMUNICATIONS POLICY*

Although the European Union today is actively involved in shaping telecommunications policy, this is a relatively recent phenomenon. The EC first published policy concepts for the sector in 1983. In 1984, the European Commission advanced the first telecommunications action program.<sup>19</sup>

Subsequently, EC telecommunications policy developed rapidly, mainly as a consequence of three factors. First, the growing digitization of European telecommunications networks began to transform telecommunications networks into multipurpose 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 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 offered could be made available to consumers sufficiently rapidly.<sup>20</sup> Second, in *British Telecommunications*,<sup>21</sup> the European Court of Justice ("Court of Justice" or "Court") confirmed that EU competition rules applied to the telecommunications sector. This case is addressed in greater detail later. Third, and finally, the impact

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19. Commission of the European Communities, Progress Report on the Thinking and Work Done in the Field of Telecommunications and Initial Proposals for an Action Programme, COM (84) 277 Final (1984).

20. Commission of the European Communities, Towards a Dynamic European Economy: Green Paper on the Development of a Common Market for Telecommunications Services and Equipment, COM (87) 290 Final (1987) [hereinafter Telecommunications Green Paper]. This document stated that "telecommunications took 140 years to develop from a single service to a dozen services in the early 1980's. The new technological capabilities will now lead to explosive growth and multiplication of services and applications within a single decade." *Id.*

21. Commission Decision No. 82/861/EEC, O.J. L 41/83 (1985), [1983] 1 C.M.L.R. 457 (*British Telecommunications*). The issue was presented on appeal in *Italy v. Commission*, Case C-41/83, [1985] E.C.R. 873, [1985] 2 C.M.L.R. 382.

of the AT&T divestiture agreement and the resulting transformation of the U.S. market began to be felt in Europe.<sup>22</sup> At the same time, the progressive deregulation of the telecommunications sector and the privatization of British Telecom in the United Kingdom since 1982 made Europe more receptive to the concept of market deregulation.

The combination of these factors led the Commission to issue, in 1987, its Telecommunications Green Paper,<sup>23</sup> which set forth for the first time a comprehensive policy framework for EC action in the telecommunications sector.<sup>24</sup> The Green Paper envisaged a number of changes in the EU telecommunications industry: (1) a full liberalization of markets and progressive introduction of competition for services with the exception of public voice telephony;<sup>25</sup> (2) the separation of regulation and operations;<sup>26</sup> and (3) the harmonization of EC telecommunications regulations, in particular regarding access conditions<sup>27</sup> (the "Open Network Provision," or "ONP" concept) and the attachment of conditions for terminal equipment to the telecommunications networks and procurement procedures of equipment for such networks.<sup>28</sup>

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22. See *United States v. Western Electric Co.*, 552 F. Supp. 131 (D.D.C. 1982) (Modification of Final Judgment or MFJ), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (approving reorganization), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983) (approving plan of reorganization).

23. Telecommunications Green Paper, *supra* note 20, COM (87) 290 Final at 295-96.

24. *Id.* at 296. For a comprehensive review of developments leading 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*, European Perspectives Series (EC Off'l Pub. Off. 1990).

25. As we will see later, EC competition law played an essential role in this area.

26. This progressively led to profound organizational reform in all Member States, resulting, in the first stage, in a transformation of telecommunications monopolies into normal companies of the traditional PTTs (now referred to as "TOs" for Telecommunications Organizations), and in the second stage, in privatization, now underway in most Member States.

The privatization of Deutsche Telekom during the first half of 1996 will be the largest transaction ever to take place on the German stock market. Besides the privatization of British Telecom ("BT"), completed in 1992, privatizations have taken place or are under way in the Netherlands, Denmark, Portugal, Sweden, Finland, Spain, Italy, Greece, Belgium, and Ireland.

27. See Council Directive No. 90/387, O.J. L 192/1 (1990) (concerning establishment of internal market for telecommunications services through implementation of Open Network Provision).

28. See Council Directive No. 91/263, O.J. L 128/1 (1991) (on approximation of laws of Member States concerning telecommunications terminal equipment, including

In a further stage, the Commission issued green papers to extend the principles of the Telecommunications Green Paper to satellite communications<sup>29</sup> and mobile communications.<sup>30</sup> Finally, a Review<sup>31</sup> carried out in 1992 led to an agreement on the full liberalization of the EU telecommunications market, including public voice telephony and telecommunications network infrastructure/facilities, which were not addressed by the 1987 Telecommunications Green Paper. This Review led to an agreement by the EC Council of Ministers to: (1) fully liberalize public telephone services by January 1, 1998;<sup>32</sup> (2) publish a green paper on network infrastructure liberalization; and (3) adjust the ONP framework and establish a regulatory framework for interconnection of services and networks.

The two parts of the Infrastructure Green Paper<sup>33</sup> were published in November 1994 and January 1995, and led to the inclusion of the Liberalization of Telecommunications Network Infrastructure Initiative into the January 1, 1998 schedule.

At the end of April 1995, the Commission concluded its consultations. It submitted the outline of the reform package for the future regulatory framework of a fully liberalized EU telecommunications market in its Communication on the results on the consultation.<sup>34</sup> The Communication includes a detailed

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mutual recognition of their conformity); Council Directive No. 90/531, O.J. L 297/1 (1990) (on procurement procedures of entities operating in water, energy, transport and telecommunications sectors). These measures have been subsequently amended in a number of aspects. The Commission regularly issues an up-to-date compendium of EU legislation in the telecommunications sector, entitled *European Commission, Official Documents, Community Telecommunications Policy*.

29. Commission of the European Communities, *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 Final (1990) [hereinafter *Green Paper on Satellite Communications*].

30. Commission of the European Communities, *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 Final (1994).

31. Commission of the European Communities, *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 Final (1993).

32. An additional transitional period of five years was granted to Greece, Ireland, Portugal, and Spain. Luxembourg was granted a two-year transitional period.

33. Commission of the European Communities, *Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks Part I*, COM (94) 440 Final (1994), and *Part II* COM (94) 682 Final (1995).

34. Commission of the European Communities, *Communication on the Consulta-*

timetable for planned measures. The principal components of this package are: (1) 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 EC competition law; (2) ensuring the financing of universal service and clarifying the interconnection of access conditions via further development of the ONP framework; and (3) the further development of the regulatory framework at the national and EC level, including discussion of future interaction of national and EC regulation in this sector.

The Council of Ministers confirmed the results of the Infrastructure Green Paper consultation at a meeting on June 13, 1995. Major parts of the reform package were adopted by the Commission on July 19, 1995. The rest of the package is due to be drafted by the Commission before January 1, 1996.<sup>35</sup>

The application of EC competition law, and in particular Article 90, plays a central role in the reform of the fundamental regulatory conditions foreseen up to the point of full deregulation by 1998. This will be discussed in detail later.

At this point, two comments should be made. First, the development of the telecommunications policy framework was, from the start, based on a comprehensive plan, the Green Papers, published by the European Commission, setting forth the proposed overall concept and leading to broad consultations and the subsequent adoption of principles by successive resolutions of the EC Council of Ministers and the European Parliament. These resolutions establish a framework with regard to the general competitive conditions sought.<sup>36</sup> The telecommunications sector was, with the exception of the television sector, the

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tion on the Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, COM (95) 158 Final (1995).

35. See Commission Press Release, Commission Confirms Measures Ensuring Full Competition in Telecoms by 1998, IP (95) 765 (1995). The package of measures comprised: (1) A Draft Commission Directive amending Commission Directive 90/388/EEC regarding the Implementation of Full Competition in Telecommunications Markets; and (2) A 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, COM (95) 379 Final (1995) [hereinafter ONP].

36. See Council Resolution of 22 July 1993, O.J. C 213/1 (1993) (concerning need for further development in telecommunications market); Council Resolution of 22 December 1994, O.J. C 379/4 (1994) (concerning principles and timetable for liberalization of telecommunications infrastructures); Council Resolution of 18 September 1995

first sector in which this method of proposing comprehensive policy blueprints and broad consultation was extensively used. Subsequent to the problems encountered by the European Community during the ratification of the Maastricht Treaty,<sup>37</sup> the Commission has emphasized transparency in policy formulation and broad consultation; this method is now widely used in other areas of EC policy.

Second, in the course of implementing the telecommunications policy concept, the application of EC competition law under Article 90 was of primary importance from as early as the adoption of the Telecommunications Terminal Directive in 1988.<sup>38</sup> In December 1989, a basic policy compromise defined the respective role of Article 90 measures and harmonization through internal market legislation based on Article 100a<sup>39</sup> of the EC Treaty. The compromise reached between the Commission and the Member States on the occasion of the adoption of the Telecommunications Services Directive<sup>40</sup> and the ONP Framework Directive<sup>41</sup> established the principle of a complementary role of liberalization under Article 90, EU competition law, and harmonization under Article 100a.<sup>42</sup>

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(not yet reported) (concerning implementation of future regulatory framework for telecommunications).

37. TEU, *supra* note 1.

38. Telecommunications Terminal Directive, O.J. L 131/73 (1988).

39. EC Treaty, *supra* note 1, art. 100a, [1992] 1 C.M.L.R. at 633. Article 100a of the 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." *Id.*

40. Article 90 Telecommunications Services Directive, O.J. L 192/10 (1990) [hereinafter *Telecom Services Directive*].

41. EC Treaty, *supra* note 1, art. 100a, [1992] 1 C.M.L.R. at 633.

42. Commission Press Release, Dawn of a New Era in European Telecommunications: Member States Notified of Two New Directives, IP (90) 589 (1995). The Commission stated, *inter alia*, that:

[T]he two measures relate together. Liberalization will, for the first time, open up unlimited opportunities for the telecommunications industry, for business users and for 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, and The Article 90 Telecoms Services Directive, which establishes the right for independent undertakings to offer new services on the telecommunications network.

The Open Network Provision ("ONP") Framework Directive, O.J. L 192/10 (1990).

This definition of the respective application of EC competition law and EC internal market legislation laid the groundwork for the application of Article 90 measures that have been stepped up within the general policy framework to deregulate the communications sector in time for 1998.

### III. MEDIA POLICY

EC media policy initially developed more or less independently from EC 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 Member State law, aimed at ensuring public service goals in the sector, with a substantial variation of these structures among Member States.

The Community was cautious in adopting a comprehensive policy regarding broadcasting and electronic media given their specific cultural and social implications.<sup>43</sup> Community action in the media sector to date has focused on four broad areas: (1) creation of the internal market for the sector; (2) promotion of advanced television technologies; (3) support for content production; and (4) monitoring the impact of media concentration.

With respect to the creation of an internal market in the media industry, the Court of Justice confirmed, as early as 1974, that television/broadcasting fell within the scope of the EC Treaty and, in particular, under its provisions concerning the freedom to provide services.<sup>44</sup> The Court also accepted, however, that in the absence of harmonized legislation at the Community level, national legislation in the form of, for example, copyright laws could continue to be applied, except where such application constituted a means of arbitrary discrimination or a disguised restriction on trade between Member States.<sup>45</sup> The Commission submitted in June 1984, therefore, a green paper on "Television without Frontiers,"<sup>46</sup> which developed requirements for the introduction of a common market for television

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43. A specific provision on culture was introduced into the EC legal framework by the TEU. That Treaty, however, never contained a general "cultural exception."

44. Giuseppe Sacchi, Case C-155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177.

45. See *Coditel v. Ciné Vog Films*, Case C-62/79, [1980] E.C.R. 881, [1981] 2 C.M.L.R. 362.

46. Commission of the European Communities, Green Paper on Television Without Frontiers, COM (84) 300 (1984).

broadcasting on the basis of a harmonized regulatory framework. Subsequently, the Community adopted a number of directives designed to harmonize certain aspects of broadcasting. In particular, Directive 89/552<sup>47</sup> on "Television without Frontiers" set out a number of harmonized provisions concerning, *inter alia*, advertising, sponsoring, and the protection of minors. This Directive was complemented with regard to copyright and related rights in the field of satellite broadcasting and cable retransmission in Directive 93/83 of September 27, 1993.<sup>48</sup>

On the basis of a review of the Television without Frontiers Directive of March 22, 1995, and already in the context of the new Global Information Society concept, the European Commission adopted a proposal for an amendment of this Directive intended to solve a number of problems in its application.<sup>49</sup> The Commission chose to strengthen implementation, but not to extend the scope of the Directive to new interactive audiovisual services, such as video-on-demand, distance learning, telemedicine, tele-shopping, and leisure services. Because these services raise regulatory problems that are substantially different from those regarding traditional television broadcasting, the Commission decided to conduct in-depth studies and broad consultation of interested parties before defining its position on new audiovisual services in a future green paper.<sup>50</sup> With respect to the copyright aspects of these new services, the Commission launched a broad discussion in 1995 by submitting, according to the Information Society Action Plan, a green paper on "Copyright and Related Rights in the Information Society" that should

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47. Council Directive No. 89/552, O.J. L 298/1 (1989).

48. Council Directive No. 93/83, O.J. L 248/15 (1993).

49. *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 Final (1995) [hereinafter *Report on Application of Directive 89/552/EEC*]. The provisions of the Directive in favor of European programming content replacing Member States' national regulations promoting domestic and European production (a "majority proportion" of programs of European origin "wherever practicable" and with absolute minimum requirements) and the extent to which these provisions were to apply to new multimedia services were major issues.

With regard to the first issue, the amendment proposal establishes a compromise that creates legal certainty by eliminating the "where practicable" clause, but allowing special-interest channels opting out for a minimum investment in European programs and limiting the duration of the provisions to a ten-year period.

50. At the time of this 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.



help develop an action programme in the area.<sup>51</sup>

With regard to broadcasting technologies, the Commission has taken action to promote the development and introduction of digital television, in particular, the 16/9 format<sup>52</sup> in the European Union.<sup>53</sup>

The Commission addressed issues relating to content provision and the promotion of program production in its 1994 green paper on audiovisual services.<sup>54</sup> Subsequent to consultations held on the green paper, the Commission proposed to extend and reinforce the MEDIA<sup>55</sup> program. This program is intended to support the EU audiovisual industry, particularly 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 program.<sup>56</sup> Both programs relate directly to the Information Society framework.

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>57</sup> and in a communication on the follow-up to this Green Paper.<sup>58</sup> In

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51. Green Paper on Copyright and Related Rights, *supra* note 13, COM (95) 382, at 382.

52. The 16/9 format refers to the width/height ratio for delivering television, which is larger than the formats used in traditional television systems.

53. *See, e.g.*, Council Resolution of 22 July 1993, O.J. C 209/1 (1993) (concerning development of technology and standards in field of advanced television standards); Council Decision on an Action Plan for the Introduction of Advanced Television Services in Europe, No. 93/424, O.J. L 196/1 (1993); Communication from the Commission to the Council and the European Parliament, COM (93) 557 Final (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, including repeal of Directive 92/38/EEC, COM (93) 556 Final (1993).

54. Commission of the European Communities, Strategic Options to Strengthen the European Programme Industry in the Context of the Audiovisual Policy of the European Union, Green Paper, COM (94) 96 Final (1994); *see Report by the Think-Tank on Audiovisual Policy in the European Union*, Luxembourg (1994), established in preparation for the Green Paper (not available).

55. *See Towards the Information Society*, *supra* note 15, COM (95) 224, at 224.

56. *Id.*

57. Pluralism and Media Concentration in the Internal Market — An Assessment of the Need for Community Action: Green Paper from the Commission to the Council and the European Parliament, COM (92) 480 Final (1993).

58. Communication from the Commission to the Council and the European Parliament Regarding a Follow-up to the Consultation Process Relating to the Green Paper

addition, the European Parliament has concluded that the existing divergences in national legislation with regard to media concentration could jeopardize the functioning of the internal market, notably concerning the freedom to provide services and the freedom of establishment, and has invited the Commission to submit proposals for a harmonized framework.<sup>59</sup>

Regarding the consequences for the application of EC competition rules, the following should be noted. First, from the outset, the Commission's policy in this sector was primarily directed towards ensuring the free transborder reception and redistribution of television programs throughout the Community.<sup>60</sup> Second, the initial structure of public broadcasters providing services to the public under strict national regulation and funded directly by the audience via licence fees is being rapidly eroded through a process that began in the late 1980's. This erosive process was attributable to: (1) the progress of private broadcasters in a number of Member States; and (2) the emergence of advertising revenue as a second major, and for private broadcasters, in many cases, the only, revenue source. The commercial television industry is now starting to look to pay-television subscription or pay-per-view revenues as a third principal revenue source.<sup>61</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 have introduced intense competition in the EU television sector. Third, competition will be amplified by the introduction of digi-

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on "Pluralism and Media Concentration in the Internal Market — An Assessment of the Need for Community Action," COM (94) 353 Final (1994).

59. European Parliament Resolution of 15 June 1995, O.J. C 166/1 (1995).

60. This Commission policy was the basic thrust of the Television Without Frontiers Green Paper. The subsequent Directive was 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 all Member States. The Court of Justice has recognized that the broadcast of television services can constitute a service of general economic interest within the meaning of Article 90. See *Sacchi*, [1974] E.C.R. at 442-43, [1974] 2 C.M.L.R. at 177.

61. 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 to 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*, *supra* note 49, COM (95) 86 Final at 86.

tization in the television sector, which may have similar effects in the television sector in the 1990's as did the introduction of digitization in the telecommunications sector in the 1980's. The first consequence of this development will be the further multiplication of channels and supply.<sup>62</sup> A second consequence will be the convergence of telecommunications and software services in the context of the Information Society concept.

The resulting new opportunities for packaged offerings across sectors, particularly in fields like video-on-demand, special-interest offerings and online services, are leading to repositioning and the creation of alliances across technologies and markets in the move towards multimedia. The media sector is undergoing substantial restructuring in the European Union as in the United States. These developments are to a large extent circumventing existing regulation at the Member State level concerning media concentration and, in particular, have led to a dramatically increased role of EC competition law for the sector.

#### IV. INFORMATION TECHNOLOGY

EC policies with regard to information technologies, computers, software, consumer electronics, and components, were dominated throughout the 1980's by discussions of the apparent growing gap between Europe and its competitors, the United States and Japan, and attempts to counteract this perceived trend. The primary result of this debate was the introduction of major research and development programs in the field at the EC level during the mid-1980's, in which most European industrial groups participated in shared research projects.<sup>63</sup>

A major milestone in the development of a general policy for the information technology sector was the Commission's adoption of a new industrial policy. Commissioner Martin Bangemann introduced a strong market orientation into the European Union's approach to industry in general,<sup>64</sup> later reflected

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62. The first digital television services will enter the market in Europe in the Spring of 1996. It is estimated that digital compression will allow a multiplication of channels by a factor of at least five.

63. The EU Research & Development framework programs began in 1984. The European Strategic Programme for Research in Information Technologies program ("ESPRIT") has been a major flagship programme in this context.

64. Commission of the European Communities, Communication on Industrial Policy in an Open and Competitive Environment, COM (90) 556 Final (1991).

in the Bangemann Report.<sup>65</sup>

In the information technology sector, this basic orientation led to the pronouncement of a general policy statement,<sup>66</sup> which sets the ground rules for the EC policy approach to the sector: (1) reliance on competition as the principal means for restructuring; (2) accompanying measures for stimulating demand, now subsumed into the Information Society projects; (3) intensification of research and development programs; (4) promotion of training; (5) ensuring access for EU industry into third country markets; and (6) a number of measures for facilitating the operation of enterprises.

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 EC policy, and the fact that markets have tended to be dominated at the global level by very large enterprises, have given EC competition rules an important role in the development of this sector. The principal case in this context was, without a doubt, the IBM Undertaking.<sup>67</sup> With the growing importance of personal computers, software, and networking in the information technology markets, attention is shifting to these areas.

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

As recently noted, the Commission's:

[P]rерogatives 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 Commis-

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65. Bangemann Report, *supra* note 4.

66. Commission of the European Communities, *The European Electronics and Information Technology Industry: State of Play, Issues at Stake and Proposals for Action*, SEC (91) 565 (1991), *E.C. BULL.*, Supp. 3/91, at 25-40; Council Resolution of 18 November 1991, O.J. C 325/2 (1991) (concerning electronics, information and communication technologies).

67. 7/8 *E.C. BULL.*, no. 10, at 96 (1984).

sion is therefore in a position to implement a comprehensive competition policy, preventing all restrictions of competition, whatever their origin.<sup>68</sup>

The first instrument for implementing a competition policy with regard to Member States is the application of EC competition rules to state aids.<sup>69</sup> The second, which will be treated here, is the application of Article 90 of the EC Treaty.

Article 90 has developed into a cornerstone of the Commission's telecommunications policy since it issued the Telecommunications Green Paper.<sup>70</sup> Article 90 entrusts the Commission with the duty to ensure that Member States apply existing obligations under the EC Treaty with respect to regulations adopted or maintained relating to public undertakings or undertakings enjoying special or exclusive rights.<sup>71</sup>

68. COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH REPORT ON COMPETITION POLICY 93 (1994).

69. EC Treaty, *supra* note 1, arts. 92-94, [1992] 1 C.M.L.R. at 630-32. This aspect is beyond the scope of this Article. State aids have recently played a growing role in the sector, particularly with regard to State transactions in the context of the privatization of companies. See *TeleDenmark A/S case*, reported in EUROPEAN COMMISSION, XXIVTH REPORT ON COMPETITION POLICY 510 (1994).

It should also be noted that there can be close interaction between state aid aspects and issues related to Article 90. The objective of the first Directive issued under Article 90 concerned the transparency of financial relations between Member States and public undertakings required to verify that public undertakings do not receive hidden aids from public authorities. Council Directive No. 80/723, O.J. L 195/35 (1980), amended by Council Directive No. 85/413, O.J. L 229/20 (1985).

70. Telecommunications Green Paper, *supra* note 20, COM (87) 290 Final at 290.

71. EC Treaty, *supra* note 1, art. 90, [1992] 1 C.M.L.R. at 629. Article 90 provides that:

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.
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.

*Id.*

In practice, and especially after the "compromise of 1989,"<sup>72</sup> the liberalization of EU telecommunications markets was largely the result of a systematic use of these provisions in Commission directives based on Article 90(3), and individual cases.<sup>73</sup> We focus here on telecommunications.

A. *The First Phase: The British Telecommunications Case*

In the early 1980's the Commission dealt with a series of individual cases concerning the extent of the legal monopolies of the national public telecommunications operators,<sup>74</sup> but only the widely known case, *British Telecommunications*, led to a Commission decision and, ultimately, to a judgment of the Court of Justice. Arguably, this case not only laid the foundations for applying the competition rules to the telecommunications sector in general, but was also the point of departure for the use of Article 90 in the telecommunications sector.<sup>75</sup>

In *British Telecommunications*,<sup>76</sup> which was confirmed by the Court of Justice in its Judgment of March 20, 1985,<sup>77</sup> the Commission found that British Telecommunications ("BT") abused its dominant position in the telecommunications systems market by taking measures to prevent certain private message-forwarding agencies from offering a given type of service. The service

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72. As indicated by the European Court of Justice, Article 90(3) of the Treaty only empowers the Commission to lay down general rules specifying the obligations arising from the Treaty, which are already binding on the Member States, regarding public undertakings and undertakings with special or exclusive rights. See *France v. Commission*, Case C-202/88, [1991] E.C.R. I-1223, [1992] 5 C.M.L.R. 552. The Commission cannot, under Article 90(3), create entirely new obligations as under Article 100(a) of the EC Treaty.

The 1989 compromise, the liberalization under Article 90 and the harmonization under Article 100a, was, therefore, critical in creating a comprehensive regulatory framework.

73. A number of Court rulings important for these developments originated from cases in the broadcasting sector. See, e.g., *Sacchi*, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177; *Centre Belge d'Etude de Marché-Télémarketing SA v. CLT/IPB*, Case C-311/94, [1986] E.C.R. 3261, [1986] 2 C.M.L.R. 558.

74. Some of these cases are discussed in the Telecommunications Green Paper of 1987. Telecommunications Green Paper, *supra* note 20, COM (87) 290 Final at 124-26; see COMMISSION OF THE EUROPEAN COMMUNITIES, XVTH REPORT ON COMPETITION POLICY 205 (1985).

75. See P. Ravaioli & P. Sandler, *The European Union and Telecommunications: Recent Developments in the Field of Competition (Part 1)*, 2 Int'l Competition Law. 2-24 (1994).

76. Commission Decision No. 82/861/EEC, O.J. L 360/36 (1982), [1983] 1 C.M.L.R. 457 [hereinafter *British Telecommunications*].

77. *Italy*, [1985] E.C.R. at 873, [1985] 2 C.M.L.R. at 382.

was new to the United Kingdom and permitted telex messages to be received and forwarded on behalf of third parties at prices lower than those charged by BT for its international telex service.

Although the Commission's decision was based on Article 86, the case implicitly raised an issue relating to the interpretation of Article 90. BT's claim that the application of EC competition rules would obstruct it in the performance of its duties required the Commission to discuss the applicability of Article 90(2). 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. The Commission stated, however, that in order to justify an exemption from the competition rules, it was not sufficient that compliance with those rules make the performance of its duties more complicated. Consequently, the Commission held that BT was not obstructed in the performance of its duties. On the contrary, it would have been in BT's interest to allow the operation of the services offered by private message-forwarding agencies because it would have attracted international telex traffic onto BT's network.<sup>78</sup>

In its judgment, the Court confirmed the Commission's assessment, holding that "the employment of new technology which accelerates the transmission of messages constitutes technical progress in conformity with the public interest and cannot be regarded *per se* as an abuse," and that the applicant:

[H]as 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>79</sup>

Furthermore, the Court stressed 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, rather, that "Article 90(3) assigns to the Commission the task of monitoring such matters, under the

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78. *British Telecommunications*, O.J. L 360/36 (1982), [1983] 1 C.M.L.R. at 457.

79. *Italy*, [1985] E.C.R. at 887-88, [1985] 2 C.M.L.R. at 382.

supervision of the Court."<sup>80</sup>

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 issues concerning the application of Article 90 that proved to be of major significance to subsequent developments in the telecommunications sector. First, the Court made clear that it was for 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). Second, the Court emphasized that it would favour a narrow interpretation of the scope of a 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 a service of general economic interest within the meaning of Article 90.<sup>81</sup>

Consequently, the judgment of the Court in *British Telecommunications* could be read as encouraging the Commission to strengthen its activities designed to ensure the application of the competition rules with regard to public undertakings and undertakings that were granted special and exclusive rights. At the same time, the judgement clarified several basic concepts with respect to Article 90 and the telecommunications sector.

#### B. *The Second Phase: The Terminal Equipment Directive and the Services Directive*

Based on the principles set out in the Telecommunications Green Paper of 1987,<sup>82</sup> the Commission adopted two directives based on Article 90(3) with the purpose of implementing the major liberalization goals of the Green Paper. On May 16, 1988, the Commission adopted a Telecommunications Terminal

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80. *Id.* at 888, [1985] 2 C.M.L.R. at 382.

81. RTT v. GB-Inno-BM, Case C-18/88, [1991] E.C.R. I-5941, (confirming this principle). The broadcast of television services was recognized as a service of general economic interest within the meaning of Article 90 in *Sacchi*, [1974] E.C.R. 409, [1974] 2 C.M.L.R. at 177.

82. See Telecommunications Green Paper, *supra* note 20, COM (87) 290 Final at 290.



Equipment Directive (88/301/EEC),<sup>83</sup> which opened the markets for telecommunications terminal equipment on which most European telecommunication administrations enjoyed monopoly rights at that time. Specifically, the Directive obligated 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.

Member States' rights to impose conditions on the provision of terminal equipment were limited to a small number of essential requirements, including: user safety, safety of employees and of public telecommunications network operators, protection of public telecommunications networks from harm, and the interworking of terminal equipment.

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

With respect to the legal justification for these obligations,<sup>84</sup> the recitals to the Directive are based on the EC Treaty provisions concerning the freedom to provide goods and the freedom to provide services and on the provisions intended to ensure undistorted competition.<sup>85</sup>

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

The opening of the telecommunications services market was initiated by a second directive, the so-called Services Directive of June 28, 1990.<sup>86</sup> This Directive has a structure that is very similar

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83. Commission Directive on Competition in the Markets in Telecommunications Terminal Equipment, Commission Directive No. 88/301, O.J. L 131/73 (1988).

84. Member States should also ensure that customers may terminate long-term lease or maintenance contracts regarding terminal equipment for which special or exclusive rights existed when the contracts were concluded.

85. EC Treaty, *supra* note 1, art. 37, [1992] 1 C.M.L.R. at 605-06. Article 37 requires adjustment of state monopolies of a commercial character, and applies only to goods. *Id.*

86. Commission Directive on Competition in the Markets for Telecommunications

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" very narrowly,<sup>87</sup> the Directive also liberalized telephony services other than those provided to the general public, such as voice services for corporate communications or so-called closed user groups. A communication adopted by the Commission in April 1995 sets out in detail the consequences of this narrow definition for the implementation of the Services Directive in the Member States.<sup>88</sup>

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," such as security of network operations, maintenance of network integrity, interoperability of services, and data protection.<sup>89</sup> Furthermore, the Directive requires the separation of regulatory and operational functions with regard to service provision, in particular regarding issues like: the grant of operating licences, the control of type approval and mandatory specifications, frequency allocation, and the surveillance of usage conditions.<sup>90</sup>

Both the Telecommunications Terminal Equipment Directive and the Telecommunications Services Directive, quite apart

Services, Commission Directive No. 90/388, O.J. L 192/10 (1990) [hereinafter Services Directive].

87. *Id.* According to Commission Directive No. 90/388 ("Services Directive"), "voice telephony" means "the commercial provision for the public of the 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." *Id.* at 15.

88. Commission of the European Communities, Communication to the European Parliament and the Council on the Status and Implementation of Directive No. 90/388 on Competition in the Markets for Telecommunications Services, COM (95) 113 Final (1995).

89. Services Directive, *supra* note 86, O.J. L 192/10, at 15 (1990). The Services 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 "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 service providers" are also permitted. *Id.*

90. The Services Directive also contained a provision obliging Member States to ensure that users of liberalized telecommunications services could terminate long-term contracts for the supply of telecommunications services. *Id.*

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 Article 90, and, in particular, the acceptance of Article 90(2) and the powers conferred to the Commission under Article 90(3). It is, therefore, worthwhile to look in closer detail at the legal arguments underlying these Directives.

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. In a number of judgments, the Court of Justice confirmed that the very existence of a legal monopoly does not *per se* constitute an infringement of the EC Treaty.<sup>91</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 EC Treaty. The Commission justified the Directives on the grounds that, under the circumstances, the legal monopolies concerned necessarily led to a violation of provisions of the EC Treaty. In the Terminal Equipment Directive, the Commission argued that special or exclusive rights for the provision of terminal equipment prevented users from choosing the equipment that best suited their needs, regardless of their origin, thus, constituting an infringement of Articles 30 and 37. Equally important, special or exclusive rights for the maintenance of terminal equipment are necessarily restrictive of 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 EC 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."<sup>92</sup>

Similarly, the Commission based the obligation to withdraw

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91. 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, in 1991* FORDHAM CORP. L. INST. 197-222 (Barry Hawk ed., 1992).

92. Services Directive, *supra* note 86, O.J. L 192/10, at 15 (1990).

special or exclusive rights respecting 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. Regarding Article 86, the Commission held that special or exclusive rights granted to telecommunications organizations led to the abuse of a dominant position, particularly since 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>93</sup>

With respect to the derogation granted by Article 90(2), the Terminal Equipment Directive explicitly recognized that the provision and exploitation of a universal telecommunications network was the particular task entrusted to the telecommunications organizations within the meaning of Article 90(2), consistent with the Commission's previous rulings. The Directive stated that the revenue from voice telephony service ensures the financing of this network and could, therefore, be reserved for the telecommunications administration. Thus, the Directive implied that for all other services the derogation could no longer be requested.

Given the political significance of these directives, both in terms of their substance and the nature of the legal actions taken, both decisions were challenged in the Court of Justice by several Member States. In its judgment of March 19, 1991, on the Terminal Equipment Directive<sup>94</sup> and its judgment of November 17, 1992, on the Services Directive,<sup>95</sup> the Court largely confirmed the legality of the Directives.<sup>96</sup>

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93. For a recent review of approaches to Article 90, see e.g., D. Edward & M. Hoskins, *Article 90: Deregulation and EC Law, Reflections Arising from the XVI FIDE Conference*, 32 *COMMON MKT. L. REV.* (1995); see also Höfner v. Macrotron, Case C-41/90, [1991] E.C.R. 1979, [1993] 4 C.M.L.R. 306; Porto di Genova, Case C-179/90, [1991] E.C.R. I-5889; La Crespelle, Case C-323/93, [1994] E.C.R. 5077.

94. France v. Commission, Case C-202/88, [1991] E.C.R. I-1223, [1992] 5 C.M.L.R. 552.

95. Spain v. Commission, Joined Cases C-271/90, C-281/90, C-289/91, [1992] E.C.R. I-5833.

96. 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

From the Commission's perspective, two conclusions could be drawn from these judgments with respect to the further development of EC telecommunications regulatory policy. First, the Court confirmed the Commission's power to adopt directives under Article 90(3) in order to clarify Member State obligations arising from this Article. The Court also confirmed that the Commission could clarify the obligations of Member States in a specific sector, and that this power could include requiring Member States to withdraw special and exclusive rights. Second, the Court confirmed that where the withdrawal of special or exclusive rights can be required, the Commission could also establish the conditions for ensuring the effective abolition of special and exclusive rights. Examples of such conditions in the Services Directive include the provisions concerning the authorization of services and the provisions on publication requirements. In political terms, such conditions make it possible to link the liberalization measures with the general policy measures for the sector, and to ensure the creation of a coherent framework at the Community level.

The Commission summarized the situation after the publication of the Telecommunications Terminal Equipment and Services Directives and the 1989 compromise on liberalization under Article 90 and harmonization under Article 100(a) within the general policy framework, 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 recognizes 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

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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.

for which competition is possible.<sup>97</sup>

*C. The Third Phase: The Amendments for Satellite, Cable, and Mobile Communications*

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

Following consultations on the November 1990 Green Paper on satellite communications,<sup>98</sup> Directive 94/46 of October 13, 1994 ("Satellite Directive"),<sup>99</sup> amended the Terminal Equipment Directive and the Services Directive with regard to satellite communications. The amending Directive required Member States to eliminate special and exclusive rights for satellite earth station equipment and the provision of satellite communications services. In addition, the Directive introduced a definition of special rights in the Terminal Equipment Directive and the Services Directive that took account of the Court judgments on these Directives.

Meanwhile, in an effort to create transparency similar to the application of competition law to enterprises, the Commission established new procedures for public consultation and consultation with the Council, European Parliament, and the other EC institutions.<sup>100</sup>

Within this framework, on December 21, 1994, the Commission adopted, for public consultation, a draft Article 90 Directive ("Cable TV Directive") concerning the liberalization of cable television networks for the provision of telecommunications services.<sup>101</sup> The objective of this amendment was to open already

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97. COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 12 (1991).

98. See Green Paper on Satellite Communications, *supra* note 29, COM (90) 490 Final (1990).

99. Commission Directive No. 94/46, O.J. L 268/15 (1994) (amending Directive No. 88/301 and Directive No. 90/388, in particular with regard to satellite communications).

100. After adoption by the Commission, Draft Article 90 Directives are now published for a two-month consultation period in the EC Official Journal. They are also transmitted to the Council, the European Parliament, the Economic and Social Committee, and the Committee of Regions.

101. Draft Commission Directive amending Commission Directive No. 90/388 Re-

existing or licensed cable television networks across the European Union for the provision of telecommunications services, other than voice telephony, by January 1, 1996, at the latest. The draft Directive does not address the issue of the licensing of new cable television networks but, rather, leaves this under the authority of the national regulators.

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

This liberalization of cable networks is expected to lead to a rapid upgrading and development of existing cable television networks, in order to make the transmission of voice services technically possible by 1998. It should also substantially facilitate investments in new cable networks, in particular in Member States where cable television networks still do not exist to any major extent. At the same time, the liberalization required by the Directive will facilitate the beginnings of true multimedia use of cable television networks.

The comments received in response to the publication of the draft Directive were generally positive. The Directive was finally adopted by the Commission on October 18, 1995.<sup>102</sup>

On June 21, 1995, the Commission adopted the draft Article

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garding the Abolition of the Restrictions in the Use of Cable Television Networks for the Provision of Telecommunications Services, Commission Draft Directive, O.J. C 76/06 (1995); see J.L. Buendia, *Liberalisation and State Intervention, Application of Article 90 of the EC Treaty, Main Developments Between 1 April and 31 July 1995*, COMPETITION POLICY NEWSLETTER (European Commission of the European Communities), 1995, vol. 1, no. 5.

102. Commission Directive No. 95/51/EEC, O.J. L 256/49 (1995) (amending Directive 90/388/EEC, with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services); see Commission Press Release, *The Commission Opens Cable-TV Networks to Liberalised Telecoms Services*, IP (95) 1102 (1995) [hereinafter *Commission Opens Cable-TV Networks*]. The European Parliament, in its resolution on the draft, requested that rights for public telecommunications network operators to convey television programs via their network be included in the Directive, thus, ultimately, removing the distinction between public telecommunications networks and cable networks and

90 Directive for consultation concerning the liberalization of mobile communications.<sup>103</sup> This Directive calls for the abolition of remaining exclusive and special rights in the sector and establishes full liberalization for mobile and personal communications. It addresses the use of one's 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 and of GSM/DCS 1800 mobile technologies.<sup>104</sup> The draft Directive, therefore, lays the foundation for the development of truly personal communications services. Personal communications services, as envisaged in the Mobile Green Paper, were to be based on a combination of mobile technologies and, ultimately, fixed networks.

The Mobile Directive<sup>105</sup> was published, for consultation, by the Commission on August 1, 1995. Comments could be made within the two-month publication period, that is, until the end of September, 1995. The Directive was finally adopted by the Commission on January 16, 1996.

With respect to its legal basis, the Cable Directive<sup>106</sup> builds on the reasoning used in previous Directives. Specifically, it argues that, contrary to Article 90 when read in conjunction with Article 59, restrictions on the provision of telecommunications services over cable television networks are restricting the free provision of services to the benefit of national telecommunications organizations. At the same time, the exclusive right of telecommunications organizations to provide telecommunications services over their telecommunications networks is contrary to Article 90 when read in conjunction with Article 86, specifically because the existence of this exclusive right delays the emer-

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opening the way for both towards evolution into the future distribution and transmission networks of the multimedia 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." *Id.*

103. Draft Commission Directive, O.J. C 197/5 (1995) (amending Directive No. 90/388 with regard to mobile and personal communications).

104. GSM is the digital Global System for Mobile Communications. DCS 1800 is a closely related digital standard of higher frequency bands (DCS 1900 in United States).

105. Commission of the European Communities, Mobile Directive, O.J. L 20/59 (1996) [hereinafter Mobile Directive].

106. Cable Directive, O.J. C 76/1 (1995).



gence of new services that can only be provided on broadband networks.

In the Mobile Directive, the principal argument advanced by the Commission for the removal of special or exclusive rights for mobile communications services was that they necessarily entail a restriction on 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. Another argument was used, however, that followed the line of reasoning adopted by the Court of Justice in the *Télémarketing*<sup>107</sup> and *RTT/GB INNO*<sup>108</sup> 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>109</sup>

The three Directives: Satellite, Cable TV, and Mobile, can be seen, therefore, as logical extensions of the original Telecommunications Services Directive, advanced, however, in a rapid sequence and liberalizing substantial parts of the EU telecommunications market. They also represent a major step in developing the procedural framework for EC competition law relating to the telecommunications industry by establishing the principle of public comment. They have, therefore, laid the groundwork for formalization of these procedures at a later stage.

#### D. *The Fourth Step: Implementation of Full Competition*

Reform of the EU telecommunications market, to provide for full liberalization by 1998, required an additional step in the form of a directive providing for full competition. The specific issue that needed to be addressed was the abolition of the dero-

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107. *Télémarketing*, Case C-311/94, [1985] E.C.R. 3261, [1986] 2 C.M.L.R. 558.

108. *RTT/GB INNO*, [1991] E.C.R. I-5941.

109. Commission Directive No. 96/2/EEC, recital 10, O.J. L 20/59 (1996) (amending Directive 90/388/EEC with regard to mobile and personal communications).

gation under Article 90(2) for public telecommunications networks.

Article 90(2) allows derogations from Community law where Community law would obstruct, either in law or in fact, the performance of tasks assigned to undertakings entrusted with advancing the general economic interest. In its 1990 Services Directive, the Commission granted a temporary exemption under this Article with respect to exclusive and special rights for the provision of voice telephony. This exemption was justified on the grounds that financial resources for the development of the network still derived mainly from the operation of the telephony service. Liberalization of that service could, therefore, threaten the financial stability of the existing telecommunications organizations and interfere with their responsibility to advance the public interest: "This task consists in the provision and exploitation of a universal network, i.e., one having general geographical coverage, and . . . provided to any service provider or user upon request within a reasonable period of time."<sup>110</sup>

The Services Directive also contained a review clause. Subsequent to review and public consultations on the telecommunications sector organized by the Commission in 1992, the Council unanimously called for the liberalization of all public voice telephony services by January 1, 1998. In its resolution, the Council recognized that there are less restrictive means than the granting of special or exclusive rights to ensure fulfillment of this service of general economic interest.

Subsequently, the Council unanimously recognized that the provision regarding the telecommunications infrastructure should also be liberalized by January 1, 1998.<sup>111</sup> Furthermore, the Council established basic guidelines for the future regulatory environment.<sup>112</sup> Subsequent to these statements by the Council, the Commission adopted on July 19, 1995, the draft Article 90 directive for consultation concerning full liberalization<sup>113</sup> of the

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110. Commission Directive of June 28, 1990, O.J. L 192/10 (1990).

111. Council Resolution of 22 December 1994, *supra* note 36, O.J. C 379/4 (1994). This liberalization would be subject to the same transition periods as agreed for the liberalization of voice telephony.

112. Council Resolution of 18 September 1995, *supra* note 36.

113. Draft Commission Directive Amending Commission Directive No. 90/388 regarding the Implementation of Full Competition in Telecommunications Markets, O.J. C 236/5 (1995).

EU telecommunications market, including inter-exchange and local networks. The draft withdraws the Article 90(2) derogation for public voice and the underlying network infrastructure and establishes the framework for the overall reform process in the Member States through 1998. First, it provides for the removal of all remaining exclusive and special rights in the sector, in particular for public voice telephony and network infrastructure, at the latest by January 1, 1998, with an additional five-year transition period for Greece, Ireland, Portugal, and Spain, and a two-year period for Luxembourg. Second, the draft provides a definition of less restrictive means that can be used to safeguard the services of general economic interest for which a derogation is, therefore, no longer required. This means the establishment of a universal service fund, financed by all market participants or supplementary access charges imposed on competitors by the incumbent telecommunications organizations, but under the strict control of national authorities and the Commission. Third, it specifies, in general terms, the conditions that can be included in national licences. The draft directive stipulates that with respect to 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 the following: (1) essential requirements as specified in the draft directive; (2) public service specifications relating to permanence, availability, and quality of service; and (3) financial obligations with regard to universal service. Finally, it provides a firm time schedule for the required national reforms, in order to allow market participants to plan for market entry.<sup>114</sup>

The draft directive was published in the Official Journal of the European Communities for the two-month public comment period. It was finally adopted on March 13, 1996.

### *E. Comments*

The rapid progress made in liberalising the EU telecommu-

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114. Member States must:

- (1) notify the Commission of required licensing or declaration procedures no later than January 1, 1997;
- (2) ensure publication of these procedures no later than July 1, 1997;
- (3) ensure availability of adequate numbers for all telecommunications services before July 1, 1997; and
- (4) publish interconnection terms no later than July 1, 1997.

nications sector has clarified the scope of Article 90. The general contours of these developments include the following:<sup>115</sup>

(1) a general political framework has been established and a political consensus developed that full liberalization is needed to build the Information Society; (2) a consistent line of directives and Court rulings has been built up; and (3) a high priority has been given to rapid action in response to market requirements.

In legal terms, the essential steps have been: (1) recognition of the Commission's power to act; (2) 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 EC Treaty rules, such as the freedom to provide services or the abuse of dominant market power;<sup>116</sup> and (3) confirmation by the Court that the derogation given under Article 90(2) from EC Treaty rules must be interpreted narrowly. The undertaking in question must show that the entrusted task is made impossible, not merely more difficult or more complicated by the lifting of special or exclusive rights.

With respect to the telecommunications sector, the third justification above is provided by a framework developed on a broad political basis. Recent developments have made competi-

115. The Commission has also recently initiated a number of individual Article 90 procedures in the telecommunications field which have greatly advanced the introduction of competition into the EU's mobile communications market. See Commission Press Release, *As GSM Mobile Communications Market Is Opened to Competition the Commission Screens the Licensing Procedures*, IP (95) 959 (1995).

In the case of Italy, the Commission adopted an Article 90 Decision on October 4, 1995; see Commission Press Release, *GSM Italy: Commission Asks Fair Treatment for Omnitel*, IP (95) 1093 (1995). In addition, a number of individual Article 90 Decisions have been taken in other fields. See Commission Decision No. 85/276/EEC, O.J. L 152/25 (1985); Commission Decision No. 87/359/EEC, O.J. L 194/28 (1987), [1988] 1 C.M.L.R. 331; Commission Decision No. 90/12/EEC, O.J. L 10/47 (1989), [1990] 4 C.M.L.R. 464 (subsequently annulled on Feb. 12, 1992 on procedural grounds); Commission Decision No. 90/456/EEC, O.J. L 233/19 (1990), [1991] 4 C.M.L.R. 560; Commission Decision No. 94/119/EEC, O.J. L 55/52 (1994); Commission Decision No. 96/364/EEC, O.J. L 216/8 (1995).

116. The Court has stated that "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*, Case C-41/90, [1991] E.C.R. 1979, [1993] 4 C.M.L.R. 306. The Court has also confirmed that the grant of exclusive or special rights can, in itself, be a "measure" undertaken by a Member State and thus can be contrary to the Treaty. See *France v. Commission*, [1991] E.C.R. I-1223, [1992] 5 C.M.L.R. 552; *Porto di Genova*, [1991] E.C.R. at I-5929.

tion rules the spearhead for the deregulation of the EU telecommunications sector and, with this, of a core sector of the information society. At the same time, these developments demonstrate that the full effect of EC competition law can only be achieved by carefully correlating measures with the development of the general regulatory framework. The political compromise reached in this sector, liberalization and harmonization, is indicative of this requirement.

The Commission's basis for action in the telecommunications sector was its recognition of the universal service objectives in the sector. There was also a general conviction in the sector that universal service could be secured by less restrictive means than retention of monopoly rights, such as by financial contributions or the creation of a universal service fund. Competition and public service goals can, therefore, be complementary and mutually reinforcing.

Conditions in sectors differ. The experience in the telecommunications sector cannot be generalized in an automatic manner. Each sector has its own specific considerations.

Another important result of the work of the last few months is a clarification of procedures. The Commission has taken steps to ensure that 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.

Enhanced transparency and accountability in this area also seem to be the appropriate response to the comments raised by some<sup>117</sup> with regard to action by the Commission under Article 90 in the approach to the 1996 Intergovernmental Conference.

Less rigorous Commission action under Article 90 will not address the problem that action in the field of highly regulated sectors will inevitably touch on very substantial Member State interests. As the Commission has pointed out, weakening EC competition law with regard to Member State measures would leave

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117. See, e.g., the proposal by the European Centre of Public Enterprises (CEEP) for modification of Article 90 and a European Charter for services of general economic interest (not available); Miguel Angel Peña Castellot, *The Application of Competition Rules in the Telecommunications Sector: Strategic Alliances*, in COMPETITION POLICY NEWSLETTER (European Commission of the European Communities), Spring 1995, vol. 1, no. 4.

the European Union without a means for resolving competition conflicts in these areas and, therefore, without the only satisfactory means of ensuring that telecommunications in Europe are modernized effectively. The experience in the telecommunications sector shows that the right response is to view 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 EC COMPETITION LAW TO  
ENTERPRISES: ARTICLES 85 AND 86 AND THE  
MERGER REGULATION*

The deregulation of the core telecommunications market, the increasing dynamics created by the privatization of the former monopolies that accompanies 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 through the expansion of private broadcasters, the transformation of public broadcasting entities, and the entry of new actors from the publishing and software industries into the market is contributing to a substantial acceleration in the overall development of this sector. 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 and has become a major challenge for EC competition policy. The Commission must try to ensure that the current restructuring process will lead to competitive and growth oriented market structures.<sup>118</sup>

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118. The dynamics of this 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. Alan Cane, *Deals in Information Technology at Record*, *FIN. TIMES*, Sept. 27, 1995, at 26. Mr. Cane noted that "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 liberalization of European telecommunications." *Id.* Total value for the first six months of 1995 amounted to US\$17.5 billion, compared with US\$7.4 billion in the first half of 1994. *Id.* Further, the four largest deals involved telecommunications companies. *Id.*

The following discussion 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 cases and to establish general trends.<sup>119</sup>

The Commission is dealing with 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 organizations, as they move into global markets. This first group of cases generally involves horizontal agreements. 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.

With respect to the application of Articles 85 and 86<sup>120</sup> to the telecommunications sector, the Commission's policy has been spelled out in special Guidelines<sup>121</sup> designed to increase the level of legal certainty for companies and to deal with a number of case situations. The Guidelines seek to address, for example, 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 market entry discrimination. Access and interconnection issues are of primary importance and the 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

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119. For recent developments, see COMMISSION OF THE EUROPEAN COMMUNITIES, XXIII<sup>TH</sup> AND XXIV<sup>TH</sup> REPORTS ON COMPETITION POLICY (1993, 1994). A comprehensive overview of the application of EC 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.

120. EC Treaty, *supra* note 1, arts. 85, 86, [1992] 1 C.M.L.R. at 626-28. Article 85 deals with agreements or concerted practices between undertakings. *Id.* art. 85, [1992] 1 C.M.L.R. at 626-27. Article 86 deals with the abuse of dominant positions. *Id.* art. 86, [1992] 1 C.M.L.R. at 627-28. Procedures for the application of Articles 85 and 86 are set out in Council Regulation No. 17/62, First Regulation Implementing Articles 85 and 86 of the Treaty and Subsequent Implementation and Amendment Regulations. Council Regulation No. 17/62, O.J. L 35/1118 (1962).

121. Guidelines on the Application of the EEC Competition Rules in the Telecommunications Sector, O.J. C 233/2 (1991). For a detailed description, see Ravaioli & Sandler, *supra* note 75.

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 service 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.

As far as alliances are concerned, the determination of the "cooperative" or "concentrative" nature of an alliance is of major importance from a procedural point of view. In the first case, Articles 85 and 86 as implemented by Regulation 17 apply; in the second case, the Merger Regulation<sup>122</sup> applies. Recently, the Commission refined the distinction between cooperative and concentrative joint ventures.<sup>123</sup> This distinction will be revisited later.

#### A. *Strategic Alliances*

Strategic alliances have topped the telecommunications sector agenda for the last two years.<sup>124</sup> The Commission's efforts to liberalize the telecommunications sector would clearly serve little purpose if new cartels were allowed to develop and to suffocate emerging competition on liberalized 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 monopolies 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

122. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990) [hereinafter Merger Regulation].

123. Commission Notice, O.J. C 385/1 (1994) [hereinafter Joint Ventures Notice] (distinguishing between concentrative and cooperative joint ventures); Commission Notice, O.J. C 385/5 (1994) (discussing notion of concentration); Commission Notice, O.J. C 385/12 (1994) (concerning undertakings); Commission Notice, O.J. C 385/21 (1994) (concerning calculation of turnover).

124. See Peña-Castellot, *The Application of the Competition Rules in the Telecommunications Sector: Strategic Alliances*, *supra* note 117. This 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. *Id.*



players, both on the demand side and the supply side, have been analyzed in-depth. This Article will focus, therefore, on potential threats and on how the Commission may address them, bearing in mind the evolving nature of the telecommunications market. In general, alliances may be classified as horizontal, vertical, or conglomerate.

Strategic horizontal alliances between several telecommunications organizations will almost certainly be caught by Article 85(1),<sup>125</sup> since 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 research and development activities, production, and distribution of services, all of which reduce current and future choices of alternative suppliers and services.

Moreover, if alliances include a vertical component, instead of or in addition to a horizontal dimension, the vertical risks contribute to a potential foreclosure of competitors, notably regarding the latter's access to bottleneck infrastructures, networks, and/or services, which are indispensable for the develop-

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125. EC Treaty, *supra* note 1, art. 85(1), [1992] 1 C.M.L.R. at 626-27. Article 85(1) provides that:

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.

*Id.* Article 53 of the European Economic Area ("EEA") Agreement, which was concluded between the European Union and the Member States of the European Free Trade Agreement ("EFTA"), is analogous to Article 85 of the EC Treaty. With the European Union joining EFTA members Austria, Finland, and Sweden on January 1, 1995, this Agreement remains in force for Norway and Iceland.

ment of the competitors' activities. Given the significant negative effects of such discrimination on the development of effective competition in the marketplace, avoiding such negative effects is one of the Commission's main areas of activity.

The term "conglomerate alliances" may be reserved for agreements concluded either between companies with no prior presence in the telecommunications market, but which benefit from synergies through market entry such as electricity utilities or banks that have substantial internal networks as well as financial means and know-how, or between banks and telecommunications organizations. These alliances open state-of-the-art networks to competitive utilization and, therefore, are of growing importance.

Conglomerate alliances may not be caught by Article 85(1) if the parents are neither actual nor potential competitors in the relevant market. Inversely, "negative clearance"<sup>126</sup> will not be available whenever conglomerate alliances involve companies that hold dominant positions in markets that, albeit currently separate from telecommunications, are in the process of convergence. The Commission has looked into a number of alliances since the early precedent of *Infonet*,<sup>127</sup> the agreement having been notified pursuant to Article 4 and Regulation 17 at a time when liberalization was still in its early stages.

### B. *Leading Cases*

In the following discussion, major issues arising from the application of EC competition law to the telecommunications sector are discussed based on the recent *BT-MCI*<sup>128</sup> and *IPSP*<sup>129</sup> cases, which may be considered the leading cases in this area.

#### 1. Case BT-MCI

The first major strategic alliance the Commission examined in the telecommunications sector was the agreement notified by British Telecommunications PLC ("BT") and MCI.<sup>130</sup> This very

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126. Negative clearance is a certification that Article 85(1) is not infringed, per Article 2 and Regulation 17.

127. See Commission Notice, O.J. C 7/3 (1992) (concerning *Infonet*).

128. *BT-MCI*, O.J. L 223/36 (1994) (Commission).

129. Commission Decision No. 94/895/EEC, O.J. L 354/75 (1994) [hereinafter *IPSP*].

130. *BT-MCI*, O.J. L 223/36 (1994); Commission Press Release, Commission

complex agreement 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>131</sup> as a cooperative joint venture. The operation actually comprised two main MCI transactions. First, BT was to take a twenty percent stake in MCI, worth US\$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 included, however, in the relevant agreements to impede BT from controlling or influencing MCI. Second, the agreement called for 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, the parties used the framework of Concert to rationalize their respective holdings in other telecommunications organizations and groupings in the world. In this respect, MCI acquired most of BT's existing business in North America.

#### a. Negative Clearance

BT's acquisition of a twenty percent stake in MCI led the Commission to grant a negative clearance under the competition rules 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 behavior of the parties would be coordinated or influenced.<sup>132</sup>

In addition, those parts of the two transactions affecting

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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 (1994), reported in COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH REPORT ON COMPETITION POLICY 384 (1994).

131. In addition, following the entry into force of the EEA Agreement, the parties requested that the Commission extend the notification to cover Article 53 of the EEA Agreement.

132. BT-MCI, O.J. L 223/36, at 49 (1994). This paragraph reads:

[I]n 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).

*Id.*

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 Commission reached the same conclusion with respect to the non-compete obligation on BT and MCI concerning the activities to be undertaken by Concert, and an obligation on BT and MCI, as exclusive distributors of Concert's services, to obtain from Concert all of their required global telecommunications services, on the grounds that such provisions were ancillary to the creation and successful initial operation of Concert.<sup>133</sup>

b. Exemption under Both Article 85(3)<sup>134</sup> of the EC Treaty and Article 53(3) of the EEA Agreement

The Commission found that Concert's creation fell under the scope of both Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement,<sup>135</sup> because BT and MCI were, and for the foreseeable future would continue to be, 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.<sup>136</sup>

The Commission determined, however, that Concert satisfied all the conditions for receiving an individual exemption,

133. *Id.*

134. EC Treaty, *supra* note 1, art. 85(3), [1992] 1 C.M.L.R. at 627. Article 85(3) reads:

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.

*Id.*

135. BT-MCI, O.J. L 223/36, at 42 (1994).

136. *Id.* at 49.

which was made available to it until November 15, 2000.<sup>137</sup> In particular, Concert would be able to offer a set of new, global services to customers more quickly and more cheaply; services that were more advanced than either BT or MCI would be capable of providing individually under their existing technologies.<sup>138</sup> 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.<sup>139</sup>

The development of those services, and of the platform on which they are to be provided, are the responsibility of Concert.<sup>140</sup> The development of a comprehensive portfolio of services would require five years.<sup>141</sup> 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.<sup>142</sup>

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 EEA market in certain 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. Both provisions tried to isolate the entire EEA from competition by companies located outside the EEA.<sup>143</sup> Although a number of arguments were advanced by BT and MCI to justify those provisions, an exemption, until November 16, 2000, in the first case, and for five years from the date of adoption of the decision, in the second, was only granted by the Commission. Once it had been ensured that 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 once the parties had agreed to limit the provision on MCI to five years

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 53.

insofar as the territory of the EEA is concerned.<sup>144</sup>

The *BT-MCI* case provides guidance to the future application of the EC competition rules in similar situations. The Commission accepted that the creation of Concert, and thus a certain restriction of competition between the parents, was indispensable for quickly overcoming the shortcomings of existing networks and services and that the inadequacies associated with the provision of such global services under the existing framework of correspondent relationships between telecommunications operators. The fact that restrictions were kept to a strict minimum was a significant factor in the case.<sup>145</sup>

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

## 2. International Private Satellite Partners-ORION

International Private Satellite Partners ("IPSP") was also reviewed under Regulation 17 as a cooperative joint venture. IPSP<sup>146</sup> was created as a limited partnership under U.S. law, first, to provide international business telecommunications services<sup>147</sup> and, second, to offer transmission capacity on satellites to other users to the extent capacity was not fully utilized by IPSP and its partners.<sup>148</sup>

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

144. *Id.*

145. *Id.*

146. IPSP, O.J. L 354/75, at 83 (1994).

147. 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-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").

148. For so doing, OrionSat, acting as General Partner, applied for and obtained a licence from the Federal Communications Commission ("FCC"). Under the terms of the FCC licence, IPSP and its customers were not allowed to interconnect the IPSP satellite facilities with a switched telephone network for the purpose of providing telecommunications services. In December 1993, however, 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 considered an own-facilities-based alternative carrier to established operators.

approval by the limited partners, was granted broad authority to carry out the development, operation, marketing, and promotion of IPSP's services.<sup>149</sup> With respect to 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.<sup>150</sup> 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.<sup>151</sup>

In its decision, the Commission concluded that the partners of IPSP were not actual or potential competitors in the two relevant markets to be addressed by IPSP.<sup>152</sup> The Commission further concluded that none of the partners, most of them active in different segments of the aerospace industry, were in a position to obtain all the necessary authorizations and licences to provide services in all the countries within the footprints of the satellites, and that only through cooperation in a venture like the one envisaged would the parties be able to arrange for the financing, construction, launch, and operation of two satellites.<sup>153</sup> In addition, most of the IPSP partners did not have the experience necessary for providing communication services to other companies on a competitive basis, although several had gained some experience by managing their own internal networks.<sup>154</sup> Finally, none of the IPSP partners could reasonably be expected to make the investment and assume the substantial risk necessary to enter the two markets concerned.<sup>155</sup> The very high barriers to entry, the substantial market power of the incumbent telecommunications operators in the overall telecommunications market, the market power 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, the high financing costs, and the bargaining power of customers, in particular the

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149. IPSP, O.J. L 354/75, at 83 (1994).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

big multinational corporations, made this venture very risky.<sup>156</sup> Given such risks, it was not realistic to expect 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 found not to have as its object or effect the prevention, restriction, or distortion of competition and, therefore, fell outside the scope of both Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement.<sup>157</sup> The same conclusion was reached with respect to several provisions in the agreements, including a non-compete obligation on the general partner and a provision requiring preference to be given to partners for contracts by IPSP, that were considered to be directly related and necessary to IPSP. Accordingly, they did not exceed what was required by the creation and operation of IPSP.<sup>158</sup> Finally, several provisions in the agreements concerning STET's role as exclusive distributor of services in Italy and in Austria were considered non-appreciable restrictions of competition.<sup>159</sup>

The decision to clear the *IPSP-ORION* agreement under Article 85(1) rather than exempt it under Article 85(3) is an example of the positive attitude that the Commission takes with regard to the entry of new joint ventures that will tend to increase competition in the market and, therefore, can be considered as basically pro-competitive.

### 3. MSG Media Services GmbH-MSG

Media Services GmbH ("MSG") was reviewed under the Merger Regulation as a concentrative joint venture.<sup>160</sup> This case concerned the German companies Bertelsmann AG, Deutsche Bundespost Telekom, and Taurus Beteiligungs GmbH ("Taurus"), a company of the Kirch-group ("Kirch").<sup>161</sup> The parties proposed the creation of a joint venture called MSG, in which each parent would hold one-third of the share capital and voting

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156. *Id.*

157. *Id.* at 84.

158. *Id.* at 85.

159. *Id.*

160. Commission Decision, O.J. L 364/1 (1994) [hereinafter MSG].

161. MSG, O.J. L 364/1, at 2 (1994).



rights.<sup>162</sup> 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-television and other television services financed through subscription or payment by viewers in Germany.<sup>163</sup>

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

The proposed joint venture involved an alliance between companies that were likely to be important in the pay-television sector. Bertelsmann and Kirch are active in the audiovisual sector and, jointly with Canal+, run the only existing pay-television channel in Germany, *Premiere*.<sup>164</sup> Kirch, the principal supplier of films and television programs, would have continued to secure the dominant position of *Premiere* in the German pay-television market. This arrangement would be maintained after the possible introduction of digital television, which would make a much larger program 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.

The Commission considered it unlikely that competitors would enter MSG's market. Therefore, the creation of a lasting dominant position could be expected.<sup>165</sup> Furthermore, the monopolistic position of MSG as a supplier of services would give the parent companies control over their competitors in the pay-television market.<sup>166</sup> The conclusion of the Commission investigation was that the proposed operation would create or aggra-

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162. *Id.*

163. *Id.* at 4.

164. *Id.* at 5.

165. See Merger Regulation, *supra* note 122, O.J. L 257/13 (1990). According to the Merger Regulation, concentrations with a Community dimension are appraised by the Commission with a view toward determining whether "they are compatible with the common market." *Id.* 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." *Id.*

166. *MSG*, O.J. L 364/1, at 20 (1994).

vate a dominant position on the market for administrative and technical services for pay-television, and that MSG would obtain a lasting dominant position in this market.<sup>167</sup> 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, specifically, that in view of the position of Telekom, the effects of a possible liberalization of cable infrastructure would be limited by the creation of MSG. Thus, the Commission declared the joint venture incompatible with the common market.<sup>168</sup>

The *MSG* case centered on the development of the cable television market, and is representative of a new generation of cases in the media field that are directly linked to multimedia and the convergence phenomena mentioned above. The Commission demonstrated its determination that, while it favoured restructuring, it would not permit the closure of markets before they had a chance to develop.

The Commission's assessment of the impact of the venture on the market, as well as its 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 designed to control the media and assure pluralism, thus giving Community competition policy, as an inherently Europe-wide mechanism, a central role.

#### 4. Nordic Satellite Distribution ("NSD")

Nordic Satellite Distribution ("NSD") was also reviewed as a concentrative joint venture. NSD intended to transmit satellite television programs to cable television operators and households receiving satellite television via dish antennas, the direct-to-home market. The Commission prohibited the NSD joint venture in July 1995,<sup>169</sup> following a five-month investigation of the case.<sup>170</sup> The Commission concluded, however, that the establishment of NSD in its current form would have led, in effect, to a concentra-

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167. *Id.*

168. *Id.*

169. See Commission Press Release, Commission Decides Not to Authorise NSD in Its Current Form, but Remains Open to Examine New Proposals, IP (95) 801 (1995).

170. *MSG*, O.J. L 364/1, at 20 (1994).

tion of the activities of its parents,<sup>171</sup> creating a highly vertically integrated operation extending from the production of television programs, through the operation of satellites and cable television networks, to retail distribution services for pay-television and other encrypted channels.

NSD's parents were important companies in television transmission and media in the Nordic area. Norsk Telekom ("NT") is the main cable television operator in Norway with about thirty percent of household connections, and controls the satellite capacity on one of the two allocated Nordic satellite positions. Moreover, it is an important pay-television distributor in Norway through its company, Telenor CTV. TeleDanmark ("TD") is the largest cable television operator in Denmark, with about fifty percent of household connections, and will retain a privileged position for its cable television operations possibly until January 1, 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 television programming, magazines and newspapers, as well as in steel, paper, packaging, and telecommunications, and is the most important provider of Nordic satellite television programs, including the most popular channels. Kinnevik is the largest pay-television distributor in the Nordic countries, through its Viasat companies, and also has an important stake in Kabelvision, the second-largest cable television company in Sweden, as well as in TV4, the largest advertising-financed Swedish channel.

The Commission concluded that the creation of the NSD joint venture would have resulted in the creation or strengthening of a dominant position in three markets: (1) the market for provision of satellite television transponder capacity to the Nordic region, Denmark, Norway, Sweden, and Finland. This would have meant the creation of a dominant position for NSD itself; (2) the Danish market for operation of cable television networks. This would have strengthened the dominant position already held by TD; and (3) the market for distribution of satellite pay-television and other encrypted television channels to direct-

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171. Norsk Telekom A/S (NT), TeleDanmark A/S (TD) and Industriförvaltnings AB Kinnevik (Kinnevik), O.J. L 53/20 (1996).

to-home households. This would have created a dominant position for NSD.

The operation was vertically integrated and, thus, both the downstream market positions, cable television operations and pay-television, and the upstream market positions, satellite transponders and provision of programs, would have been mutually reinforcing. The parties would have achieved such strong positions that they would have been able to foreclose the Nordic satellite television market for competitors. Essentially, NSD would have obtained a "gatekeeper" function for the Nordic market for satellite television 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. Consequently, the Commission's decision took on a particular importance, since this is the period during which future market structures are being defined.

To a large extent, the *NSD* decision reaffirms the reasoning followed in the *MSG* decision. The Commission also reiterated, however, 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.

##### 5. The Microsoft Undertaking in 1994

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 personal computer ("PC") manufacturers excluded competitors from selling their products, since 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>172</sup> and entered into a parallel consent decree with the U.S. Department of Justice,<sup>173</sup> indicating that it would not: (1) enter into licence contracts with a duration of more than one year; (2) impose minimum commitments on licensees; or (3) use per-processor clauses in its contracts.<sup>174</sup> Per-system licences would only be allowed if licensees were given flexibility to purchase non-Microsoft products and to avoid payment of royalties to Microsoft in such instances. Any existing provisions of licence contracts that were in breach of those provisions would not be enforced, and licensees would have the option to terminate existing contracts. On the basis of this undertaking, Novell withdrew their complaint.

The Commission demonstrated with this case that while favouring technology exchange and transfer, it would ensure that markets are not foreclosed by the actors in the software/services field, consistent with its position taken in the *IBM Undertaking*.<sup>175</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.

## 6. Other Cases

With the dramatic transformation of the telecommunications, media, and information technology sectors, the Commission has been reviewing a growing number of cases. In the field of strategic telecommunications alliances, the *Phoenix/Atlas* case<sup>176</sup> (Deutsche Telekom/France Télécom/Sprint) stands out, as does *Unisource*,<sup>177</sup> and its Uniworld alliance with AT&T.

Currently, the *Phoenix/Atlas* case is still pending. However, in an announcement made when the agreement was notified,

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172. 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 (1994).

173. *Microsoft Agrees to End Unfair Monopolistic Practices*, Dep't. of Justice Press Release, No. 94-387 (July 16, 1995).

174. This case is also significant for its demonstration of the increasing importance of cooperation between competition authorities in this sector.

175. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH REPORT ON COMPETITION POLICY 77 (1994). In 1994, IBM withdrew the undertaking, effective from July 1995.

176. Commission Notice, O.J. C 377/2 (1994).

177. Unisource, O.J. C 154/04 (1995).

the Commission made it clear that this second case, involving a global telecommunications alliance, would be received under the same principles as those applied in *BT-MCI*. It was also made clear, in that announcement, that the factual differences between the cases would also play a crucial role in the review. The home markets of the parties in the *Phoenix/Atlas* case, France and Germany, are less liberalized than the home markets of BT and MCI, and the domestic elements of the services intended are much stronger relative to the global elements.

In the second case, *Unisource/Uniworld*, the Commission opened, on its own initiative, investigations in April, 1995.<sup>178</sup> In the meantime, a number of components of the project have been notified.

A second group of cases concerns market entrance in the newly liberalized markets, as well as into the new markets created by convergence.<sup>179</sup>

In *MSG* and *NSD*, the Commission made it clear that it would carefully screen agreements and practices in order to avoid the foreclosure of markets;<sup>180</sup> the general approach has

178. Commission Press Release, Commission Examines a Third Strategic Alliance in the Telecommunications Sector, IP (95) 288 (1995).

179. See Mannesmann, RWE, Deutsche Bank, Commission Press Release, Commission Cleared a Joint Venture Between Mannesmann, RWE-Deutsche Bank in the Telecommunications Sector, IP (93) 1241 (1993); Telenordia (BT/TeleDenmark/TeleNor), Commission Press Release, Commission Approves Creation of Swedish Telecoms Joint Venture, IP (95) 426 (1995); Cable&Wireless and Veba, Commission Press Release, Commission Approves Establishment of Cable&Wireless and Veba Telecommunications Joint Ventures, IP (95) 922 (1995); BT/Italy, 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 (1995); Banco Santander/BT, Commission Press Release, Commission Finds Banco Santander/BT Telecom Agreement to be Outside the Jurisdiction of the Merger Regulation, IP (94) 263 (1994).

In BT/Italy and Banco Santander/BT, the notified concentrative joint ventures were found to represent an acquisition which did not require a Decision under the Merger Regulation.

In the equipment market, see Siemens/Italtel, Commission Press Release, Commission Clears Proposed Joint Venture Between Siemens and Italtel in the Sector of Telecommunications Equipment, IP (95) 149 (1995).

In the media field, see Bertelsmann/News International/Vox, Commission Press Release, Commission Approves News International Stake in Vox, IP (94) 821 (1994); CLT/Disney/Super RTL, Commission Press Release, Commission Clears Establishment of Super RTL Between CLT and Disney, IP (95) 535 (1995); and Kirch/Richemont/Telepiu, Commission Press Release, The Commission Clears the Joint Acquisition of Telepiu by Richemont and Kirch, IP (94) 783 (1994).

180. Commission Press Release, Global European Network, Project for Optical-Fi-

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

A third group of cases concerns access issues. In the telecommunications field, the central issue to date has been access to the dominant and, in many cases still, monopoly incumbents' facilities. In the media field, there were a series of cases where the issue under dispute was access to programme content.<sup>181</sup> With the development of pay-television and the convergence towards multimedia, conditional access systems and access to set-top boxes start to play a major role.<sup>182</sup> This was the case in both the *MSG* and *NSD* Decisions.<sup>183</sup>

There have also been a number of cases where the Commission indicated that it would use the Article 85(3) exemption to favor the exchange and transfer of technology.<sup>184</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>185</sup>

### C. Access and Interconnection Issues

As the cases discussed clearly indicate, the issue of access, and the related issue of network interconnection, is bound to become a central issue in the telecommunications, media, and information technology market.

bre Transmission of Data: Mr. Van Miert Seeks Clarification of Intrastructure Prices, IP (95) 443 (1995).

181. See e.g., Commission Decision, O.J. L 248/36 (1989), [1990] 4 C.M.L.R. 841; Commission Decision, O.J. L 179/23 (1993); BBC/BSky B/Sports Events, Commission Press Release, Commission Clears Agreements Concerning Exclusive Television Coverage of English Football Matches, IP (93) 614 (1993).

182. See Commission Notice, O.J. C 168/05 (1995) (concerning strategic alliance in pay-television business).

183. See *MSG*, O.J. L 364/1; *NSD*, Case — (Eur. Ct. J. 199 ) (not yet reported).

184. See, e.g., Commission Decision, O.J. L 309/24 (1994); 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 (1994); Commission Decision, O.J. L 341/66 (1994); 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 (1995).

185. See Commission Notice, O.J. C 76/5 (1995).

In the media context to date, access to content has been a major issue, though with the emergence of pay-television and multimedia, conditional access systems and set-top boxes are now 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.

In *Infonet*,<sup>186</sup> which involved an entity that was owned at the time of the notification by a large number of Community and non-Community telecommunications operators, the notification related to the organization of Infonet and its shareholders in relation to the supply by Infonet of telecommunications services, called global value-added network services, or VANS, in a number of countries around the world, including all of the Member States at that time.<sup>187</sup>

Infonet's data communications services, the largest part of its business, were operated on the basis of an international packet-switched network, constructed with lines leased from the telecommunications organizations and other operators, and nodes belonging to Infonet.<sup>188</sup> At the time, 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 twelve Member States.<sup>189</sup>

The Commission was concerned with this arrangement and, therefore, required undertakings from the parties relating to non-discrimination, ensuring that they would apply the same terms and conditions to Infonet as to other service providers for the provision of reserved services, such as 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 emphasized 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 telecommunica-

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186. *Infonet*, O.J. C 7/3 (1992).

187. *Id.* at 4.

188. *Id.* at 4.

189. *Id.* at 5.



tions network or reserved services [than other service suppliers]."<sup>190</sup> The Commission also required undertakings relating to cross-subsidization, together with recording and reporting requirements.<sup>191</sup>

In *Eirpage*,<sup>192</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 paging system.<sup>193</sup> BTE had statutory exclusive rights over the public telecommunications network to which the paging system was to be interconnected.<sup>194</sup> 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*.<sup>195</sup>

Both cases are typical of cases that the Commission expects to face, with the removal of all remaining exclusive and special rights, as former monopoly incumbents turn into dominant operators and as, with converging markets, companies may acquire control of essential segments that others need to benefit from the full value chain. The post-monopoly and future multimedia environment is likely to be characterized by situations where firms singly 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 the future application of EC competition law to the sector.<sup>196</sup> Access and interconnection agreements may, in principle, be seen as pro-competitive because they aim to enlarge the service offered to the customer. These agreements can, however, also generate substantial collusive behavior and market foreclosure, as well as abuse of dominant positions, raising concerns under Article 85 and/or Article 86.<sup>197</sup>

190. *Id.* at 5.

191. *Id.* at 6.

192. Commission Decision No. 91/562/EEC, O.J. L 306/22.

193. *Id.* at 23.

194. *Id.* at 22.

195. *Id.* at 25.

196. The G-7 conclusions and the Telecommunications Infrastructure Green Paper emphasize the central importance of interconnection agreements for the regulatory environment of the future telecommunications market.

197. See COUDERT BROS., COMPETITION ASPECTS OF INTERCONNECTION AGREEMENTS

The central problem will surely be that, given the evolving market structure, the telecommunications, media, and information technology sector will in many areas depend on ensuring access to bottle-neck/essential facilities, such as networks, that are essential for reaching customers and cannot be replicated in a reasonable manner by other means. The concept of access to essential facilities and the evolving doctrine in this respect in EC competition law has been discussed in-depth in a more general context.<sup>198</sup> It is worthwhile to quote from this analysis:

[EC] competition law also says that when 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>199</sup>

Roughly speaking, as this requirement becomes stronger, the weaker the competition becomes in the downstream market.<sup>200</sup> The issue of access and interconnection in the telecommunications, media, and information technology sector will surely become a major test for the application of the essential facilities doctrine under EC competition law. Another significant test will be the definition of the relationship of the application of EC

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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) (not yet published). Types of issues capable of raising competition concerns in interconnect agreements under Art. 85 and/or Art. 86 include the number and location of points of connection, the costs and charges of providing interconnection, service delivery and quality, numbering and number portability, access to premises or equipment, directory services, intellectual property, and the exchange of technical and commercial information.

198. See John Temple Lang, *Defining Legitimate Competition, Companies' Duties to Supply Competitors and Access to Essential Facilities*, in 1994 FORDHAM CORP. L. INST. (Barry Hawk ed., 1993).

199. *Id.* at 283. Mr. Lang also notes that:

[I]mportant 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 [of the] EC Treaty*.

*Id.* (emphasis added).

200. See *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*, Magill, Joined Cases C-241/91P & C-242/91P (Eur. Ct. J. 1995) (not yet reported). This ruling has strengthened the argument that essential facilities are recognized under EC competition law.

competition law to regulation of access under the EC Open Network Provision regulations. As previously mentioned,<sup>201</sup> 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>202</sup>

#### D. Comment

As illustrated by the cases discussed above, the Commission recognizes that enterprises must be allowed to adjust to the evolution of the telecommunications market as these structures react to demonopolization and convergence. At the same time, the Commission must avoid market foreclosure, which would slow down market development if allowed to progress unchecked. In terms of Article 85(3), this balance may be expressed as follows.

First, there should be an improvement of production and distribution of goods and services and the promotion of technical or economic progress. Alliances that offer new global services with features required by, in particular, large corporations such as seamlessness, end-to-end, one-stop shopping and billing, etcetera, will improve the quality and availability of advanced telecommunications services,<sup>203</sup> and will also contribute to the creation of trans-European networks, which is one of the aims of the EC Treaty.<sup>204</sup>

Second, there must be benefits to consumers. Global alliances allow consumers, including large multinational companies, to benefit from more advanced global services and efficiency gains that improve their competitive position both globally and within the European Union. As is often the case, no one

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201. ONP, *supra* note 35, COM (95) 379 Final (1995). The Commission's Communication of May 3, 1995 also announced amendment Directives for the original ONP Framework Directive of 1990 and subsequent Directives.

202. In a number of aspects the concept of public networks, or "networks used primarily for services for the general public," is comparable with the common carrier concept in the United States.

203. *But see Astra*, O.J. L 20/23 (1992). In *Astra*, restrictions on 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." *Id.*

204. EC Treaty, *supra* note 1, art. 129B, [1992] 1 C.M.L.R. at 663.

company can provide such global services. This leads to a generally positive approach to large-scale alliances ("Global Players").

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

Fourth, and finally, the Commission must examine the elimination of competition of a substantial part of the products or services in question. This requirement, in particular, demands an 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 that is at the heart of the current evaluation of global alliances such as the Phoenix/Atlas agreement. The Commission may not allow parties to obtain power to eliminate competition, either now or in the future.

Application of EC competition law to enterprises, therefore, closely interacts with national regulatory reform and with the application of EC competition law to Member State measures, which, as seen above, to a large extent set the rhythm of regulatory reform. At the same time, the desire of Member State governments to create the right base for allowing enterprises to participate in global alliances may prompt early relaxation of national constraints. Following the principles established in *BT/MCI*, the Commission stated in the *Phoenix/Atlas* case that deregulation of an alternative infrastructure was a pre-condition to create a market environment before approval could be granted.<sup>205</sup> Roughly speaking, the more competitive the home market, the more easily an enterprise may obtain approval under

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205. Commission Press Release, Commissioner Van Miert Details Conditions

EC competition law. The Commission has also adopted this approach in the air transport sector.

Developments in the telecommunications, media, and information technology sector at the same time test a number of EC competition law concepts and may prompt their further development, principally because of the unprecedented speed of market change, the convergence of different sectors, and the inherently global character of the Information Society.

First, the sector tests the consistency of the approach under EC competition policy to the analysis of alliances and 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. In other words, between the application of Article 85 and Regulation 17, and the application of the Merger Regulation, these cases will test the clarity of the distinction refined in December 1994, in the Notice.<sup>206</sup> The ambiguity between the above distinctions has been demonstrated by the fact that cases have been transferred between the two procedures.<sup>207</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 behavioral 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, focus on analyzing constraints, the concentrative nature of ventures critically depends on the evaluation of the risk of coordination or adjustment of the practices

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Under Which Atlas Telecommunications Venture Could Be Acceptable Under the Competition Rules, IP (95) 791 (1995).

206. Commission Notice, O.J. C 385/1 (1994).

207. BT-MCI, O.J. L 223/36, at 53. The case was originally labelled 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 a cooperative nature. Commission Press Release, The Commission Has Considered That the Creation of Omnitel-Pronto Italia Is Not a Concentrative Joint Venture Has to Be Assessed Under Article 85, IP (95) 312 (1995).

of the parents or of their re-entry into the markets concerned.<sup>208</sup> This is difficult to establish or disprove in an environment of rapid regulatory evolution, changing alliances, and the convergence of markets.

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 classified as concentrative, due primarily to the continuing existence of separate national markets, and the fact that parents are active in different States or come from unrelated sectors.

While, undoubtedly, a discussion of the distinction between cooperative and concentrative joint ventures will reopen the confrontation between those who subscribe to the "freedom of action" view of EC competition law and those who subscribe to the "market impact" view of EC competition law,<sup>209</sup> and I will not deny that 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.

First, the Merger Regulation requires notification if the criteria<sup>210</sup> are met, whereas there is no such obligation under Article 85. This could lead to a different intensity and timing in the screening of the market. Second, there are high thresholds<sup>211</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>212</sup> Third, and finally, evaluation under the Merger Regulation emphasizes mar-

208. Joint Ventures Notice, O.J. C 385/1 (1994). This notice states that: [C]oordination 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.

*Id.*

209. 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. The second school gives preference to an analysis of the impact of the agreement on the overall competitive structure of the market.

210. The criteria refer to Articles 1 and 3 of Regulation 4064/89.

211. The Worldwide turnover test (5 billion ECUs); the Community-wide turnover test (250 million ECUs); and the two-thirds test.

212. See Commission Notice, O.J. C 231/2 (1986).

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

The first problem can be partly offset 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>213</sup> global satellite consortia,<sup>214</sup> and online services.<sup>215</sup> Own initiative cases will continue to be necessary because not all important alliances are the subjects of notifications or complaints.<sup>216</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, and 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.

A second challenge for EC 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 national legislation for the control of media concentrations and the guarantee of pluralism in the media. The fact that three negative decisions were taken recently under the Merger Regulation<sup>217</sup> does not indicate a negative position on media develop-

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213. Unisource, O.J. C 154/04 (1995).

214. Iridium/Globalstar/Odyssey, Commission Press Release, Commission Launches Investigations into Global Mobile Satellite Systems, IP (95) 549 (1995).

215. Europe Online, Commission Press Release, The Commission Surveys the European Online Market, IP (95) 1001 (1995). Europe Online is the joint venture of a number of European publishing companies and AT&T.

216. See Commission Opens Cable-TV Networks, *supra* note 102, IP (95) 1102 (1995). Thus, the Commission has recently opened a series of proceedings with regard to the extension of telecommunications organizations 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).

217. These negative decisions include: *MSG, NSD*, and *Veronica*. 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 (1995).

ments but, rather, that the new joint ventures have outgrown the framework of traditional national media legislation and control.<sup>218</sup> The Commission is addressing this issue in the current consultation subsequent to the Green Paper on media pluralism.<sup>219</sup>

A third major challenge is defining the relationship between the application of EC competition law and specific legislation established to regulate the sector. An immediate concern is the application of competition rules to access issues related to the ONP framework in the telecommunications sector, as mentioned above.<sup>220</sup>

More generally, the complementary role of competition rules and EC internal market regulations for public services, established particularly to ensure 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>221</sup>

218. Most Member States have media laws relating to issues of media ownership and program 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 that any company or individual can have in each broadcaster, with limits commonly between 20 and 30%.

219. Merger Regulation, *supra* note 122, O.J. L 257/13 (1990). The Regulation provides that: "Member States may take appropriate measures to protect legitimate interests . . . . Plurality of media . . . shall be regarded as legitimate interests." *Id.* art. 21, O.J. L 257/13, at 24 (1990). Notes on Council Regulation No. 4064/89, Annex to the Regulation, state that:

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.

*Id.*

220. A similar issue emerges for conditional access systems in the media field where a Directive has been adopted. Commission Directive (Eur. Comm'n July 24, 1995) (not yet reported).

221. See Competition Guidelines, *supra* note 121, O.J. C 233/2 (1991). The Court has given guidance on the matter in *Ahmed Saeed*, where it has established that standards and conditions set by general EC legislation can be referred to in Decisions under EC competition law for the purpose of determining what would constitute abusive conduct. *Ahmed Saeed Flugreisen and Silver Line Reisbüro GmbH v. Zentrale zur Bekämpfung unlänteren Wettbewerbs e.V.*, Case 66/86, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102.

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 harmonized conditions, such as reasonable interconnection and access to public networks. Conversely, while competition measures can only be taken to



A fourth challenge facing EC competition law will be the global nature of the new ventures in the telecommunications, media, and information technology field. It is desirable, therefore, not only to try to ensure consistency between decisions of national and Community authorities.<sup>222</sup> It is also important to ensure that similar results are reached at more or less the same time. This latter goal can be achieved if the parties agree to a settlement. Settlement may not be possible if a case is litigated through either the U.S. Federal Courts or the Court of Justice. In *BT/MCI*, cooperation was established between the Commission and the U.S. Department of Justice with the consent of the parties. *Phoenix/Atlas* will be the first major case to which the U.S./EC cooperation agreement<sup>223</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.

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

### CONCLUSIONS

The European telecommunications, media, and information technology market now amounts to some ten percent of the European Union's gross domestic product ("GDP"), and is 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 that grow at high speed and where liberalization 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 with other market participants, whereby together they can provide the required strength.

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pursue competition objectives, the express wording of Article 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.

222. FORRESTER NORALL & SUTTON, EFFICIENT COOPERATION WITH THE NATIONAL TELECOMMUNICATIONS AUTHORITIES, REPORT TO THE EUROPEAN COMMISSION (not yet published).

223. EC/U.S. Agreement on Competition Policy, O.J. L 95/49 (1995); see Commission Press Release, IP (95) 393 (1995).

The European Commission and European competition law are faced, therefore, with a double task: on the one hand, allowing restructuring that will make the development of the Information Society possible, and on the other hand, ensuring that markets are not closed off before they have opened or even come into existence.

It is this double objective that runs as a common thread through the application of EC competition law to the sector, regarding application to Member 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, or by the fact that companies in the media and publishing field are at the same time repositioning their activities in Europe and in the United States, outrunning to some extent the national control measures established to ensure pluralism of the media.

The European telecommunications reform for full liberalization in 1998 is at the core of the EC program for the Information Society. European telecom reform can be regarded as a parallel to the telecom reform act. EC competition law, as shown, plays a central role in Europe.

The application of EC competition law to the sector must, however, be seen in the context of the much broader objectives of the European Union for the Information Society. Namely, ensuring competitive markets, while at the same time ensuring an open media environment, and avoiding as far as possible the danger of a split between information haves and have-nots, both in Europe and in developing countries, all goals confirmed by the G-7 countries in the February 1995 declaration.

Liberalization 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 reorganization and in many cases privatization of enterprises.

With respect to EC competition rules, the developments in this sector have made, in my view, three major contributions. First, they have firmly established and strikingly shown that the application of EC competition law under Article 90 is a third, and essential, pillar of EC competition law, the application of EC competition law to enterprises and to State aids being the first

two pillars. EC competition law is built on these three pillars. Weakening one of them, or a failure to use one of them fully and correctly, would weaken the whole construction. The liberalization and modernization of the European telecom industry could not have been completed satisfactorily without the use of Article 90.

Second, the two principal procedures under EC competition law, Regulation 17 and the Merger Regulation, touch on each other in this area, due to the high dynamics of markets that 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.

Third, the telecommunications, media, and information technology markets are inherently global. Global alliances and operations that respond to these requirements need inevitably closer cooperation between antitrust authorities. The sector, therefore, is also a proving ground for testing the effectiveness of agreements, such as the U.S./EC Agreement on antitrust cooperation. More broadly speaking, the more common ground that exists on the basic principles applied by antitrust authorities to the sector the easier it will be to arrive at similar results in all jurisdictions. This is particularly true for U.S. antitrust and EC 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 World Trade Organization negotiations on basic telecommunications services will be of major importance, and will provide opportunities for anticipating and solving some of the problems that can already be foreseen.

Let me then sum up a few concrete conclusions that I would like to emphasize concerning the application of EC competition law to the telecommunications sector.

First, the application of Article 90 in the telecommunications sector has proven that this Article can be applied fully in a competition context, but can and ultimately must be linked to

the general policy framework for its potential, if it is to be used to full effect.

Second, 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.

Third, the application of Articles 85 and 86 and the Merger Regulation to the sector will further increase in importance in the post-liberalization environment, driven particularly by globalization and multimedia developments. Cases will centre on joint venture and access issues.

Fourth, ventures must be screened against the regulatory framework. There is a clear link here to progress being achieved on liberalization: the more competitive the home market, the easier it will be to obtain approval under EC competition law. The Commission has shown in recent cases that this principle will be consistently applied.

Fifth, in addition to the application of competition rules, there will be substantial public interest legislation in both the telecommunications and media markets. The principal concerns will be universal service, in the first, and maintenance of media pluralism, in the second. Relationships will have to be worked out both at the legal level and in day-to-day operations.

Sixth, with respect to joint ventures, projects tend to be at the boundary between cooperation and concentration. The sector, therefore, will also serve as a testbed for the principles in this area.

Seventh, the access/interconnection issue is likely to give rise to the most important group of future cases. The concept of essential facilities will become central, parallel to, and complementary with public interest legislation in the field of public networks, such as the EC ONP concept developed in the telecommunications sector.

Eighth, the definition of the relationship between competition authorities and telecom and media authorities will become a major task in the multimedia world in Europe, where these functions have traditionally been separated.

Ninth, with respect to U.S.-EU relations in the field, it might become necessary for the European Commission to develop

links, along the lines of those that it has with the U.S. Department of Justice and the Federal Trade Commission, with other U.S. federal authorities.

Tenth, and finally, globalization will require a closer relationship worldwide between national authorities, both in anti-trust and in specific sectors. The U.S.-EU Agreement on anti-trust cooperation may be seen as a starting point in this context.

The transformation of the European Union's economy into an information-based economy is a fundamental transformation that reaches far beyond economic aspects and touches deeply on social values, reaching from the maintenance of basic concepts about public service toward 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. Antitrust law was born in the United States during the great industrial revolution of the second half of the last century. Antitrust 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.