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Media, Multimedia, and European Community Antitrust Law

John Temple Lang*

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Abstract

This Article discusses the main European Community ("EC") antitrust law issues that have arisen in the media industries or which are especially relevant to media. Part I discusses general principles and directives that influence multimedia law. Part II examines the relevant markets which relate to multimedia. Part III reviews evidence of dominance within multimedia. Part IV discusses the impact multimedia has had upon broadcasting sports events within the European Union ("EU"). Part V also considers film catalogues and performing rights societies. Part VI explores mergers within the media sector. Part VII discusses conditional access systems. Finally, the Article concludes that the European media industry has yet to fully comprehend the interrelationship of media and EC Antitrust law. Therefore, the issues presented and discussed throughout this Article will continue to appear throughout the courts of the Member States.

MEDIA, MULTIMEDIA, AND EUROPEAN COMMUNITY ANTITRUST LAW

*John Temple Lang**

“Europe is littered with scrapped media alliances”¹

“[T]he distinction between stars (who have always been allowed to behave badly) and senior managers (who are supposed to exercise self-restraint) was more or less abolished.”²

INTRODUCTION

This Article discusses the main European Community (“EC”) antitrust law issues that have arisen in the media industries or which are especially relevant to media. The media discussed here are cinema; radio; television, including cable, satellite, and terrestrial; videos and sound recordings; multimedia and the Internet; newspapers; and magazines. In due course, on-line film delivery will become another medium. In fact, much of this Article concerns television and performing rights because that is where most money is spent in European media, where the latest developments are occurring, and where most antitrust issues and cases have arisen. Multimedia refers to services that provide more than two kinds of data, either images, text, video, or audio, through the same apparatus and which allow viewers to interact with that data.

This Article is limited to analyzing antitrust issues arising in current cases, and will not consider the many other legal aspects of media operations, including state subsidies to public broadcasting. There are many more issues and arguments that have arisen in Community media cases than have been dealt with in formal judgments or decisions. Some allegations are summarized here, which on examination, may prove to be exaggerated or unjustified, at least in some cases.

* Director in the Competition Directorate General—European Commission; Professor, Trinity College, Dublin. Opinions expressed are purely personal. A version of this Article will appear in 1997 *FORDHAM CORP. L. INST.* (Barry Hawk ed., 1998). Copyright © Transnational Series Publication, Inc. 1998.

1. Edmund L. Andrews, *The Media Business*, N.Y. TIMES, July 3, 1997, at D4.
2. Mark Canton, *The Nightmare Continues*, ECONOMIST, Sept. 21, 1996, at 67.

This Article consists of several parts. Part I discusses general principles and directives that influence multimedia law. Part II examines the relevant markets which relate to multimedia. Part III reviews evidence of dominance within multimedia. Part IV discusses the impact multimedia has had upon broadcasting sports events within the European Union ("EU"). Part IV also considers film catalogues and performing rights societies. Part V explores mergers within the media sector. Part VI discusses conditional access systems. Finally, the Article concludes that the European media industry has yet to fully comprehend the interrelationship of media and EC Antitrust law. Therefore, the issues presented and discussed throughout this Article will continue to appear throughout the courts of the Member States.

I. CHARACTERISTICS OF PRINCIPAL MEDIA IN EUROPE

In Europe, both the principal television stations and principal radio stations originated as state-owned monopoly services. Many important broadcasting companies are still state-owned, and traditionally have been regarded as public services. Some television stations, however, are financed wholly or partly by licence fees, others wholly or largely by advertising, and other newer stations by pay-TV or viewers' subscriptions.

Television and radio stations in Europe are mostly national in coverage and in their audiences, primarily because of linguistic reasons. These stations are subject to national regulations, but relatively few Community measures. Consequently, most European media markets are national, even though some of the companies are worldwide and, as is technically possible, the same television picture is transmitted with soundtracks in several languages.

Within each Member State of the EU, there is one or more large national broadcasting corporation, and a variety of private, regional, or local stations.

Media markets in Europe include a wide variety of different types of participants, many of whom are obliged to maintain commercial or technical relationships with others. For example, in the television sector there are cable, terrestrial, and satellite broadcasting companies, companies owning satellites, program producers, advertisers and publicity companies, intermediaries selling the right to broadcast sports events, sponsors, viewers,

sports organizations, stadium owners, film studios with film portfolios, and companies that measure audience ratings.³ A broadcaster who broadcasts music videos provides services to video producers, advertisers, and to viewers. Many of the relationships between these types of companies involve a degree of mutual dependence, which creates tensions and complicates antitrust analysis. This means that a single case can involve reciprocal provisions of different kinds of services in different service markets.

The last two decades witnessed an increase in the liberalization of television services. This was due partly to Community law and, simultaneously, to a vast increase in the number of television channels due to digitalization and the growth of conditional access technology and pay-television, which involves either cables that can be used also for special interest offerings, for on-line and interactive services, or encryption and decoding. These factors have vastly increased the amount of money involved in the industry, and have also increased competition for advertising revenue. These factors have made antitrust issues more important than before, and are leading to an increased number of TV channels specializing in sports.⁴ Most European TV channels, public or private, are still analogue, free to air, and financed by licence fees or advertising. Pay TV, and therefore, conditional access systems, have become important.

Regulation of media in Europe has been largely national. There is no European equivalent of the United States' Federal Communications Commission ("F.C.C."). Apart from the EC Directives mentioned below, there has been national legislation in various Member States to maintain State or regional public monopolies; to ensure diversity of ownership and control; political impartiality and local content; to limit cross-media ownership; and to oblige publicly owned broadcasters to obtain a minimum proportion of their programs from sources outside the broadcasting corporation itself. States also have restricted advertising of products such as cigarettes and alcohol. There are rules simi-

3. See Commission Decision No. 93/668/EEC, O.J. L 306/50, at 137-138 (1993) [hereinafter *Auditel*]; *Elliniki Radiofonia Tileorassi Anonimi Etairia v. Dimotiki Etairia Pliroforissis*, Case 260/89, [1991] 1 E.C.R. 2925, [1991] 4 C.M.L.R. 540.

4. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIIRD REPORT ON COMPETITION POLICY 1992, at 83-84 (1993).

lar to the pre-1987 F.C.C.'s Fairness doctrine.⁵ In other words, national authorities have regulated the media for a wide variety of purposes, much wider than the limited purposes dealt with by Community Directives on television.⁶ Regulatory definitions of broadcasting and of telecommunications have not yet been modified to deal with new technology.

Economically, today's media involve content, carriage, and software, but the companies involved no longer fall neatly into any of these three categories because there is much convergence. Antitrust problems arise when a company which is dominant in one of these areas makes use of or extends its dominance into another area of specialty, especially by a joint venture with another company which is itself dominant in the second area.

Although television and, to a lesser extent, radio, have been regulated, other media have been largely unregulated. In addition to formal regulation, state-owned television stations have in practice been influenced by official views on cultural issues of various kinds. Until recently, television has been regarded much less as a business in Europe than in the United States. Television is seen as a public service and means of entertainment, but not as a business like any other business. European cable television companies regard themselves as more advanced in conditional access technology, essential for pay-TV, than U.S. cable companies.

The European Court of Human Rights in Strasbourg, not to be confused with the Court of Justice of the European Community in Luxembourg, has ruled that broadcasting is covered by Article 10 of the European Convention on Human Rights, governing freedom of expression,⁷ and that only restrictions al-

5. *Id.*

6. 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); Eric Barendt, *Towards a European Media Law?*, MAASTRICHT J. OF EUR. & COMP. L. 41, 41-55 (1994); Vereinigte Familienpress Zeitungsverlags- Und Vertriebs GmbH v. Heinrich Bauer Verlag, Case C-368/95, [1997] E.C.R. ___, [1997] 3 C.M.L.R. 1329.

7. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5. Article 10 of European Convention on Human Rights states that

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and

lowed by Article 10 of that Convention are permissible.⁸ These restrictions apparently do not permit broadcasting monopolies.⁹

In federal states, the power to regulate media may belong to the regions or may be shared between the federal government and the regions. Several EU Member States such as Austria, Belgium, Germany, Italy, and Spain, are federations or have regions with so much power that they are similar to federations. As regulated markets become more competitive, whether due to, or in spite of, regulation, it will be necessary progressively to relax regulatory rules. Because of this, antitrust law will become more important.

Technological change now makes it possible to provide point-to-point telephone service, content services, and information services through the same network. It is also now possible to provide content services on a point-to-point basis for video-on-demand, as distinct from traditional point-to-multi-point broadcasting.

There is still some uncertainty, how much is disputed, over whether private households' total expenditure on media will grow much; whether Internet will replace broadband communications in the foreseeable future; and how far subscriber pay TV will replace free television, whether publicly or commercially financed.

In analyzing media antitrust issues in Europe, apart from the usual need to identify the relevant market discussed below, it is useful to distinguish between:

ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id.

8. *Autronic, Informationsverein Lentia v. Switzerland*, 12 Eur. Ct. H.R. (ser. A) at 485 (1990); *Groppera v. Switzerland*, 12 Eur. Ct. H.R. (ser. A) at 321 (1990).

9. *Id.* It has also been suggested that it would be contrary to the Convention to take away from sporting bodies the right to sell exclusive rights to broadcast major events. This would be the effect of national legislation obliging them to make the relevant broadcasting rights available to public interest channels.

- content;
- programs, whether current or archive material, and whether produced in-house or commissioned;
- channels, series of radio or television programs broadcast on the same frequency, and whether general or thematic;
- means of delivery, terrestrial, satellite direct-to-home, satellite via cable, each carrying either analogue or digital signals;
- encrypted or free access signals; and
- reception equipment owned by viewers or rented from cable companies.

There are major differences between EU Member States. In Germany, for example, seventeen million households, fifty-one percent of the total, are connected to cable. This is a much higher proportion than in any other Member State. This means that German cable television subscribers can see many channels without paying the extra cost of pay-TV. Germany is also unusual because Deutsche Telekom, the dominant telecommunications company, controls the national cable network.

Media markets in Europe are changing rapidly in many ways. This means that findings by antitrust authorities about relevant markets may become obsolete and unreliable. It also means that individual exemptions under Article 85(3) should not be given for long periods, as the future is so hard to foresee.

Penetration of personal computers ("PC"), into households is still on average much less in Europe, eighteen percent in 1994, than in the United States, thirty-seven percent in 1996. Because not every PC has a modem, this has consequences for use of the Internet and, therefore, for the importance of the Internet in multimedia services available and utilized in Europe.

A. *Free Movement of Goods*

EC Treaties require free movement of goods, but allow restrictions on imports on grounds of public morality and the protection of industrial and commercial property. The case law on intellectual property, insofar as it is relevant to media, may be summarized as follows.

Protection of intellectual property rights is given largely by national law. The main exception is the Convention on the Eu-

ropean Patent.¹⁰ These laws have not been fully harmonized, and there are significant differences between them.

B. *Exhaustion of Intellectual Property Rights*

The Court has repeatedly held that intellectual property rights throughout the EC are exhausted by the marketing of goods by the owner of the right to the goods or by the owner's consent in any Member State. In this situation, the owner cannot use its rights to prevent the goods from being imported into another Member State, or to insist on receiving an additional royalty on the imported goods.¹¹

The principle of exhaustion, however, does not apply to performance rights — that is, the right of owners of copyright or the equivalent to receive payment for public performance of the copyright material. The owner of the copyright may grant a licence for a certain number of performances in one EC Member State, and may also authorize television broadcasting of a film in that State. A copyright owner has a right to require fees for any public performances. If a licence has been granted for only one Member State, the licensee has no right to broadcast or perform it in another State. Also, fees must be paid for any performance or transmission by cable companies, not covered by the first licence. Thus, a copyright owner may require cable television companies in one State to pay fees or royalties for transmitting its film even if the television companies received the film from a television station in another Member State that was duly licenced to broadcast it there.¹²

10. Convention for the European Patent for the Common Market of 15 December 1975, O.J. L 17/1 (1976), amended by the Implementing Regulations to the Convention for the European Patent for the Common Market, O.J. L. 401/28 (1989). The as yet unenacted Community Patent Convention would provide for a single patent effective throughout Europe.

11. *Musik-Vetrieb Membran v. GEMA*, Joined Cases 55 and 57/80, [1981] E.C.R. 147, [1981] 2 C.M.L.R. 44; *Ministere Public v. Tournier*, Case 241-242/88, [1989] E.C.R. 2521, [1991] 4 C.M.L.R. 248.

12. *Coditel v. Cine-Vog Films*, Case 62/79, [1980] E.C.R. 881, [1981] 2 C.M.L.R. 362 [hereinafter *Coditel I*]; See also *Coditel v. Cine-Vog Films*, Case 262/81, [1982] E.C.R. II-3381, [1983] 1 C.M.L.R. 49 [hereinafter *Coditel II*]; *G. Basset v. Societe des auteurs, compositeurs et editeurs de musique (SACEM)*, Case 402/85, [1987] E.C.R. 1747, [1987] 3 C.M.L.R. 173. The mere fact that a licence is issued only for a given geographical area and that the given area is a Member State does not make the limitation unlawful. The Court warned performing rights societies about the Community's antitrust rules:

The future relevance to both music and films on the Internet is obvious, even if nobody has yet given a licence to put feature films on the Internet. This also explains why there is a separate performing rights society in each Member State.

The mere fact that an exclusive copyright licence has been given for a limited period is not enough to bring the licence within Article 85, although the exercise of copyright rights and the terms of copyright licences can fall under Article 85 and Article 86.

The sale of goods outside the EC and European Economic Area ("E.E.A."), including Norway, Iceland, and Liechtenstein, does not exhaust intellectual property rights in the Community or the E.E.A.¹³ If intellectual property rights, however, were used to support a market-allocation arrangement contrary to EC antitrust law, these rights would not be exercisable to achieve

Although copyright in a film and the right deriving from it, namely that of exhibiting the film, are not, therefore, as such subject to the prohibitions contained in Article 85, the exercise of those rights may, none the less, come within the said prohibitions where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market It is for the national court to make such inquiries as may be necessary It is for national courts, where appropriate, to make such inquiries and in particular to establish whether or not the exercise of the exclusive right to exhibit a cinematographic film creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not, from a general point of view, such exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market.

Accordingly, . . . a contract whereby the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in Article 85 of the Treaty. It is, however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market, regard being had to the specific characteristics of that market.

Coditel II, [1982] E.C.R. at 3402, [1983] 1 C.M.L.R. at 70. See also *Danske Videogramdistributører v. Laserdisken/Pedersen*, Case 61/97, (not yet decided) (discussing whether Articles 30-36 allow right holder who sells videodiscs for renting in one Member State to prevent their importation for renting in another Member State).

13. *Polydor v. Harlequin*, Case 270/80, [1982] E.C.R. 329, [1982] 1 C.M.L.R. 677; *EMI v. CBS*, Joined Cases 51/75, 86/75, 96/75, [1976] E.C.R. 811, 871, 913, [1976] 2 C.M.L.R. 235; Council Directive No. 92/100, art. 9, O.J. L 346/61 (1992).

results that could not be obtained by agreement.¹⁴

There is no exhaustion of copyright if the first sale, even with the owner's consent, was in a Member State whose legislation does not protect the owner's rights¹⁵ or which was made after the copyright protection period there has expired.¹⁶

In *Collins v. Imtrat*,¹⁷ the Court confirmed that the Community law prohibition of discrimination on the grounds of nationality applies to copyright laws and is directly applicable in national courts without needing any implementing national measures. This means that everyone whose rights are governed by Community law must be treated, in each Member State, in the same way as its citizens. Therefore, a Member State cannot make copyright rights depend on the owner residing in the State, when this is not required of its own citizens.

In addition, the Commission has acted against contractual export restrictions in copyright licences in various cases.¹⁸

C. *Freedom to Provide Services*

The EC Treaty prohibits discriminatory restrictions on free-

14. *Consten and Grundig v. Commission*, Joined Cases 56/64 and 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418 (trademark used to back up illegal exclusive distribution agreement); *EMI v. CBS*, Joined Cases 51/75, 86/75, and 96/75, [1976] E.C.R. 811, 871, 913, [1976] 2 C.M.L.R. 235 (trademark rights exercisable because market allocation agreement which had led to their assignment had clearly ceased to operate). If an agreement to use different technical standards in the United States and Europe was illegal, associated intellectual property rights could not be used to achieve the same results.

15. *Warner Brothers v. Christiansen*, Case 158/86, [1988] E.C.R. 2605, [1990] 3 C.M.L.R. 684; *EMI Electrola v. Patricia*, Case 341/87, [1989] E.C.R. 79, [1989] 2 C.M.L.R. 413.

16. *EMI Electrola v. Patricia*, Case 341/87, [1989] E.C.R. 79, [1989] 2 C.M.L.R. 413.

17. *Collins v. Imtrat*, and *Patricia v. EMI Electrola*, Joined Cases 92/92 and 326/92, [1993] E.C.R. I 5145, [1993] 3 C.M.L.R. 773.

18. See COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY 1977, at 85 (1977) (BBC and "the Old Man and the Sea"); COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH REPORT ON COMPETITION POLICY 1980, at 73-74 (1980) (Ernest Benn and Dutch Publishers' Association); COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 1981, at 66-67 (1981) (STEMRA); COMMISSION OF THE EUROPEAN COMMUNITIES, TWELFTH REPORT ON COMPETITION POLICY 1982, at 73-74 (1983) (Neilson-Hordel-Richmark); see generally Commission's Proposal for a Council Directive on the legal protection of computer programs, COM (88) 816 (detailing Commission's views on relationship between Community Competition Law and Copyright); COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 1989, at 56-7 (1990).

dom to provide services. Instead, the treaty provides for harmonization of national rules on services. This has largely been based on the principle of mutual recognition. A company providing a service, however, may have to comply with the national requirements in the Member State where it is providing services in addition to those requirements in its own Member State, if this is necessary for reasons based on the general good.¹⁹ Subject to this, companies must not be required to set up branch operations in the host state.

But public interest restrictions can be imposed only insofar as the public interest is not safeguarded by rules in the State where the service provider has its base.²⁰ Restrictions in the public interest must not "go beyond what is necessary in order to achieve the intended goals."²¹

1. *Bond van Adverterrers*

In *Bond van Adverteerders*,²² the Court held that the distribution by cable networks of television programs broadcast in other Member States, containing advertisements intended especially for the public in the State where the cable companies operate, involve services within the meaning of the Treaty. The Court struck down, as discriminatory, prohibitions on advertisements directed specifically at the Dutch market. The Court also struck down prohibitions on subtitles in Dutch in programs directed at the Dutch market because they applied only to television stations outside the Netherlands. The ban on subtitling merely complemented the ban on advertising.

19. *Van Binsbergen v. Bestuur*, Case 33/74, [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298; *Ministere Public v. Van Wesemael*, Joined Cases 110 and 111/78, [1979] E.C.R. 35, [1979] 3 C.M.L.R. 87; *Alpine Investments v. Minister van Financien*, Case 384/93, [1995] E.C.R. I 1141, 1178-82, [1995] 2 C.M.L.R. 209; *Gebhard v. Consiglio Dell'Ordine Degli Avvocati E*, Case 55/94, [1996] E.C.R. 189, [1996] 1 C.M.L.R. 603 (requirements for establishment must be non-discriminatory, imperative in general interest, appropriate to their objectives and proportional).

20. *Criminal Proceedings against Alfred Webb*, Case 279/80, [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719.

21. *EC Commission v. France*, Case 96/85, [1986] E.C.R. 1475, 1486, [1986] 3 C.M.L.R. 57.

22. *Bond Van Adverteerders v. The State*, Case 352/85, [1988] E.C.R. 2085, [1989] 3 C.M.L.R. 113.

2. *Collectieve Antennevoorziening Gouda & Commission v. Netherlands*

In two other leading cases involving television and the Dutch law on media,²³ the Court stated that restrictions on freedom to provide services in one Member State, which apply to companies established in another Member State, are permitted only if they are justified by overriding reasons relating to the public interest or if the requirements in the legislation of the host or receiving State are not satisfied by the rules imposed in the State where the company is established. Overriding reasons relating to the public interest include protection of intellectual property and consumer protection. In addition, the application of the laws of the host State to providers of services established in other Member States must guarantee the achievement of the intended aim and must not go beyond what is necessary to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules.

Having restated these principles, the Court, in the first of these cases, decided that certain rules about broadcasters, namely that advertising must be handled by a legal entity separate from that responsible for programs, all advertising revenue must be used to produce programs, and third parties must not be allowed to make a profit, were not necessary to protect Dutch culture or pluralism. It also decided that restrictions relating to television advertisements, namely that they must be clearly recognizable as such and separate from the other parts of the program, they may not exceed five percent of air time, and they must not be broadcast on Sundays, were not justified, because their main effect was to protect the profits of the Dutch TV advertising enterprise. The Court recognized, however, that some restrictions on TV advertising could be justified to protect consumers against excessive advertising or to maintain program quality, as an objective of cultural policy.

In *Commission v. Netherlands*, the Court struck down a rule of Dutch law requiring companies broadcasting for the Dutch market, including those in other Member States, to have all their radio programs and a fixed proportion of their TV programs

23. *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat Voor De Media*, Case 288/89, [1991] E.C.R. I-4007; *Commission v. Netherlands*, Case 353/89, [1991] E.C.R. I-4069.

produced by a State-owned Dutch Company. Pluralism in the audiovisual sector cannot be affected by allowing broadcasters to use program-producers in other Member States. Although Article 90 does presuppose the existence of some enterprises with special or exclusive rights, not all special or exclusive rights are necessarily compatible with the Treaty.

3. *Greek TV Case*

In the Greek Television case,²⁴ the Greek TV company had discriminated in favor of programs that it had itself made. The Court held that Community law does not prohibit the granting of a television monopoly for non-economic reasons relating to the public interest. But such a monopoly must not discriminate against imported goods or services, unless the discrimination is specifically justified on one of the grounds set out in the Treaty, in the light of Article 10 of the European Convention on Human Rights. Article 90 prohibits a State from granting exclusive rights to transmit TV broadcasts where those rights are liable to lead to discrimination in favor of the monopoly's own programs, unless this is permitted by Article 90(2).

4. *Commission v. Belgium*

In *Commission v. Belgium (VTM)*,²⁵ the Court stated that Member States are not free to prohibit cable companies from carrying on their networks programs from broadcasters in other Member States on the grounds that the programs are not in a language of the receiving State. Such a rule is discriminatory, and unjustifiable. A State cannot prohibit services by companies in other States altogether, although it can take action if broadcasters aiming principally at its territory set up abroad to avoid rules that would apply if they were set up on its territory, such as rules intended to establish a pluralist and non-commercial radio and TV system.²⁶

24. *Radiofonia*, [1991] E.C.R. at I-2925, [1991] 4 C.M.L.R. at 540.

25. *Commission v. Belgium*, Case 211/91, [1992] E.C.R. I-6757; See COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIIRD REPORT ON COMPETITION POLICY 1991, at 459 (1993) (BBC Enterprises).

26. *TV10 SA v. Commissariat Voor de Media*, Case 23/93, [1994] E.C.R. I-4795, [1995] 3 C.M.L.R. 284.

5. *Leclerc-Siplec*

In *Leclerc-Siplec*,²⁷ the Court held that Article 30 allows a Member State to prohibit broadcasting of televised advertisements for distributors of goods. Distributors could advertise in other ways, and the rules applied to all traders in the state and affected imported and domestic goods in the same way. Nor does Directive 89/552 prevent this, since it allows Member States to impose rules stricter than those required by the Directive for TV advertising.

D. *Directives Relating to Television Services*

The EC Commission has adopted several Directives that relate to and influence multimedia and television rights throughout the EU.

1. Directive on Competition in the Markets for Telecommunications Services

Since the coming into force of a Directive adopted in 1990,²⁸ cable TV networks could be used for providing liberalized telecommunications services.

2. Directive Concerning the Pursuit of Television Broadcasting Activities

A Directive adopted in 1989,²⁹ commonly called the televi-

27. *Leclerc-Siplec v. TF1 Publicité and MG Publicity*, Case 412/93, [1995] E.C.R. I-179, [1995] 3 C.M.L.R. 422.

28. Commission Directive 90/388, O.J. L 192/10 (1990) (amended by Commission Directive 96/51, O.J. L 256/49 (1995)).

29. Council Directive 89/552, O.J. L 298/23 (1989). The European Court of Justice summarized this directive as follows:

The main purpose of the Directive, which was adopted on the basis of Articles 57(2) and 66 of the Treaty, is to ensure freedom to provide television broadcasting services.

To that end, it lays down, according to the thirteenth and fourteenth recitals in the preamble, minimum rules to govern broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State.

To attain that objective, Chapter II of the Directive, devoted to general provisions, requires Member States from which broadcasts are made to ensure that television broadcasters under their jurisdiction comply with the provisions of the Directive (Article 3(2)) and Member States receiving broadcasts to ensure freedom of reception and not to restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall

sion without frontiers directive, EC Member States were required to ensure free reception of TV broadcasts from other Member States, and prohibited from restricting retransmission. Advertising on TV must be readily recognizable as advertising and kept separate from other parts of the program service. Advertising normally may not exceed fifteen percent of daily transmission time and there are rules about the content of advertisements. Also, where practicable, a majority of transmission time should be reserved for European programs.

3. Directive on the Adoption of Standards for Satellite Broadcasting of Television Signals

By another directive, adopted in 1992,³⁰ the Council required Member States to promote advanced satellite broadcasting for television, using certain technical standards, and giving a standard-setting role to the European Telecommunications Standards Institute ("E.T.S.I.").

4. Directives on the Use of Standards for the Transmission of Television Signals

By another directive in 1995,³¹ Member States were obliged to use certain technical standards for television transmission by cable, satellite, or terrestrial means. Article 4 of this directive contains a provision relating to conditional access television.

within the fields coordinated by the Directive, although they may provisionally suspend broadcasts in certain specified cases (Article 2(2)). Article 3(1), which is in the same chapter, provides that Member States are to remain free, as regards television broadcasters under their jurisdiction, to lay down more detailed or stricter rules in the areas covered by the Directive.

The fields coordinated by the Directive include the minimum provisions governing the Member States from which broadcasts are made relating to televised advertising, which are contained in Chapter IV.

See *Mattel/Lego*, 1995/95 Rep. EFTA Ct. 113 (interpreting Directive).

This Directive is currently being amended by the European Parliament and the Council. It does not apply to new on-line audiovisual services such as video-on-demand, but will apply to teleshopping. *Leclerc-Siplec v. TFI Publicite and M6 Publicite*, Case 412/93, [1995] E.C.R. I-179, 219, [1995] 3 C.M.L.R. 422.

30. Council Directive No. 92/38, O.J. L 137/17 (1992) (concerning adoption of standards for satellite broadcasting of television signals).

31. Council Directive No. 95/47, O.J. L 281/51 (1995) (concerning use of "advanced television standards" for transmission of television signals); *See also* Council Directive 92/38, O.J. L 137/17 (1992) (concerning standards for satellite broadcasting of Television signals). The Commission's 1997 proposal on legal protection of services based on conditional access is not relevant to the issue discussed in the text.

The provision states that Member States shall take all the necessary measures to ensure that the operators of conditional access services, irrespective of the means of transmission, who produce and market access services to digital television services, offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers authorized by means of decoders administered by the service operators, and comply with Community competition law, in particular if a dominant position appears. This provision deals partly with the problems of decoders and set top boxes, because:

- it only applies to the new digital services, not to the existing analogue services, which will continue for some years and which confer market power at present;
- it benefits only broadcasters, and cable companies are not regarded as broadcasters, for they usually merely carry programs originated by other companies;
- it does not guarantee access for the provision of interactive services, which are not television but which may have an important impact on the profitability of cable companies and other carriers of television services in the near future;
- a fair, reasonable, and non-discriminatory basis is not a very precise duty; and
- the directive only applies to conditional access systems, and not to other essential facilities of similar kinds or having similar effects, in particular the application program interface, the verifier system and the electronic program guide.

5. Cases Interpreting the Directives

In a recent case involving Council Directive 89/552,³² the Court held that a Member State may not determine which satellite broadcasters come under its jurisdiction by using criteria other than establishment, such as transmission or reception of programs. Such criteria lead to the receiving State exercising control, contrary to the directive, over broadcasts coming from, and, therefore, under the jurisdiction of, another State. The Court said that the Council of Europe Convention on Trans-

32. *See* Commission v. UK, Case 222/94, [1996] E.C.R. I-4025, [1996] 3 C.M.L.R. 793; Denuit, Case C-14/96, [1997] E.C.R. ___, [1997] 3 C.M.L.R. 943; De Agostini, Joined Cases 34/95, 35/95 and 36/95, All ER (EC) 687 (1997).

frontier Television does not help to interpret the directive, because it uses a different approach.

In another case,³³ the Court held that the directive applies to distribution of television by cable. It is solely for the State from which TV broadcasts come to monitor the application of the law of the originating State. In general it is not for the receiving state to monitor this.

In a recent judgment,³⁴ the Court held that a broadcaster is subject to the jurisdiction of the where it is established and, if it established in two Member States, that of the State where it has the center of its activities, in particular where its program is decided and where its programs are finally put together.

E. Directives Relating to Copyright

A 1992 Directive³⁵ harmonized principles of copyright law for authors, performers, phonogram producers, and the producers of films. Under the directive, authors and performers are given a non-waivable right to equitable remuneration. The administration of this right may be given to collecting societies representing authors or performers. Performers, producers of films and phonograms, and broadcasting organizations are given exclusive rights. Cable distributors get no copyright as a result of mere retransmission. A single payment must be made if a phonogram published for commercial purposes is used for broadcasting, and must be shared between the performers and the producer of the sound recording.

The right to sell copies of goods in which there is copyright is called the distribution right. This is the exclusive right of performers, producers of films and sound recordings, and broadcasting organizations. This right is exhausted within the Community only if the first sale in the Community is made by the

33. *Commission v. Belgium*, Case 11/95, [1996] E.C.R. I 4115, [1997] 2 C.M.L.R. 289.

34. *VT4 Ltd v. Vlaamse Gemeenschap*, Case C-56/96, [1997] E.C.R. ___, [1997] 3 C.M.L.R. 1225.

35. Council Directive 92/100, O.J. L 346/61 (1992). See also Council Directive 93/98, O.J. L 290/9 (1993) (harmonizing term of protection of copyright); Council Directive 93/83, O.J. L 248/15 (1993) (explaining coordination of rules concerning copyright . . . applicable to satellite broadcasting and cable retransmission); See generally *The Commission's Green Paper on Copyright and Related Rights in the Information Society*, COM (95) 382 Final (1995), and *Follow up to the Green Paper on Copyright*, COM (96) 568 (1996).

right holder or with its consent. Compulsory licences are allowed only to the extent permitted by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the Rome Convention, and in accordance with the national copyright law on literary and artistic works. A twenty-year copyright period was fixed for films. The other periods must be at least those in the Berne Convention for the Protection of Literary and Artistic Works for authors' right and in the Rome Convention for performers, producers of sound recordings and broadcasting organizations.

Then in 1993, the Commission adopted a directive dealing specifically with copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.³⁶ Essentially, this directive extends the earlier directive to communication of copyright material by satellite and by cable. When programs from other Member States are retransmitted by cable in one State, copyright rights must be respected in that State. The right of copyright owners to grant or refuse a licence for cable retransmission may be exercised only through a collecting society, except in the case of a broadcasting company's own transmission. Mediators are to be appointed to help with negotiations. Member States are to ensure that parties do not prevent negotiation without justification.

II. *RELEVANT EU MARKETS RELATING TO MULTIMEDIA*

A. *Relevant Geographic Markets*

Relevant geographic markets in the media sectors in Europe are still, to a surprising extent, national. This is primarily for linguistic reasons. Except in the case of a radio channel specifically aimed abroad, such as the BBC World Service, most public broadcasting companies have no reason to broadcast programs in languages other than their own national languages. In states such as Belgium with two major national languages, separate channels broadcast in each language. Channels that are financed largely or wholly by advertisements may have difficulty getting advertising revenue unless their programs are directed at listeners of one linguistic group in one Member State. Many programs and films produced in one language are given subti-

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

titles or soundtracks in another language when they are shown to audiences in another State. Where there are large enough numbers of foreigners living in a State, their interests may be met by specialized radio or TV channels, or by imported films, newspapers or magazines. Advertisers also find significant differences in the tastes and preferences of buyers in different States, some of them no doubt due merely to tradition and habit, and they try to adapt their advertisements as far as possible to buyers' tastes in these respects. TV viewers who want to watch sports programs are significantly more interested in seeing teams and players of their own nationality than those from other countries. Viewers who have invested substantial sums of money in a decoder, set-top box, will tend to continue to watch programs transmitted to their fellow-countrymen and women with the same kind of decoders.³⁷ Cable TV companies will not pay for the right to transmit a program in a State unless they are sure they have a large enough audience for it there. There is also some evidence that a TV channel that set out to have a Europe-wide audience loses market share to otherwise similar channels that broadcast in only one language and try to appeal primarily to popular tastes in one country. The language used for the commentary on a sports event largely determines the audience that will watch the program. In short, entrenched language-based consumer preferences make markets national, and cause most programs to be produced in the Member State in question.

The primarily national or linguistic nature of geographical media markets in Europe is not altered by the fact that some of the companies involved are international or multinational. To a large extent they adapt their programs to national audiences, and when they move into new States they tend to do so with local partners, whether carriers or content providers. The fact that a competitor is multinational does not mean that the relevant market is multinational, although it may, of course, give the company concerned economies of scale or other advantages when bidding, for example, for the rights to televise the Olympic

37. See *Tetra Pak Int'l SA v. Commission*, Case 333/94, [1997] All ER (EC) 4 [hereinafter *Tetra Pak II*]. On the significance of the cost to users of changing equipment on linguistic markets, see generally Commission Decision No. 94/922/EC, O.J. L 364/1 (1994), [1995] 1 C.E.C. 2509 [hereinafter *MSG Media Service*]; *RTL-Veronica-Endemol*, O.J. L 134/32 (1995); *Kirch-Richemont-Multichoice-Telepin*, Merger decision No. M 584, ¶ 17 (May 5, 1995).

Games or experience in subscriber management systems. Many people fail to understand this. Many radio stations, of course, have local or regional markets.

B. *Relevant Service Markets*

There are a large and increasing number of distinct service and product markets in the media sectors in Europe.³⁸ Cinema films are produced and distributed through cinemas and video rental and sales shops. Sound recordings are produced and sold, and are played in places that are open to the public, giving rise to the collection of royalties. The production of cinema films and sound recordings involves different kinds of companies and artists. Cinemas provide services both to audiences and to the film studios whose films they distribute. TV stations provide services to views, to advertisers and to program right owners. Cable companies provide services both to viewers and to broadcasting companies whose programs they receive and distribute to householders.

Because various relationships involve the parties in providing services to one another and not merely one party paying for services provided by the other, even a bilateral relationship may involve assessing market power on two markets, not just one. This is complex, but not inherently difficult.

1. Emerging Content Markets and Resulting Problems

Greater difficulty has arisen in defining product markets by program content because of the rapid increase in the number of specialized TV channels, due to cables and digitalization. Channels and, therefore, demand for content are emerging for the following areas:

- children's programs;
- news;
- feature films;
- archives;
- shopping;
- documentary;

38. For some recent statements on the definition of relevant markets, see generally, *Tetra Pak II*, [1997] All ER (EC) 4; *MSG Media Service*, O.J. L 364/1 (1994), [1995] 1 C.E.C. 2509.

- ethnic;
- science fiction;
- cartoons;
- pop music;
- gardening;
- do-it-yourself-activities; and
- particular kinds of sports.

This creates a series of narrower markets than previously existed, in particular for the content providers and the organizers of sports events who ultimately generate the content for sports channels.

One difficulty this has caused is on how to decide whether, for example, any other sports are substitutable for Formula I motor racing or soccer. Such questions must be answered first in the light of viewers' demands, as this will influence or determine the attitudes of advertisers and broadcasters. Increasingly, contracts between broadcasters and organizers of sports events, involving large sums of money, mean that important events are broadcast live, and viewers expect that they will be. It seems that in most countries professional soccer broadcast live is a sport for which no other sport is satisfactorily substitutable, and Formula I motor racing also may be. Some other sports are in the same category, no alternative being satisfactory to viewers, but only in some Member States. A distinction must also be drawn in all countries between international events in which national teams are participating, and lesser events, and between the final games in a competition and the games in the first round. There is also a difference between live coverage and recorded coverage, and between full coverage and extracts, and there is a separate market for full live coverage of important sports events.

The degree of substitutability of various events can be measured in various ways, bearing in mind that developments in the industry, in particular viewers' rising expectations, are making them less substitutable over time. Audience ratings, what advertisers are willing to pay for slots during particular events, what broadcasters are willing to pay for the right to broadcast each event, and what viewers pay if events are broadcast pay-per-view, are all useful measures.

Because markets are primarily national, the key question is

the degree of substitutability in each national market, not in other Member States. A given sports event, team, or player will interest a much larger audience in one state than in another, perhaps even in one region within the same state.

2. EBU-Eurovision System

In the *EBU* decision,³⁹ the Commission was able to treat all sports television as if it formed a single content market. However, that was primarily because the parties to the joint buying arrangements did not differentiate between different sports. The Commission, therefore, saw no reason to do so for the purposes of that case. The positions of the parties as buyers were similar in relation to all the main televised sports. The criticism of the decision came from other broadcasters, not from sports organizations. The *EBU* decision certainly does not mean that the Commission would now regard all sports as substitutable for one another. The Commission does not do this, nor would any other European antitrust authority.

3. Supplier Market

Apart from content markets, distinctions need to be made between different kinds of services. Similar services can be supplied to different kinds of buyers. One distinction which needs to be drawn is between the supply of television services at wholesale level, by satellite and other broadcasting companies to cable TV companies, and at retail level, to viewers and households. Television can be provided direct-to-home by satellite or terrestrial means, or through cables, so cable companies are in competition with satellite and terrestrial TV companies in the supply of TV to households. TV can be supplied to households as pay TV, where the householder pays a fixed sum per month for the right to see certain TV channels, or pay-per-view, where the householder pays special rates for particular programs. Ultimately pay-per-view should be even more profitable than pay TV because it is the most discriminating price policy a monopolist can have.

39. Commission Decision No. 93/403/EEC, O.J. L 179/23 (1993) [hereinafter *EBU Eurovision*], *annulled in* *Metropole Television v. Commission*, Case T-528/93, [1996] E.C.R. II 649, [1996] 5 C.M.L.R. 386 (CFI), on grounds not related to the definition of the market (on appeal to ECJ).

Separate questions concern the degree of substitutability for viewers between pay-TV, pay-per-view, video-on-demand, and near-video-on-demand, on the one hand, and specialized TV channels on the other. The degree of substitutability depends among other things on the desired content being available at the right moment, rather than on the media in question themselves. A viewer who wants to see *Gone with the Wind* may be able to see it in various ways. A viewer who wants to see the latest football final, which is of less lasting interest, however, may not. Both for a media corporation with a range of services and for a viewer with special interests, there may be a high degree of substitutability for any content with lasting or clearly defined appeal, whether it is educational, informative, or entertainment. More broadly, on-line newspapers compete with traditional newspapers.

As far as productions for television are concerned, although there are substantial in-house productions, only productions commissioned by a broadcaster or sometimes programs produced on the producer's initiative are on the market.⁴⁰ The market for TV productions is often broader than the national market, and is a language region, for example Germany plus Austria or the United Kingdom, plus Ireland.

There is some competition between video rental or purchase of feature films and watching them on television or on video on demand and between watching sports live on television and watching them live in the stadium. This limited kind of competition is relevant when the companies that control both kinds of rights try to prevent competition between them from reducing their aggregate financial value. Also, a thematic feature film channel can be exposed to some competition when a popular film is broadcast on a general-purpose channel, when it is shown in cinemas, and when it is available on video. This kind of competition may become more important when pay-per-view TV develops further. Business practice provides windows during which films are made available for different purposes.

The Commission has concluded⁴¹ that advertising on television and advertising in print are separate markets. Audience

40. RTL-Veronica-Endemol, O.J. L 134/32 ¶¶ 24-25, 88-89 (1995).

41. *Id.*, O.J. L 134/32, at ¶ 23.

shares in TV broadcasting determine the success of broadcasters in the TV advertising market.

Though the distinction between free access and pay-TV may become blurred in the future as digital bundles combining both kinds emerge, at present pay-TV is a separate market from free access TV, although free access TV exerts some competitive pressure on pay-TV.

The Commission analyzed the relevant television service markets in detail in *MSG Media Service*.⁴² The Commission found that the relevant product markets were:

- administrative and technical services for suppliers of pay-TV, primarily decoders, a conditional access system, and subscriber management systems;
- cable TV networks, which the Commission regarded as distinct from television services provided direct-to-home by satellite or terrestrial transmission; and
- pay-TV, which the Commission considered as a market separate from commercially financed TV and TV financed wholly or partly through fees and sometimes partly by advertising, because in commercially financed TV the contractual relationship is between program supplier and advertiser, in pay-TV the relationship is between program supplier and viewer.

It may also be appropriate to distinguish between the market for background music in commercial premises, which has constant volume, little or no speech, unobtrusive music, and the market for radio services for domestic customers, which can include advertisements and other speech. The former competes with advertising-free radio, both public and commercial, and with tapes and compact discs, and on occasion with in-house music. Domestic listeners also have access to digital pay-radio, commercial and public radio, and their own sound recordings.

The activities of performing rights societies and other societies that collect royalties on behalf of copyright owners involve different service markets. Although in theory the societies are collecting agents of the right holders, in practice they have become so large and, it must be said, so dictatorial that they tend to organize their affairs much as they have traditionally organ-

42. *MSG Media Service*, O.J. L 364/1, at ¶¶ 19-44 (1994), [1995] 1 C.E.C. 2509.

ized them. The right holders provide a service by licensing their rights, through the network of societies, to those who want to play or record their works. The societies provide their collecting services to the right holders and their licensing services to sound reproduction companies. Traditionally each society has operated only in one state, and exchanged licenses with societies in other states on behalf of its members. A series of markets are therefore involved.

Yet another issue is whether pay-per-view TV is a separate market from pay-TV, in spite of the fact that the parties to the contracts involved are the same. It seems that the nature of the programs provided, the fact that the viewer may choose to pay or not to see each program specifically, and in particular the huge price difference, means that they are separate markets. The price of one program on pay-per-view may be a quarter of the pay-TV subscription for a month.

C. *BSkyB—UK Markets & Barriers to Entry*

In the second UK Office of Fair Trading review of BSkyB's position, the relevant market was for wholesale pay TV, divided into separate markets for premium sports and movie channels. In these markets a potential competitor, to enter the market, needed quality programming rights, transponder space on a satellite able to reach the installed disk or aerial base, encryption technology compatible with that base, and a subscriber management system. These were regarded as barriers to entry. A broadcaster could enter the market with a basic channel on a cable-exclusive basis, but the investment needed to acquire all the rights needed for a viable premium channel was so large that access to the installed aerial base of UK subscribers to pay-TV was essential. The limited supply of suitable analogue transponders was, therefore, a serious entry barrier.

D. *Exclusivity & Privileges to Launch New Services*

The argument is frequently made that exclusive rights to broadcast sports events and feature films are needed in order to obtain finance for the big investment needed for launching digital television, or conditional access systems, or other major investments. This argument cannot be assessed in the abstract: everything depends on the circumstances in the Member State

in question at the relevant time, that is, when the exclusive agreements are signed.

The argument raises several distinct questions. The first is whether it could be said that Article 85(1) does not apply at all because without the exclusive rights, the investment would not be made. The second question is whether the conditions of Article 85(3) are fulfilled by the exclusivity clause, and if so, for what period an exemption should be given.

In an extreme case, no rational investor would invest without substantial exclusive rights.⁴³ But an advantage which every negotiator would obtain if possible is not the same as a prerequisite without which no investment would ever occur. Some exclusive rights to attractive content, for at least an initial period, can be necessary. Even in such cases Article 85(1) would apply to whatever exclusive rights were in addition to the basic minimum, and also apply to the initially obtained rights after the initial launch period, whatever that was exactly. The practical conclusion is that in most circumstances it would be unwise to rely on Article 85(1) being inapplicable, even if in theory it may be so, even before cumulative effects of a series of exclusive agreements are taken into account. In any case, it is important to remember that the question is an objective one, would a rational investor do this, and it is not answered by the companies saying, however sincerely, that they would not have done it.

In theory the question whether an exemption under Article 85(3) should be given ought to be answered on the basis of the facts at the time when the agreement is made. Although this is not always strictly adhered to, it does mean that it would not be appropriate for the Commission to wait and see how the market developed and grant or refuse an individual exemption retroactively in the light of later developments. This means that the Commission may have to act on an opinion about future developments in the market.

It also follows that a state measure under Article 90(2), granting a privileged position to a company to facilitate its launch, might be justified for an initial period and might be no longer justified after whatever period was long enough to allow a reasonably efficient enterprise to launch its activities. Again, the

43. See *Nungesser v. Commission*, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278; *Coditel II*, [1982] E.C.R. at II-3401-02, ¶¶ 15-20, [1983] 1 C.M.L.R. 49.

test must be an objective one for Article 90(2) does not allow Member States to protect inefficient enterprises from competition. The test should be applied at the time when the measure is adopted regardless of the fact that the enterprise has taken a longer or shorter time to become competitive without help is irrelevant.

III. DOMINANCE WITHIN THE MULTIMEDIA INDUSTRY

A. Advantages Contributing to Media Industry Dominance

Apart from market shares in whatever markets are relevant, market power can be shown in Community law by a variety of different kinds of evidence. It may be convenient to distinguish between dominant content or program providers and dominant carriers or broadcasters of programs, yet some enterprises are both. Some telecommunications companies may be, or may soon become, carriers in the sense of providers of conditional access systems.

Content providers' dominance may be based on the ownership or acquisition of exclusive rights over large quantities of commercially valuable content, in particular repertoires of feature films for broadcasting on television, and rights to televise important sports events live. It may also be based on large-scale and well known news services.

These provide the content for the pay-TV channels which attract the greatest numbers of viewers and get the largest numbers of householders to sign up.

In general barriers to entry are easier to set up, and likely to be more serious, in new, already concentrated markets, in which new entrants are needed for competitiveness, than in long-established markets.

Apart from market share, in broadcasting the following advantages are relevant when assessing the market power of carriers and content providers.⁴⁴

- Control over commercially attractive content, and a large portfolio of programs, in particular sport and films.
- Control over set-top-boxes, which unscramble encoded

44. See *MSG Media Service*, O.J. L 364/1, at ¶¶ 55-93, [1995] 1 C.E.C. 2509 (analyzing effects of proposed joint venture between television companies and telecommunications company).

broadcasts intended to be viewed only by subscribers who have signed contracts with a satellite company, and other aspects of conditional access technology.

- Control over a high proportion of the channels which can be broadcast using available satellites, and options or other contractual rights over additional channels or satellites.
- First mover advantages discussed more fully below.
- Control over an electronic program guide.
- Financial resources, to pay for long-term contracts for valuable content or to pay for the production of set-top-boxes to be sold to or rented to householders, in the case of some public service broadcasters, revenue from licence fees paid by owners of TV sets also contributes to financial strength.
- Experience in subscriber management. A subscriber management system must deal with all individual requests for particular services and give different instructions to each individual set top box.
- Technical experience with developing other services, such as telecommunications, Internet, interactive services, that can be combined with television, preferential access to program software, or substantial long term contractual links with companies developing those services, horizontal integration or links.
- Satellite transponder capacity, radio frequency spectrum, cable bandwidth or other significant delivery capacity.
- Share holdings in satellite companies and cable networks, and also in companies providing telecommunications and interactive services.⁴⁵
- A large base of subscribers already signed up, which increases advertising revenue, as well as strengthening the company's finances directly, and provides useful customer information.
- A number of channels already being broadcast, making an attractive package.
- The ability to produce its own programs, ownership of the merchandising rights, for example, the right to sell videos of a portfolio of valuable programs.

45. The question of how far dominant telecommunications companies should be free to control cable networks is an important issue both due to convergence and in the telecommunications market itself.

- Vertical integration, creating power to shut competitors out of the market at more than one level, and forcing them to enter the market at more than one level simultaneously.
- Control of a book club or any other network which is an important potential distribution channel for pay-TV.
- A program portfolio big enough to make it easy to produce a wide variety of different specialized packages of programs targeted at particular groups.
- The ability, through control of technical services needed by competitors, in particular the subscriber management system, to obtain information about the plans and activities of the competitors, and the preferences of subscribers.
- Control over resources, including rights of way for cables, and spectrum resources.
- A pay-TV company which has subscribers in several States finds it easier to negotiate film rights than a company with the same number of subscribers in only one country.
- Where the capacity of cables of analog signals is limited and is fully used, it is very difficult for a second pay-TV company to get access to them, since the cable company will neither want to replace one package of channels with another nor be free to replace one channel at a time to test customer reaction to the second company's channels.

These factors, which contribute to dominance, tend to reinforce one another, thereby producing cumulative effects. If, as a result of a vertical or convergent merger, a series of new barriers to entry arise, a series of measures may need to be taken to correct the situation.

B. *The Tipping Effect*

Some media sectors show what is called the tipping effect, which is important in considering dominance. This effect occurs when one company obtains a market share that is substantially greater than its competitors, and when this in itself causes it to attract more customers. This can be due to a newspaper having a wide circulation or a television station having a large audience. Advertisers assume that they will reach a larger audience, which is correct, and that they will get better value for their advertising expenditure, which is not necessarily true. So they tend to move to the leading company, or it can be due to

consumers' beliefs that two mutually incompatible TV standards will not both survive, and their wish to avoid the risk of buying equipment which might become useless, leading them to contract with the market leader. Tipping effects also occur in networks that become more attractive the more members they have. When a market has tipped in favor of the biggest competitor, that competitor is likely to become dominant and to remain so for a considerable time.

A dominant company's dependence on advertising revenue, however, can inhibit change. In general, a dominant company that wishes to change from analogue to digital transmission can increase the number of its digital customers only by reducing the number of its analogue customers. In addition, advertisers who are unsure whether the new digital customers are as numerous as the old analogue customers might cease to advertise in order to await the outcome, or switch to another station with all-digital customers.

What may be called a tipping effect can occur simply because a pay television station, which attracts more subscribers, can afford to pay more and buy more and better programs. Program providers prefer to use the encrypted pay TV package with the biggest audience and the most popular overall package.

Tipping effects are not the same as first mover advantages in that, although the effect is similar, the market does not necessarily tip in favor of the first entrant into the market, but in favor of the first company to get such a decisive lead over its competitors that the network effect begins.

One of the difficult questions to answer today is how far simply being the first company in the market with a large number of set-top-boxes is likely to create a tipping effect. The answer may be different in different countries.

If the tipping effect occurred as a result of behavior contrary to Articles 85-86, the Commission would need to take strong action to restore a competitive market. The question whether tipping is likely to occur in the future is important when deciding whether to authorize the acquisition of exclusive broadcasting rights for a limited period on the grounds that they are needed to ensure the financial viability of substantial investments in new digitalization or conditional access systems. The

risk of tipping is an argument for authorizing exclusive agreements only for relatively short periods.

C. *Convergence*

Frequently it is stated that due to digitalization the television and telecommunications markets, and computing and telecommunications, are horizontally converging. In this sense, convergence means several things. First, facilities initially intended for transmission of one kind of content can also be used for transmitting other kinds. Second, companies so far involved in either television, whether broadcasting or cable, or telecommunications are beginning to involve themselves in the other sector.

Convergence is occurring for two reasons. First, the need for telecommunications companies to generate profits for investment in network is driving them into application areas. Second, content providers are going into infrastructure so that they can control distribution and have direct contacts with customers.

This kind of convergence has certainly not yet unified the television and telecommunications markets.⁴⁶ No new market definitions are needed yet, however, convergence may make the advantages of a company dominant in one of these markets relevant to the assessment of its plans in the other. In brief, the two kinds of markets are now related enough for market power in

46. There are other examples of convergence of the portable-computer industry, the Internet, interactive multimedia services, telecommunications equipment companies, network operators, and software companies, and, within telecommunications, convergence of, for example, cable and satellite. But these seem so far to be less relevant to media markets, where the most important convergence is between the different kinds of carriage of entertainment, going in the direction of interactive video delivery. It may be useful to distinguish technical convergence (*e.g.* use of cable TV networks for telecommunications) and convergence in relation to content, which is less likely to happen, and which is relevant to the question of how much (*e.g.* audiovisual content made available through telephone lines) should be subject to media regulation. Many national regulatory regimes and authorities are still technology-specific, and may need to be reorganized to cope with converged sectors, and to make it easier for companies trying to offer both content or services and carriage to deal with a small number of regulators. The risk of regulatory capture must be kept in mind. From an antitrust viewpoint, convergence cases tend to raise several kinds of problems: conglomerate joint ventures and mergers (discussed below), rapidly-changing markets, standards, and standardization (which may be needed to give the full benefit of convergence), and in due course, redefinition of relevant markets. Convergence may be accompanied by specialization, and the whole process does not necessarily lead to broader market definition.

one to be used to gain market power in the other, or in intermediate or related markets.⁴⁷

A variety of different situations can occur. For example, a company controlling television cables or broadcasting television programs supplied to households via cable that offers interactive services may be a duopolist in the market for these services, because only it and the national telecommunications company are in a position to offer them on a nation-wide basis. A corresponding situation will arise when a dominant telecommunications company puts itself in a position to offer feature films and other visual information by telephone wires, as well as normal telecom and other interactive services.

In each of these situations a company that is likely to be dominant is extending its activities into a related market. If it does so without making any merger or restrictive agreement or committing any exclusionary abuse, it may of course be perfectly

47. See, e.g., *CBEM Benelux SA v. Compagnie Luxembourgeoise de Telediffusion SA*, Case 311/84, [1985] E.C.R. 3261, 3278, [1986] 2 C.M.L.R. 558, 573. In this case the Court said that its ruling in *Instituto Chemioterapico Italiano SpA & Commercial Solvents v. Commission*, Joined Cases 6/73 and [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309,

also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market. If . . . telemarketing activities constitute a separate market from that of the chosen advertising medium, although closely associated with it, and if those activities mainly consist in making available to advertisers the telephone lines and team of telephonists of the telemarketing undertaking, to subject the sale of broadcasting time to the condition that the telephone lines of an advertising agent belonging to the same group as the television station should be used amounts in practice to a refusal to supply the services of that station to any other telemarketing undertaking. If, further, that refusal is not justified by technical or commercial requirements relating to the nature of the television, but is intended to reserve to the agent any telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by Article 86, provided that the other conditions of that article are satisfied.

It must therefore be held . . . that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of eliminating all competition from such undertaking.

Id., [1986] 2 C.M.L.R. at 573. See John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 *FORDHAM INT'L L.J.* 437 (1994).

entitled to do so subject to national regulatory rules, but such an extension of the company's activities into a related area is likely to raise barriers to entry for third parties because it may mean that later market entrants need to enter both markets at once. If it is done jointly with a partner company with a strong market position, it is also likely to have substantial anti-competitive effects by eliminating competition between them and giving each an interest in cooperating only or primarily with the other. In such circumstances there are also possibilities tying in or bundling with exclusionary effects.

Another less sophisticated situation arises when a company has interests in both television and newspapers, and the question arises whether its interests in one are relevant to its market power over the other. Cross-media interests of these kinds do not merely provide conglomerate strength. They can provide valuable reciprocal publicity and enable the company to offer attractive advertising packages, therefore, raising barriers to entry into both markets.

In addition to considering convergence joint ventures under Article 85 and possible strengthening of a single dominant position, it may also be necessary to consider them as cases of joint dominance. Two parent companies, each dominant in their own industries, might well be jointly dominant in a market which was so closely related to both industries that each parent separately had important advantages in launching itself, or its joint venture, in the related market. In most cases, however, this analysis would not add much to the other two analyses under Article 85 and Article 86 on single dominant companies.

*D. Extending Dominance Through Actions of Public Authorities:
The Case of BskyB*

In 1996, the U.K. authorities decided to issue new licences for digital terrestrial television, in addition to the digital satellite and digital cable TV already authorized. The strongest applicant for licences was a joint venture between BskyB, the dominant U.K. satellite pay-TV company, and two terrestrial TV companies. The Independent Television Commission, the authority responsible for issuing the new licences, realized that issuing the licences to the joint venture would be likely to cause problems

under Community antitrust law, and asked the advice of the European Commission.

The Commission stated that if granting the licence to the joint venture would extend and strengthen the dominant position of BSKyB, as seemed likely, it would be contrary to the principle in *Ahmed Saeed*.⁴⁸ The ITC informed the joint venture that no licence could be issued to it unless BSKyB ceased to be a shareholder in the joint venture, and BSKyB withdrew, selling its shares to the other shareholders. This resolved most of the anti-trust difficulties.

Article 90(2), which allows Member States limited powers to grant some limited exemptions from EC legal rules,⁴⁹ did not apply. This is one of the relatively few cases in which, when a national non-competition authority has formally sought the advice of the Commission under Community antitrust law, the Commission's advice has determined the outcome. Although the same result might have been arrived at under national competition law, the ITC letter to BSKyB was expressly based on the Commission's advice.

The case was a clear one. The granting of the licences to a joint venture in which BSKyB held a one-third interest would certainly have strengthened its dominant position in pay-TV transmitted by satellite and by cable. There would be little point in trying to promote competition by granting licences for digital terrestrial TV to a subsidiary of a company already dominant in satellite and cable. But the principle that a national regulatory authority may not grant a licence to a dominant company if the grant would extend or strengthen an existing dominant position is an important one, with obvious relevance in the telecommunication sector. If the dominant enterprise could itself have achieved the same results by legitimate competition, without us-

48. *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs eV*, Case 66/86, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102.

49. See *BRT v. SABAM*, Case 127/73, [1974] E.C.R. 51, [1974] 2 C.M.L.R. 238; *Ex parte Giuseppe Sacchi*, Case 155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177; John Temple Lang, *Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty*, in 1984 *FORDHAM CORP. L. INST.* 543, 561-64 (Barry Hawk ed., 1985). For recent cases involving Article 90, see *Gemeente Almelo v. Energiebedrijf Ijsselmij*, Case C-393/92, [1994] 2 C.E.C. (CCH) 281 (Eur. Ct. J. Apr. 27, 1994); *Regie des Postes v. Corbeau*, Case C-320/91, [1993] E.C.R. I-2533, [1995] 4 C.M.L.R. 621.

ing leverage, and by its own unaided efforts, a licence could be granted, but that was not the situation in the BSKyB case.

A second aspect of this case was whether the joint venture required an individual exemption under Article 85(3), which the U.K. authorities could not give. They could only have granted a licence to take effect when an exemption was given. Such an exemption could hardly have been given as long as BSKyB was a shareholder.

E. Publicly Owned Companies: Companies with "Special" Rights, and Public Service Obligations

The media, and in particular television, have in the past been regulated in various ways. Television monopolies were permitted by Community law for non-economic reasons.⁵⁰ Monopoly rights and rights given only to limited numbers of selected companies are special rights that come under Article 90, whether or not the companies were publicly owned. In addition, some companies were obliged to provide a range of programs, and given special rights to compensate them for these public interest or public service duties. Article 90(2) creates an exception to the normal Treaty rules insofar as the exception is necessary to enable a company which has been entrusted by legislation or other official act with the operation of services of general economic interest to carry out its task. Serious television, including news, is a service of general economic interest.

IV. MULTIMEDIA'S IMPACT UPON THE BROADCASTING OF SPORTING EVENTS, FILM CATALOGUES, & PERFORMANCE RIGHTS WITHIN THE EU

A. Guaranteeing Public Access to Major Events

Several Member States have taken measures to ensure that major events, in practice mostly sports events, will be broadcast free-on-air, that is, they will not be broadcast encrypted. This is partly to ensure that the public need not subscribe to a particu-

50. *Sacchi*, [1974] E.C.R. at 429-30, [1974] 2 C.M.L.R. at 197-99. In *Sacchi*, the Court stated that Member States could "for considerations of public interest of a non-economic nature" set up TV monopolies, but that the monopolies must not discriminate, and come under Article 90. *Id.* At the Amsterdam intergovernmental conference in June 1997, a protocol to the EU Treaty was adopted on financing for public service broadcasting. It is not clear if it significantly altered the previous law.

lar channel to see an important event, and partly to ensure that the national broadcasting company is not prevented from broadcasting it.

This has been done by adopting lists of important events which cannot be made the subject of exclusive rights or, as in the Netherlands, giving the national broadcasting company, in effect, some kind of first option on the right to broadcast major sporting events. Official lists of events, adopted under national legislative powers, which cannot be made the subject of exclusive rights do not seem open to criticism under Community competition law.

The justification for protecting the interests of national broadcasting companies to get the right to broadcast popular events is said to be that they have public service responsibilities imposed on them by legislation which make them less profit-driven and so less profitable than they otherwise would be, and so they cannot afford to outbid the biggest commercial broadcasting companies for the exclusive rights to broadcast major sports events.

1. Eurovision

The European Broadcasting Union ("E.B.U."), insofar as it raised EC antitrust issues, was an arrangement for joint buying of television rights to sports events, and for exchanging sports programs and licensing them to non-members. Membership was open to broadcasters providing a service of national character, producing a substantial proportion of their own programs, providing and being required to provide balanced programming catering for minority interests, and covering all or most of the population of their State. Most were not-for-profit companies.

In practice, these requirements limited, or should have limited, membership to public broadcasting companies with duties imposed by legislation. Such companies have obligations that are not necessarily profitable to fulfill. New wholly commercial stations are free to concentrate on mass-appeal programs generating high ratings and advertising revenues, and to limit their range of programs and concentrate on densely populated areas. Such commercial stations were not allowed to join the E.B.U.

The Commission authorized the E.B.U. under Article

85(3).⁵¹ The Commission stated that the system reduced transaction costs and benefited smaller members. It led to coordination of broadcasts by different stations in each country and facilitated exchange of programs between countries. The fact that the system avoided competition between the parties for the right to broadcast important sports events was not mentioned. Arrangements for giving non-members access to programs were greatly strengthened, at the Commission's insistence.

At the request of some broadcasters, which had been denied membership, the Court of First Instance annulled the approval given by the Commission.⁵² This judgment is now on appeal. The Court first said that the membership requirements must be objective and sufficiently precise, so that they could be applied uniformly and without discrimination to all actual or potential members, as is essential. The Court found that the Commission had not considered this question and that the membership criteria were in fact so vague that it was impossible to tell whether they were indispensable, as required by Article 85(3). The Commission should also have looked at the way the criteria had been applied before the exemption was given, especially since the existing members voted on the admission of new members. The Court clearly thought that the rules had not been applied correctly in practice.

That would have been enough to invalidate the Commission's decision, but the Court considered a second issue, namely whether the idea of a special mission in the public interest is relevant to Article 85(3), as the Commission stated. The Commission said that the constraints due to having such a mission justified the E.B.U. The Court equated this with "services of general economic interest" in Article 90(2). But the Commission had said that Article 90(2) was not applicable, and so the substance of that Article could not "in the present case and without other justification" be a criterion for applying Article 85(3). The Court made it clear that the Commission could take public interest obligations into account, but it had not explained why they

51. See *EBU Eurovision*, O.J. L 179/23 (1993). *EBU Eurovision* involved an association for lobbying purposes, which did not have precisely the same members and which raised no competition problems. See COMMISSION OF THE EUROPEAN COMMUNITIES, XX-IIIRD REPORT ON COMPETITION POLICY 1992, at 84, 137 (1993) (stressing importance of sublicensing to third parties).

52. *Metropole*, [1996] E.C.R. II-649, [1996] 5 C.M.L.R. 386.

made exclusive purchasing indispensable. The Commission's duty of impartiality required it to look at how the broadcasters' public service obligations were supposed to be financed, to relate that to the financial effects of the agreement.

The general principle that criteria for membership to any system set up by agreement must, for exemption under Article 85(3), be precise enough to be applied uniformly and without discrimination is beyond question. The implications of the second part of the judgment are less clear and comments here must be limited because the case is on appeal. It seems, however, that the following conclusions can probably be drawn.

The Commission must not confuse Article 90(2) with Article 85(3). They are quite distinct. If Article 90(2) is not applicable or if the Commission says it does not need to be invoked, the reasoning under Article 85(3) must be as full and as convincing as if there was no question of a public interest mission being involved.

The Court of First Instance seems to regard exclusivity as the most important feature of this joint buying arrangement, and some, although not all of the restrictive effects of the arrangements would be avoided if the agreement did not prevent the parties from bidding independently.

The Commission accepted the argument for the E.B.U. that, because of their public service obligations, they were not able to be as profitable as commercial broadcasters. It had not explained, however, what this meant in financial or quantitative terms, or how much the exclusivity saved the members, or how the joint buying enabled the members together to outbid commercial broadcasters. Joint buying arrangements have several effects. First, they prevent the participants from putting up the price by bidding against one another. Second, they make possible a single bid for the rights to any given event that is larger than any one participant could make. Exclusivity is irrelevant to the latter, and the precise financial effects of the public service obligations are irrelevant if the resulting disadvantage, in comparison with purely commercial TV companies, is sufficiently clear.

2. Antitrust Aspects of Televising Sporting Events

Agreements about televising sports are increasingly important in Europe. They raise a number of antitrust issues.

a. Joint Selling

The first is whether an agreement made by, for example, all the football clubs or teams in a state to sell the rights to televise their matches is joint selling which, because it eliminates price competition between the clubs or teams, is within Article 85(1), assuming that there is an effect on trade between Member States. This question arises regardless of whether the rights belong to the clubs or to the teams. The antitrust authorities in the Netherlands, the U.K., and Germany consider that joint selling by clubs is contrary to their national law rules on price fixing. The most important argument in favor of joint selling by clubs is that it enables smaller poorer clubs to get more money than they would otherwise obtain. This argument, whatever its merits, does not deny that Article 85(1) applies. There is no exemption from Article 85(1) for sport or sports organizations in Community law, and there is no doubt that sports clubs are for-profit enterprises to which Article 85 applies, even if some of them are obliged to use their profits only for sports.

The argument that joint selling helps small, poorer clubs in socially deprived areas where young people have little to do is not a negligible one. But it is a social argument that is probably better assessed by a national competition authority than by the Commission. The answer might not necessarily be the same in all Member States. Pay per view television, in due course, might anyway mean that small clubs with poor teams receive nothing from broadcasters.

The question of whether the clubs or teams can join together and sell the right to televise their matches is fundamental, in the sense that if this is not permitted the rights to televise will be dispersed among broadcasters and the price of the rights will come down.⁵³ If the event or competition is organized by

53. In the 1996 Dutch Sport 7 case, the Commission made its position clear to the parties on the setting up of the joint venture and on its duration, sublicensing policy, and certain other issues, but left it to the national courts to determine who owned the broadcasting rights for football matches in the Netherlands and whether collective selling of them was permissible. When the national courts decided that the Dutch football

one body which is not an association of enterprises within the meaning of Article 85(1), this problem may not arise. But it must also be remembered that Community law does not permit State economic powers over the organization of sport or any other industry to be given to the enterprises involved themselves.⁵⁴

b. Right to Exclusive Broadcasting

The next antitrust issue is whether giving an exclusive right to televise important events comes under Article 85(1). Only organizers of very important sports events such as the Olympic Games can make a lot of money by giving non-exclusive rights. For most sports events, the right to televise live is valuable for only a very short time. Exclusivity is important to the broadcaster because it guarantees the value of the rights, makes possible sublicensing which may be profitable, and tends to build up audiences which is important for advertising revenue. Viewers are more likely to pay for channels devoted to sport or to the particular kind of sport if that is the only way they can see important events.

Whether an exclusive right to televise sports events is contrary to Article 85 depends on a number of factors:

- the duration of the agreement, the number and importance of the events in relative and absolute terms
- how many viewers want to watch the events and whether any other events or any other sports are substitutable
- whether any other broadcaster has any right to televise any part of the event, given, for example, by legislation
- how important the events are to advertisers
- whether the same broadcaster has acquired exclusive rights to broadcast many other important sports events

association had no right to sell all the broadcasting rights to the new broadcasting company, the other issues no longer arose. In the United Kingdom, the Office of Fair Trading submitted to the Restrictive Practices Court the question of whether the Premier League should be allowed, under UK antitrust law, to sell to BSkyB exclusive rights to broadcast UK football matches. If the agreement was prohibited by UK law, no question under EC law would arise.

54. *Van Eycke v. Aspa NV*, Case 267/86, [1988] E.C.R. 4769, [1990] 4 C.M.L.R. 330; *France v. Commission*, Case C-202/88, [1991] E.C.R. I-1223, [1992] 5 C.M.L.R. 552; *RTT v. GB-Inno-BM*, Case C-18/88, [1991] E.C.R. I-5941, [1994] 1 C.E.C. (CCH) 117.

- the cost to the broadcaster of televising all the events, which might be very large in cases such as the Olympic Games
- whether it is likely that more than one camera team would otherwise film the events.

i. London Weekend Television

Although there is no formal Community antitrust ruling on the issue, it has been believed that exclusivity in these circumstances is natural and that in itself it does not infringe Article 85(1) unless it was for too long a period or unless it had other excessive effects, or as a result of the cumulative effects of a series of exclusive contracts. In *London Weekend Television*,⁵⁵ however, the Commission objected to an exclusive agreement, without qualification.

ii. English Football Association

In another case, the Commission allowed an agreement between BSkyB, the BBC, and the English Football Association, ("E.F.A.") under which the first two companies shared exclusive rights to broadcast E.F.A. matches. The Commission said in general exclusive rights should be limited to one season, but a longer period was justified because BSkyB was entering a new market for direct-to-home satellite television.

c. Broadcaster Sublicensing

Another antitrust issue is sublicensing by the broadcaster who has exclusive rights to broadcast the events.⁵⁶ A clear sublicensing policy might reduce the anti-competitive effects of exclusivity significantly, and sublicensing might be imposed by the Commission as a condition of authorization under Article 85(3), to ensure that the fourth condition of Article 85(3) is fulfilled. But the value of sublicensing depends entirely on the terms of the sublicenses. Sublicenses may be granted to everyone who

55. See COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH REPORT ON COMPETITION POLICY 1977, at 73 (1979) (discussing English Football League/London Weekend Television); COMMISSION OF THE EUROPEAN COMMUNITIES, TWELFTH REPORT ON COMPETITION POLICY 1982, at 74 (1983) (discussing exclusive contracts of opera singers).

56. This was done on the Commission's insistence, in *EBU Eurovision*, discussed above, and in *Dutch Sport 7*, which did not reach the stage of a formal decision by the Commission (the joint venture company became insolvent).

ask for them, and excessive prices may still be charged. It is desirable, but not sufficient, that the terms should be known in advance, and non-discriminatory. If sublicensing is to be important, the licensees must get something of real value, namely, the owner of the exclusive rights must not keep all the valuable rights for itself, or charge too much for them. Even if sublicenses are necessary, the Commission would be unlikely to get involved in determining their terms, which might include payment, access to unedited material, embargos on live transmission or transmission at particular times, and the interest and importance of the events sublicensed. There would usually be several categories of potential sublicensees. If this had to be regulated, as a condition for an individual exemption, it would have to be done by a national regulator, in practice, not by the Commission.

There are, therefore, practical considerations about the difficulty of fixing the terms of sublicenses, as well as arguments of principle, such as should the shrewd acquisition of exclusive rights give power to charge licensing fees at monopoly levels, which suggest that if an antitrust problem arises, sublicensing is a satisfactory solution only in unusual cases where the market could not work properly if it was fragmented. For example, some exclusive rights, duly sublicensed, must be given to televise the Olympic Games, or there would be more cameramen than spectators. In situations like Eurovision, a buyers' cartel can be permitted only if it has obligations to sublicense. The argument in favor of a buyers' cartel is that the market would not work properly if broadcasters with public service obligations have to bid for valuable rights against purely commercial broadcasters without any such obligations.

A duty to sublicense, like a duty to share an essential facility, creates timing complications for the proposed acquirer. If it does not know what the terms of sublicenses will be, or how many it will have to give, it cannot calculate precisely how much it should offer for the right to broadcast the events in question. After it has acquired the right to broadcast, it has to reconcile its interest in getting the most favorable terms from its licensees with its interest in getting the maximum benefit from using its rights on its own channels. Whether sublicenses are negotiated before or after the exclusive right is acquired is therefore important. This is an argument for determining in advance, for each

State, and by regulatory measures and not by competition law, what sports events cannot be the subject of exclusive television rights, and the terms and number of any sublicenses which must be granted.

It has been assumed, above, that the restrictive agreement in question affects trade between Member States and that, therefore, Community law applies. The mere fact that a broadcast can be received in the territory of another Member State, however, is not enough to make Community law applicable. Additionally, joint selling by football or other clubs is not in itself likely to affect trade between Member States unless the clubs are in more than one Member State, as for example when the competition is an international one. Lastly, if either the owner of the rights to televise the event, football club, competition organizer, or whoever that may be, or the broadcasting company which has acquired the rights has licensed them, or is reasonably likely to licence them, for broadcasting in another Member State, there is a sufficient effect on trade between Member States. This situation is more and more likely to arise, as more and more sports channels come into operation and need to acquire sports programs outside the countries in which they are broadcasting.

Yet another antitrust issue may arise if a sports organization integrates vertically by becoming a shareholder in a television company broadcasting sport. Such a situation has not yet created a serious antitrust issue in Europe, but it certainly could do so, at least in the case of football and perhaps Formula I car racing, which constitute markets in themselves and give great market power to TV stations with exclusive rights to broadcast them.

3. International Sports, Self-regulation, and Television Rights

In Europe, international sports have been largely self-regulated. Self-regulation of sport, insofar as it concerns money-making activities, comes under Article 85, in particular when the parties control market entry or access to important sources of funds such as broadcasting rights. Problems arise where the parties' interests in limiting entry into the market or limiting the freedom of others to sell broadcasting rights conflict with their duties to allow market entry by qualified participants, such as own-

ers of stadiums or racetracks, contestants, teams or clubs, sponsors, broadcasters launching specialized sports channels.

Problems also arise if there is scope for the parties to discriminate between potential entrants, which might be contrary to Article 86 in itself, or to use their discretion for unauthorized purposes. Self-regulation, in particular where large sums of money are involved, as they are more and more in television, can be permitted under Article 85(3) only exceptionally and with very strict safeguards. The whole system must be genuinely indispensable, it is not enough that, if the system is assumed to be appropriate, it would follow that certain features of it would then be indispensable. The public interest must be fully protected, not only the safety of spectators, but also the widest availability of sports programs to viewers, and the freedom of organizers of sports events in less well-known locations to promote themselves and benefit from whatever TV publicity and finance they are able to attract, even if that is initially only regional or specialized TV. In general, it is not desirable that parties that would benefit from keeping a monopoly of TV rights for themselves should be free to refuse recognition or approval, even ostensibly on technical or sports-policy grounds, to other events or participants. All criteria used must be clear and precise. A wide discretion is incompatible with Article 85(3), as is a self-regulatory regime which makes dominance or abuse of dominant power likely. Procedural safeguards are essential. As well as precise criteria, there must be a duty to give detailed reasons for all decisions, assessors must be qualified and impartial, there should be a right of appeal and a right to judicial review.⁵⁷

Another way of approaching such cases is to say that Member States may not delegate economic regulatory powers on private parties⁵⁸ and that enterprises may not obtain by self-regulation powers which Member States could not, jointly or individu-

57. See generally *Metropole*, [1996] E.C.R. II-649, [1996] 5 C.M.L.R. 386 (noting that entry criteria must be precise); See COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTH REPORT ON COMPETITION POLICY 1978, at 35-36 (1979) (asserting that market entry cartels should be under strict governmental supervision, that criteria must be precise, and that there must be procedural safeguards); *Heintz van Landewyck Sarl v. Commission*, Cases 209-215 & 218/78, [1980] E.C.R. 3125, [1981] 3 C.M.L.R. 134; John Temple Lang, *Trade Associations and Self Regulation under EEC Antitrust Law*, in 1984 *FORDHAM CORP. L. INST.* 605, 605-71 (Barry Hawk ed., 1985).

58. See Opinion of Advocate General van Gerven, *Netherlands v. Commission*, Case C-48/90 & C-66/90, [1992] E.C.R. I-565, 615-19.

ally, validly confer on them. Convenience and abdication of responsibility by public authorities do not justify violation of Community antitrust law. International sport will not be harmed by good quality administration.

A self-regulation system, whatever the details, which has power in practice to control access to the market, or to control access to the high-quality part of of the market, or to control access to TV rights, has to be considered under Article 86 as well as Article 85. This may not alter the result, but it explains why the application of Article 85 to such cases must be very strict.

B. Exclusive Rights to Televisé the Output and Catalogue of a Film Studio or a TV Program Studio

An agreement giving the exclusive rights to broadcast the catalogue and output of a film studio comes under Article 85(1). This situation is not like broadcasts of live sports events. A studio can make money by giving non-exclusive rights to broadcast. The rights continue to be valuable, unlike the right to broadcast a sports event live, which is valuable only briefly. With films, sub-licensing is not usually permitted. Exclusivity is not necessary to put a value on the rights. Exclusive licences of a studio's whole catalogue and output are not the general practice in the industry. Unlike the right to televise a single sports event or a connected series of events, which cannot easily or satisfactorily be split up, different films can be licenced to different broadcasters. There is no need to licence a whole catalogue or output as a unit.

This question arose in the case of the German Television stations' association, ARD, and Metro Goldwyn Meyer.⁵⁹ This initially involved a four-year agreement on TV broadcasting rights and all new feature films to be produced by MGM/UA during that period. It involved both joint buying and exclusivity. The Commission said that the number and duration of the exclusive rights made access for third parties too difficult. The Commission finally allowed the agreement under Article 85(3) when ARD agreed to allow access by other TV stations, with effect only from the date on which this was ensured, and for ten years, in

59. See COMMISSION OF THE EUROPEAN COMMUNITIES, NINETEENTH REPORT ON COMPETITION POLICY 1989, at 68 (1990); Commission Decision 284/36, O.J. L 284/36 (1989).

retrospect a surprisingly long period. It is unlikely that in 1989 the Commission saw clearly how television would develop during the 1990s. In fact, television is changing now much faster than it was in 1989.

Of course, as with any other exclusive agreement, the effects of such agreements on competition depend on the circumstances. These are in particular the duration of the agreement, the market shares of the two parties, the number and importance of the films involved and their popularity in the Member States concerned, therefore, language may be important, and in particular whether the broadcaster has acquired, exclusively or otherwise, the films of other major studios. Individual feature films are, to some extent at least, substitutable for one another. But that does not mean that the whole output and catalogue of one major film studio is satisfactorily substitutable for those of another.

The question is important not only in itself but because exclusive acquisition of important catalogues, and to a lesser extent of new output during the term of the agreement, of feature films is the second most important method, after acquisition of sports rights, by which pay-television companies acquire content and strengthen their market positions.

Though circumstances vary, in general, Article 85(1) applies to exclusive agreements of this kind, and therefore Article 85 makes it possible to prevent excessive market power being accumulated in this way.

In assessing the precise effects on competition in such a case, it may be necessary to distinguish between programs having lasting value, such as feature films for cinema or television, and cartoons, and programs of merely temporary interest, such as news magazines, games, interviews, talk shows, information programs on contemporary events or developments.

As already mentioned, one possible justification for an exclusive licence, provided that its effects on competition were not too great, would be that it was needed as the economic basis to ensure that very large new investment would be profitable. This argument is made by companies investing in digital equipment for the new generation of TV sets.

As well as creating a barrier to entry for new broadcasting

channels, concentration of feature film rights in the hands of the broadcaster eliminates price competition between studios.

Because rights to broadcast sports events are valuable for such a short time, in comparison with film rights, the market for film rights is broader, and although exclusivity is harder to justify its anticompetitive effects may be less than in the case of sports rights.

The cumulative effects of many exclusive agreements for broadcasting films is one of several antitrust problems in the media industry which companies have not dealt with fully. It might be reasonable for the broadcasting company not to notify one exclusive arrangement, however, it would be unwise not to notify a series of them. If they are not notified, the Commission cannot grant an exemption under Article 85(3), and some or all of the exclusivity clauses will be void. A broadcasting company with a series of agreements needs to arrange with the Commission to notify all exclusive agreements above a certain number or a certain proportion of all available feature films of the kinds suitable for its markets. What that proportion should be depends on a number of factors, which govern the exclusionary effects of the series of exclusive agreements. Feature films, and particularly feature films in any given language, are more important television content in some States than in others.

But the question is also important for the studios which enter into the exclusive agreements, although they are less likely to be inconvenienced if the exclusivity clauses are invalid, and although they do not necessarily know how many exclusive agreements the broadcasting company has entered into. A studio which would be prejudiced because its contracts would become entirely invalid if the exclusivity clauses were unlawful would need to take precautions.

Exclusivity can be more important for a second or third pay-TV company than for the market leader, because the second company has a greater need than the leader to differentiate its programs from those of its competitors.

C. *Collective Copyright Licensing for Television*

In *BBC Enterprises*,⁶⁰ the Commission authorized a standard

60. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIIrd REPORT ON COMPETITION POLICY 1992, at 459 (1993).

copyright licensing agreement to facilitate retransmission of U.K. television programs to Irish viewers by cable networks and similar arrangements. Collective licensing by U.K. television companies and copyright holders was the most effective way by which Irish cable companies could be sure of not infringing copyright.

D. *EU Performing Rights Societies*

Performing rights societies and copyright collection societies are basically joint ventures with large numbers of members. Their purpose is to collect royalties and distribute them to their members, both for performance and reproduction rights. When members were musicians, it was traditionally taken for granted that no member or small group of members could do this on their own behalf, or would find it worthwhile to do so. So it was assumed that Article 85(1) did not apply to a society, since Article 85(1) does not apply insofar as there would be no activity without the restriction on competition.⁶¹

In addition, it is convenient to have a single rate of royalty on all works licensed.

Another reason for societies was, and is, to combine the bargaining strength of the members. A small group of members might not have enough bargaining power, or they might not have a good enough portfolio to offer, and might get no contract. This was particularly important when dealing with a State-owned broadcaster or other copyright licensees with considerable market power. This, however, is not a reason for saying that Article 85(1) is inapplicable.

The assumption that no member or group of members of a society could negotiate licences is no longer true, if it ever was, of big sound reproduction companies which can and do, enter into individual negotiations, in particular for reproduction rights, when the size and importance of the licensee makes it

61. In oil exploration consortia, for example, it would often be impossible for one company to undertake the expense and the risk alone. See Nungesser, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278; Remia BV and Verenigde Bedrijven Nutricia v. Commission, Case 42/84, [1985] E.C.R. 2566, [1987] 1 C.M.L.R. 1.

In some Member States, performing rights societies are officially licensed. In such situations the principle in *Ahmed Saeed* applies and the licensing authority is obliged to ensure that it is not authorizing or encouraging any violation of Community competition law. See *Ahmed Saeed*, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102.

worthwhile to do so. It seems to follow that as far as such companies are concerned the main reason for ignoring Article 85(1) is no longer convincing, and such companies need exemption under Article 85(3) for their participation in these societies, at least in their relations with licensees which are important enough to make individual negotiations appropriate. It is surprising that this issue has not been raised before now.

Certainly there is, and could be, no rule of Community law which exempts societies, or the participation of major sound reproduction companies in collection societies, from Article 85.

It is also true, of course, that the bargaining power of the societies, and so of the small right holders who can be represented only by the societies, is increased to the extent to which the major sound reproduction companies use the societies for carrying on individual negotiations, as distinct from merely collecting royalties. This, however, is not enough in itself to justify an exemption under Article 85(3), and it has no bearing on Article 85(1).

1. Reciprocal Contracts

Copyright societies traditionally acquire copyright rights or ownership from composers, performers, and sound reproduction companies in their own countries. In its own country, each society licences public performances and production of recordings, collects payments, and distributes them to the right owners.

Each society also gives one society in each of the other Member States the right to grant licences there and collect payment, on its behalf and on behalf of its members. Each society guarantees that it will give national treatment to the members of the other societies, and this is required by international copyright conventions.

These reciprocal contracts are intended to make all copyrighted music subject to the same conditions in each State, and to enable each society to have its members' rights protected in other States without having any operations of its own there.

The Commission insisted that these reciprocal contracts must not be expressed to be exclusive. This, however, made no difference. The self-interest of each society in being a monopoly for rights of each type in its own State, and the absence of any pressure to be more efficient, contributed to maintaining the

status quo, in spite of the broad hints from the Court that SACEM at least was inefficient,⁶² and the strong, indeed unprecedented, findings of the U.K. Monopolies Commission against the U.K. society.⁶³

The Court has made it clear that concerted action by the societies with the effect of systematically refusing to grant direct access to their repertoires to foreign users would be contrary to Article 85(1).⁶⁴ However, parallel behavior is not proof of a concerted practice when it can be explained in other ways. In the absence of pressure, no initiative to improve the present situation was taken by the societies themselves. Even if there is no concerted practice between them, they all have parallel interests in maintaining the present arrangements.

Pressure came, in 1996 from the U.K. Mechanical Copyright Protection Society's introduction of direct distribution. The essence of the change resulting from the direct distribution service, ("D.D.S."), was that the U.K. Society, acting as a central licensing society, would pay royalties which it administers directly to its member's local rights administrator in each of the other Member States, rather than through the national collection society there. Under the old system, copyright holders paid an extra commission to those societies, through whose hands the royalties passed. Direct distribution reduces the time taken in getting the royalties into the hands of those entitled to them, and reduces costs and bookkeeping with the apparently inevitable risk of errors in calculations. It, therefore, reduces the previously very long time during which royalties remained in the hands of the societies, drawing interest which they apparently retained. At first, the other societies strongly resisted the introduction of direct distribution. Then, in early 1997, they proposed new arrangements to the U.K. society. Those new arrangements are now under consideration by the Commission. It seems unlikely that the Commission would allow any arrangements which denied right holders the substantial benefits of direct distribution.

62. *Lucazeau v. Sociaetae des Auteurs, Compositeurs et CEditeurs de Musique (SACAM)*, Joined Cases 110, 241-42/88, [1989] E.C.R. 2811, [1991] 4 C.M.L.R. 248; *Ministere Public v. Tournier*, Case 395/87, [1989] E.C.R. 2521, [1991] C.M.L.R. 248.

63. UK Monopolies and Mergers Commission, *Performing Rights Society* (1996).

64. *Tournier*, [1989] E.C.R. at 2581, [1991] 4 C.M.L.R. at 292; *Lucazeau*, [1989] E.C.R. at 2831, 2833, [1991] 4 C.M.L.R. at 294-95.

2. Member Treatment

a. GEMA

In the *GEMA* decisions,⁶⁵ the Commission prohibited, under Article 86, a series of clauses in a German society's statutes. GEMA discriminated against residents of other Member States by denying them votes, certain payments, and by creating difficulties for German companies with links outside Germany. GEMA also imposed various obligations which were unnecessary and made it more difficult for them to join another society, both exploitative abuses and anticompetitive abuses. This obstructed the setting up of a single European Market, required the payment of royalties for works which were not subject to copyright, and required payment of royalties on recordings already sold in the Community with the right holders' consent.⁶⁶ All these practices were prohibited.

b. SABAM

In *BRT v. SABAM*⁶⁷ the question was whether a copyright society was acting contrary to Article 86 by requiring assignment of all its members present and future copyrights to it as a condition of handling them. It also retained exclusive rights for five years after a member withdrew from membership. The Court stated that there must be a balance between the maximum freedom for authors, composers, and publishers to exploit their rights and the effective management of their rights by a society which they cannot avoid joining. The aim of such a society is to protect the rights of its members against broadcasters and manufacturers of sound recordings. Any obligations not absolutely necessary to attain this aim unfairly encroach on its members' freedom to exercise their copyrights. The Court also stated that a copyright society is not entrusted with services of general economic interest under Article 90(2), in which case it might be to some extent exempt from EC competition rules, because the

65. *GEMA*, Commission Decision, O.J. L 134/15 (1971); *GEMA*, Commission Decision, O.J. L 166/22 (1972); COMMISSION OF THE EUROPEAN COMMUNITIES, FIRST REPORT ON COMPETITION POLICY 1971, at 75-78 (1972).

66. This practice was later prohibited by the Court. See *Musik-Vertrieb Membran GmbH and K-tel Int'l v. GEMA* (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte), Joined Cases 55/80 & 57/80, [1981] E.C.R. 147, 2 C.M.L.R. 44 [hereinafter *GEMA*].

67. See *BRT v. SABAM*, Case 127/73, [1974] E.C.R. 51, [1974] 2 C.M.L.R. 238.

State had not assigned any task to it and because it manages purely private interests. If some of the rules of a society were contrary to Article 86, it is for the national Court to decide the legal consequences on contracts affected.

Points to note on the SABAM Case are that it seems that the abuse was primarily exploitative, an unfairly onerous obligation, rather than anticompetitive, preventing the members from using another society to protect their rights, but both kinds of abuse were involved. The Court concentrated on the word unfair simply because that word is in the text of Article 86. Another point of interest is that the Court did not consider Article 85.

After the GEMA decision, the Commission required SACEM, the corresponding society in France, to eliminate its rules discriminating on the basis of nationality, to reduce the length of time for which a member was tied to SACEM, and to allow members to assign some, and not necessarily all, of their rights to SACEM.⁶⁸ The Commission considered that an author or composer should be able to put different types of rights into the hands of different societies in different countries⁶⁹

c. SACEM

*Greenwich Film Production v. SACEM*⁷⁰ was about the financial consequences of sales of films in non-EC States. The case arose because SACEM required exclusive assignment of copyrights for the whole world. The Court noted that Article 86 could apply even if the alleged abuses related only to performances in non-EC Member States. To decide whether trade between Member States was affected, one has to look at the competitive structure in the Community without distinguishing between services, such as management of copyrights, inside and outside the Community. The Court stated that the activities of copyright societies might have the effect of partitioning the Community.

68. See COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH REPORT ON COMPETITION POLICY 1974, at 66-67 (1975).

69. See *Greenwich Film Prod. v. SACEM*, Case 22/79, [1979] E.C.R. 3275, [1979] 1 C.M.L.R. 629; *Gesellschaft für Musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) v. Commission*, Case 125/78, [1979] E.C.R. 3173, [1980] 2 C.M.L.R. 177.

70. Case 22/79, [1979] E.C.R. 3275, [1979] 1 C.M.L.R. 629.

d. Gesellschaft zur Verwertung von Leistungsschutzrechten mbh (GVL) v. Commission

In *GVL*,⁷¹ the Commission prohibited, under Article 86, the German collecting society's failure to contract to collect royalties for non-German artists unless they were living in Germany. GVL was the only German society handling performers' rights. The Commission commented that GVL and artists are entirely dependent on each other. Without GVL, artists could not exercise their secondary rights, namely rights to payment of royalties when a performance, recorded on a visual or sound recording with the performers' consent, is later broadcast or made public. Essentially, the Commission's decision required national treatment and prohibited discrimination,⁷² but it did not, of course, harmonize the underlying rules of national law, and, therefore, German performers' rights in other States continued to be less well safeguarded than the rights of non-German performers in Germany. Following *BRT-SABAM*, the Commission also said that a collection society is not an enterprise entrusted with the operation of services of general or public economic interest under Article 90(2) because it had not been entrusted with any task by any public authority and it only protected the private interests of performers.

e. Third GEMA Case

Later, in a third GEMA decision,⁷³ the Commission authorized a clause in GEMA's statutes which was designed to prevent GEMA members from making payments to broadcasters and others to play particular recordings. The Commission said that uniform effective rates of remuneration are important because some GEMA members are publishers of music who are both users, paying royalties to GEMA, and recipients of royalties, and who, therefore, may have conflicts of interest. It is perhaps surprising that the Commission considered that this did not affect competition, but the rationale that GEMA could be allowed to ensure that all music was licensed on the same effective terms is

71. *Gesellschaft zur Verwertung von Leistungsschutzrechten mbh (GVL) v. Commission*, Case 7/82, [1983] E.C.R. 483, [1983] 3 C.M.L.R. 645; *see also* Commission Decision No. 81/1030/EEC, O.J. L 370/49 (1981).

72. *See Sacchi*, [1974] E.C.R. at 409, [1974] 2 C.M.L.R. at 177.

73. Commission Decision, No. 82/204/EEC, O.J. L 94/12 (1982).

understandable. The decision states that the court is not deciding the issue of whether the agreement concerning the statutes is prohibited by Article 85(1) of the EEC Treaty and could, if appropriate, be exempted under Article 85(3),⁷⁴ and that the decision is based only on Article 86.

In another performing rights societies case,⁷⁵ the Commission prohibited interference with intra-group cross-border deliveries of sound recordings and prevented the societies from basing royalties on average retail prices of recordings in the country of sale, rather than manufacturers' published selling prices to retailers.

In yet another case,⁷⁶ the Commission prevented GEMA from charging royalties on all custom pressing work carried out in Germany when the copyright licence had been issued by a society other than GEMA itself. Custom pressing is the manufacture of sound recordings by independent firms working for sound recording suppliers. While licences are needed for reproduction of the musical works, the manufacture does not necessarily take place in the territory of the society issuing the licence. Separate royalties on manufacture in each State would re-create frontiers by contractual means. GEMA's proposal would have undermined the principle of the Community-wide validity of the licence.

3. Treatment of Licensees

A later series of cases⁷⁷ involved disputes under Article 86 between SACEM and some French discotheques who claimed that SACEM's imposed royalties were too high and that they discriminated improperly between types of discos. The discos further claimed that they were refused licences, without justification, because of the kinds of music they were interested in. The Court said that the fact that SACEM's fees were higher than those in other countries was evidence, but not proof, of abuse, and that SACEM's fees were so high as to be illegal under Article

74. *Id.*

75. COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTEENTH REPORT ON COMPETITION POLICY 1983, at 92-93 (1984).

76. COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT ON COMPETITION POLICY 1985, at 81-83 (1986).

77. *Ministere Public v. Tournier & Verney*, Joined Cases 395/87, 110/88, 241-242/88, [1989] E.C.R. 2521, [1991] 4 C.M.L.R. 248.

86, unless SACEM could explain the difference. The operating expenses of SACEM were extremely high, possibly due to lack of competition. The Court noted that the refusal of a licence of only some rights, as the discos wanted, would restrict competition if composers' interests could be safeguarded without increasing the costs of managing and supervising the limited copyrights so licensed. Whether this was happening was a question of fact for the national court to decide.

4. Excessive Royalties

Unlike U.S. antitrust law, Community antitrust law prohibits exploitative abuses of dominant market power.⁷⁸ The best example of an exploitative abuse is charging excessive prices. This practice is expressly prohibited by Article 86(a). The importance of this tends to be underestimated for several reasons. First, objectively proving a price level that is so excessive as to be unlawful is an almost insuperable difficulty, and second, the European Commission is consequently reluctant to launch excessive prices cases. It is convenient to outline the legal rules in connection with performing rights societies because they illustrate all the issues that would arise in any excessive prices case involving, for example, a dominant broadcasting company. In practice, in any complex excessive price case, conclusions may be reached on the basis of all of the criteria outlined below which are relevant to the facts of the case. It will be seen that, apart from the well known case law, there are a number of criteria which can be used if the facts make them relevant, and that the crucial issue is not an academic argument about what gross profit margin is fair.

The scenario starts with a situation in which one or more companies are dominant, and, therefore, are in a position to set prices at levels higher than would be possible in a competitive market. It is then necessary to look at the facts of each case to see how far they provide a normal standard or basis of comparison against which the monopoly prices can be measured, and how far they show unreasonableness or an immoderate attempt to take advantage of market power.

78. John Temple Lang, *Abuse of Dominant Positions in European Community Law, Present and Future; Some Aspects*, in 1978 FORDHAM CORP. L. INST. 25 (Barty Hawk ed., 1979).

a. Tests & Evidence of Excessive Price

There are several main criteria or tests used to determine whether excessive prices are being utilized.

i. Reasonable Relationship

First, in the case law, excessive prices have been described essentially as prices which have no reasonable relationship to production costs.⁷⁹ This test, however, is inapplicable to musical works⁸⁰ because production costs are meaningless with respect to a creative work. The test of economic value of the services supplied is no easier to apply. Nobody has ever said what the relationship, (the maximum gross or net profit margin), should be and there is at present no rule of thumb which one can use. Based on the facts of the cases in which the Court has said this, one can say that a price charged by a dominant company is so excessive as to be illegal when it is so much higher than the relevant costs that the price could not possibly have been charged in a competitive market, and especially when it has been based on factors other than the wish to make a reasonable profit in relation to costs, e.g. a wish to discourage parallel imports, or a wish simply to charge the maximum which the market will bear. It follows that Article 86(a) is not capable of being reduced to a simple percentage of costs, even if the costs can be identified. The payment must be grossly disproportionate to the value given, and outside the limits of what is reasonable. In approach-

79. *GT-Link A/S v. De Danske Statsbaner (DSB)*, Case C-242/95, [1997] E.C.R. __, [1997] 5 C.M.L.R. 601; *Volvo A B v. Erik Veng (UK) Ltd.*, Case 238/87, [1988] E.C.R. 6211 at ¶ 9, [1989] C.M.L.R. 122; *Bodson v. Pompes Funèbres Des Regions Liberees SA*, Case 30/87, [1988] E.C.R. 2479, ¶ 30-35, [1989] C.M.L.R. 984; *Consortio Italiano Della Componentistica Di Ricambio Per Autoveicoli v. Regie Nationale Des Usines Renault*, Case 53/87, [1988] E.C.R. 6039, ¶ 14-18, [1990] 4 C.M.L.R. 265; *British Leyland PLC v. Commission*, Case 226/84, [1986] E.C.R. 3263, [1987] 1 C.M.L.R. 185 ("fees which are disproportionate to the economic value of the service provided" are unlawful); *United Brands Co. v. Commission*, Case 27/76, [1978] E.C.R. 207, [1978] C.M.L.R. 83; *General Motors Continental NV v. Commission*, Case 26/75, [1975] E.C.R. 1367, [1976] 1 C.M.L.R. 95; *Sirena S.r.l. v. Eda S.r.l.*, Case 40/70, [1971] E.C.R. 69, [1971] C.M.L.R. 260; *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkt GmbH & Co. KG*, Case 78/70, [1971] E.C.R. 487, 512, [1971] C.M.L.R. 631; *Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm & Centrafarm*, Case 24/67, [1968] E.C.R. 55, [1968] C.M.L.R. 47; *Nat'l Ass'n of Licensed Opencase Operators v. Commission*, Case T-57/91, [1996] E.C.R. __, 5 C.M.L.R. 129 (Ct. First Instance); *Ahmed Saeed*, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102 ("excessively high" air fares).

80. *Tournier*, [1989] E.C.R. at 2553, [1991] 4 C.M.L.R. at 248 (statement of Advocate General Jacobs).

ing such cases the Court has approved two methods, namely, cost plus and comparison with competitive markets⁸¹

ii. Similar Situation

A second test that has been used is that the Court has said that it is evidence of excessive price when, in similar situations, one performing rights society charges far more than the societies in other Member States⁸²

iii. Abnormal Cost Increase

A third method, in the absence of competition, is if a dominant company had allowed its costs to rise abnormally, its prices might be excessive even if they include only a modest profit margin. Since there is conclusive evidence that at least some performing rights societies are not efficient,⁸³ this may be important. It would also be evidence of excessive prices if a dominant company failed to make a big reduction in its operating costs which an efficient modern company would be expected to make, as a result of, for example, computerization. It follows that it would be evidence of failure to try to keep costs down, and so of acceptance of unnecessarily high prices, if a society failed to make the many kinds of improvements in efficiency which had to be imposed on the U.K. society by the U.K. Monopolies Commission, assuming that the other society needed to make them.

iv. Increased Royalty Rate

A fourth method that would also be evidence of excessive prices is if a society greatly increased its royalty rate over a relatively short period without any comparable increase in its costs.

81. *United Brands*, [1978] E.C.R. at 301 ¶ 249, [1978] C.M.L.R. 83; John Temple Lang, *Abuse of Dominant Positions in European Community Law, Present and Future; Some Aspects*, in 1978 *FORDHAM CORP. L. INST.* 25, at 43-6 (Barry Hawk ed., 1979).

82. *Basset*, [1987] E.C.R. 1747, [1987] 3 C.M.L.R. 173 (noting that supplementary performance fee not charged in of origin is not abuse); *Tournier*, [1989] E.C.R. at 2521, [1990] 4 CMLR at 248.

83. UK Monopolies and Mergers Commission, *Performing Rights Society* (1996). Advocate General Jacobs said one should look at "the necessary costs of effective management of performing rights and the need to ensure reasonable remuneration of copyright owners." *Tournier*, [1989] E.C.R. at 2559-61, [1991] 4 C.M.L.R. at 248.

v. Retained Royalty

Presumably, a fifth test would be evidence of excessive remuneration or prices if a society retained royalties for an unnecessarily long period without good reason, before paying them to those who are entitled to them, and retained the interest on the money so retained. This would be particularly likely to be unlawful if the society had no good reasons for retaining the money for so long, and by doing so was failing to carry out its duty to provide an efficient service to its members.

vi. High Rate of Royalty

Yet another kind of evidence of excessive prices would exist if a society insisted on charging a relatively high rate of royalty for a substantial category of licensees who did not need to pay for a licence of more than a small proportion of the works being licensed, and who were therefore being made, in effect, to pay for tied products unnecessarily or if a society unjustifiably charged very different rates of royalties to different kinds of licensee.⁸⁴ It would also be evidence of abuse if the society obtained an unduly high proportion of the revenue of those paying the royalty.

A more difficult problem arises in the absence of any of the above kinds of evidence, or if those kinds of evidence, are inconclusive. The difficulty arises in particular in industries such as the media in which remuneration is calculated, traditionally and for good reasons, as a royalty or share of receipts. How can one say whether an increase in the rate of a royalty leads to an excessive royalty rate? Depending on the circumstances, various tests can be used. The rate of return on investment of the society and its members could be used. They would not, of course, all have the same rate of return, because a society's members include both individual musicians and composers and big sound reproduction companies. If the rate of return on capital of the society and a substantial proportion of its corporate members was substantially higher than the rate of return of other companies in the relevant part of the media industry, that would be evidence

84. *Tournier*, [1989] E.C.R. at 2521, [1991] 4 C.M.L.R. at 248. It would also be evidence of abuse if the society obtained an unduly high proportion of the receipts of those paying the royalty. *Id.*

of excessive pricing. The society would be taking more than its fair share of the total profits available to the industry.

vii. Relationship Between Profit & Risk

Yet another test, which is relevant to the issue of excessive prices in media industries, is the relationship between profit and risk. A price or royalty rate may be excessive if it represents a high rate of return for an activity which involves little or no risk, especially when other companies or individuals in the same industry, or sharing in the receipts of the same section of the industry, receive lower rates of profits or remuneration and are exposed to greater risks. In this respect also it is necessary to look separately at the society, which incurs no risk, and the members of the society, which are in a wholly different position. Sound recording companies take modest risks when they first produce any recording, as the recording may not be a success. But they take no risk when they licence the performance of works in which they own the copyright or performing rights, and they have none of the risks which are run by individual composers and musicians. In other words, a rate of royalty which was reasonable for a composer or musician, who had invested years in practice and training and who runs the risk of illness or change of taste or fashion, might be excessive for a sound reproduction company.⁸⁵

Because an unlawfully high price is an unreasonable price, imposed rather than negotiated, another kind of test of whether royalty rates are excessive would be to look at the procedures adopted by the society in question in adopting or changing them. A rate of royalty is more likely to be reasonable and lawful if it was discussed and genuinely negotiated with each of the categories of companies or individuals who will pay it or bear the cost of it. It is less likely to be lawful if it is imposed on them without discussion, or if it is discussed only with some of the interest groups involved, in particular if it is discussed only with the group which is least able to withstand negotiating pressure, or which will not be bearing the full economic burden of any rate increase. It is also less likely to be lawful if it is a single rate imposed on everybody, rather than a series of rates adjusted to

85. *Id.*, at 2555-6, [1991] 4 C.M.L.R. at 248. Advocate General Jacobs thought it would be "misleading" to do this. *Id.*

the circumstances of each group of licensees, or to each group of the society's own members.

viii. Justifications for Increased Royalty Rate

A procedural test, which one would expect the Court of Justice to use or to accept, is the reasons given by a society for raising or changing its rate of royalty. If convincing reasons are given and discussed before the rate is changed, the result is more likely to be lawful. If there is no explanation and no discussion or negotiation, or if the only reason given or apparent is that the society thought that the market would bear a higher rate of royalty, it is less likely to be lawful under Article 86. The fact that societies act in the interests of individual artists, among others, does not entitle them to act unreasonably.

ix. Changes in Response to Market Pressures

Another test is how a society adjusts or adapts to change in the circumstances in the markets in which it operates. This is perhaps no more than a specific situation involving several of the tests already outlined, but it is worth mentioning because the media industry in Europe is now changing rapidly. It is also relevant because computers now make it possible to process royalty calculations and payments far faster and more cheaply than used to be possible, and societies have a duty to provide the most efficient service reasonably possible, as well as the most economical. If a society adapts itself to changes in the industry without grasping more than a fair share of any new sources of revenue, and if it adapts its procedures and operations to cut out unnecessary middlemen, cut costs and speed up payments, it is more likely to be able to justify its royalty rates. If it does not adapt to change, e.g. if it continues to base its royalty calculations on out of date assumptions, and to follow unnecessary procedures, it is less likely to be able to justify them.

x. Profit Comparison Between Groups

Another test of excessive royalty rates, more important now than it used to be, is to compare the profits made by the different interest groups from different ways of exploiting the same work. If, for example, the rate of royalty, or the effective rate of profit overall, on films was very much higher than on videos, and

if the difference was largely due to the film market being less competitive than the video market, that would be evidence of excessive prices in the less competitive market. This again is simply a specific example of the test, already approved by the Court, of making comparison with the prices in competitive markets.

xi. Price Elasticity

Another relevant consideration, though a more complex one, is a change in the price elasticity of the demand by the interests which need licences from performing rights societies. This is of course different for different interest groups. If prices were substantially raised after the companies who pay them or bear the cost of them had invested heavily in assets which could be profitably used only with a licence from a performing rights society, and so after those companies had made themselves vulnerable to negotiating pressure, that would be evidence of excessive prices. If costs incurred in a competitive market are charged to customers in an uncompetitive market, the prices in the latter are likely to become excessive.

xii. Presence of Restrictive Agreements

Another consideration is whether the dominant position is due in part to restrictive agreements or whether it is due merely to the company's ability to offer better products or services. It is harder to justify a given price level if the dominance is in part due to restrictive arrangements, even if the arrangements themselves may be justified. Similarly, the fact that there is no regulatory control of the price charged by a society, if that is the case, is relevant: regulatory approval would be evidence against excessive prices, and the absence of any control indicates that abuse is possible.⁸⁶ Under the *Ahmed Saeed* rule,⁸⁷ any national authority or copyright court determining a royalty rate should consider whether the rate is so high as to be contrary to Article 86. Unless this issue has been very fully considered under Community law, however, the fact that a rate had got national approval would be evidence, but not proof, that it was reasonable and not contrary to Article 86. A national regulator might not be applying the

86. *Id.*, at 2550, [1991] 4 C.M.L.R. at 248.

87. See *Ahmed Saeed*, [1989] E.C.R. at 803, [1990] 4 C.M.L.R. at 102. The Court clearly thought that the prices concerned probably infringed Article 86. *Id.*

same kinds of tests as the Community institutions would use under Article 86.

xiii. Arguments Against Commission Interaction in Response to Excessive Prices

Two classical arguments against Commission action on excessive prices are that circumstances change and so a ruling that a certain price is excessive will be outdated in a couple of years, and that excessive prices encourage market entry and so encourage competition. Neither of these arguments is valid in relation to performing rights societies. Their economic circumstances change little even when circumstances in the industry alter radically and there seems to be little possibility of any new performing rights societies being set up which would offer a general service and so compete with the existing societies or even of one existing society setting up on the territory of another.

It will be seen that there is no single maximum percentage limit on the margin of gross profit, net profit or return on capital which a dominant company is permitted to make. Different percentages would be appropriate in different circumstances. This makes cases complicated, but it also means that the Community institutions are not involved in determining some abstract ethical maximum price, as is sometimes thought.

When a company claims compensation for excessive prices, it would have to estimate what proportion of the price it paid was excessive and unlawful, and what proportion was reasonable and lawful. The Commission's practice, however, has simply been to say that the price in fact charged is seriously excessive, without saying precisely what the maximum permissible price would have been.⁸⁸

5. Controllers of Essential Facilities

For many, though not all, right holders, performing rights societies are the only available mechanism for obtaining payment of royalties which are due. This means that right holders have a right to insist on their royalties being collected, on a non-discriminatory basis, by each society. Citizens of the State in which each society operates can contract directly with that soci-

88. See, e.g., *United Brands*, [1978] E.C.R. at 243-47, [1978] 3 C.M.L.R. 83.

ety and get the full benefit of its services in that State. Right holders in other States however cannot normally get the services of a society except through the society in their own State. This means that they have to contribute to the revenues of the second society, something they might wish to avoid. Since citizens of the relevant State have a right to become Members on certain standard terms, non-citizens might want to insist on joining directly. At present they would usually be told to approach the society in their own State. But the existence of reciprocal agreements, formally non-exclusive, is not a sufficient reason for refusing direct access, and it is not clear how far there is any other legal justification. The main justification is the administrative convenience of the societies, that this is how they have always done things, and this is how they are organized. As their traditional methods are now said to be out of the date, inefficient, expensive, slow and cumbersome, it is likely that they will be challenged. Indeed the only reason they have not been challenged already probably is that most companies big enough to challenge them are also big enough to contract directly with anyone who has to pay them a large royalty, if they wish, and so the inefficiency of the existing societies does not inconvenience them as much as it otherwise would.

In the long term it is difficult to see the need for separate national societies in each Community Member State. A single Community society could achieve the same results more efficiently than the present over-complex structure, and might not be significantly less competitive.

E. *Relevant Markets in Relation to Newspapers*

There is a distinction between the market in which newspapers are sold to readers and the market in which advertising space is sold to advertisers.⁸⁹ In the readers' market, distinctions have been drawn between trade publications, economic and financial magazines weeklies, women's magazines, TV magazines, specialized amateur and professional magazines, such as motor-ing, travel, and gardening, and daily newspapers. Such markets

89. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVTH REPORT ON COMPETITION POLICY 1995, at 170-71 (1996). See *Salonia v. Poidomani*, Case 126/80, [1981] E.C.R. 1563, [1982] 1 C.M.L.R. 64 (discussing newspaper distribution); *SA Binon et Cie v. SA Agence et Messageries de la Presse*, Case 243/83, [1985] E.C.R. 2015, [1985] 3 C.M.L.R. 800.

are almost always primarily national, or at least are areas in which the same language is spoken. There is also a distinction to be drawn between serious or quality daily and Sunday papers and popular tabloid papers. On the other hand, on-line newspapers compete with traditional newspapers, and individualized news selection programs compete with traditional press cuttings and media analysis services.

In *CEP/Groupe de la Cité*,⁹⁰ the Commission accepted a classification of publications by class of readers, and said that a classification by subject matter on the lines of that just outlined was acceptable although other classifications were possible.

V. *MERGERS WITHIN THE MULTIMEDIA INDUSTRIES: A CASE ANALYSIS*

Up to the end of 1996, of the eight merger cases in which the Commission had stopped the merger under the EC Merger Regulation, four have been in the media industry.

A. *Types of Mergers*

It is useful to distinguish three kinds of mergers in the media industries which are particularly likely to cause antitrust problems. First, horizontal mergers are characterized by mergers between actual or potential competitors with large market shares. Second, vertical mergers, between content providers and carriers, the subject of other papers. Third, mergers between companies with market power in sectors which are separate but converging.

These categories are not, of course, mutually exclusive. The first type does not require explanation since the issues raised are similar to those in other sectors.

1. Vertical Mergers

The second type is more common, and more difficult.⁹¹ Es-

90. *Celex/CEN* document 395 M0665, decision dated November 29, 1995. For a recent judgment on newspapers, in another context, see *Vereinigte Familienpress Zeitungsverlags- Und Vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95, [1997] E.C.R. __, [1997] 3 C.M.L.R. 1329 (noting that prohibition on sale of foreign newspapers publishing competitions is permissible only if proportional and genuinely necessary to preserve media pluralism).

91. The Commission has prohibited several mergers of this type. Commission Decision No. 91/130/EEC, O.J. L 63/32 (1991) [hereinafter *Screensport/EBU Mem-*

essentially the problem which arises is the extent of the foreclosure effect for other competitors at both the content and the carrier levels, and the barrier to entry which would result if competitors had to enter the market on both levels at once. Such cases necessitate assessments of the market power of both parties at both levels. If the content provider is dominant, a competing carrier might be unable to obtain enough valuable content in the appropriate language to offer a satisfactory selection of channels and programs. If the carrier is dominant, a competing provider might be unable to find satisfactory alternative broadcasters. Another important question is whether the carrier controls a high proportion of the set-top boxes or satellites in the relevant geographical market. If so, and unless it can be required to give access to other content providers or broadcasters, it might be able to keep competitors from getting access to all the households which have already bought a set-top box or to the satellites which they need. In several cases, discussed below and in other papers, the Commission has prohibited mergers of this kind.

2. Converging Market Places Mergers

The third type of situation, involving companies in markets which are separate, but converging and becoming linked, has already given rise to at least one merger of this type which the Commission prohibited.⁹² The extent and the nature of the antitrust problems will depend, among other things, on the nature of the relationship which is developing between the converging markets. If for example a book publisher and a video producer merge, the effects will depend on the extent to which copyright ownership in each sector strengthens the position of the merged companies in the other sector, and on the extent to which the two kinds of products are sold through the same outlets. In the case of a merger between a telecommunications company and a television company, the effect will depend on the developments

bers]; Commission Decision No. 94/922/EEC, O.J. L 364/1 (1994) [hereinafter MSG Media Service]; Commission Decision No. 96/17/EC, O.J. L 53/20 (1996) [hereinafter Nordic Satellite Distribution]; Commission Decision No. 94/346/EC, O.J. L 134/3 (1996) [hereinafter RTL-Veronica-Endemol] (authorizing merger after withdrawal of content provider Endemol).

92. *Nordic Satellite Distribution* can be regarded as being in both the second and third categories. The Commission has not yet had to deal with a merger in which the principal issue politically was whether media were becoming too concentrated. The Commission could look at such a case only under antitrust law.

in interactive services, the use of TV satellite and TV cable for telecommunications, and the use of personal computer screens for showing films and TV programs. Where cable television companies are already dependent on satellite television broadcasting, but are capable of competing with a telecommunications company by using their cables for telephone calls, telecommunications and interactive services, a merger between a satellite company and the telecom company could put the cable companies in a permanent position of dependence and eliminate potential competitors entirely from the telecom market. In all such cases a series of present and future markets may need to be looked at, and the mutual dependence of many companies in the media sectors must be kept in mind. Small companies caught between two merging companies in converging markets are no longer able to play one off against the other. The effects would be particularly serious if the merged companies owned or controlled a large proportion of the facilities such as satellites, cable networks, or transponders in the two markets. Even if not all these facilities are necessarily essential,⁹³ control of them can give considerable market power.

So in this third type of situation there may be a variety of problems. Both content provider and carrier, whether broadcaster, cable company, or telecommunications company, may be strengthening their respective dominant positions or extending them into separate markets through the use of their existing power.

Second, a joint venture may come into being with a large market share in its market, due to its parents' power.

Barriers to entry also may be raised because a new entrant may be forced to enter several markets at once, or at least to provide a large series of services at once.

Additionally, the joint venture may control a conditional access system or set top box which, whether or not it constitutes an essential facility, gives the joint venture and its associated companies an unbeatable first mover advantage, set top boxes are expensive, few households will pay for more than one or replace

93. See generally, John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities*, in 1994 *FORDHAM CORP. L. INST.* 245 (Barry Hawk ed., 1995).

the one they have bought, and more services can be provided through a box, and may become a monopoly.

Each major parent also may have ended the threat to its market from its principal potential competitor. The Commission is always anxious to ensure that a company which already has market power does not neutralize its principal potential rival, the nucleus of any competing group which may emerge.

Another potential problem is that combination may constitute an increased threat to the independence of cable TV companies. Further, the joint venture may go into Internet services, ordering and banking services, and other interactive services, with considerable advantages over competitors in those markets, and creating in turn advantages in the traditional markets.

Another problem is that the parties may be able, in due course, to use their set-top boxes for a wider variety of purposes than any of their competitors, thus enabling them to cross-subsidize the price of the boxes.

There also is scope for a variety of bundling and tying practices, and for predatory prices, a cross-subsidy may be predatory if an extra service bears only the extra, incremental cost of providing the service which may be close to zero, rather than a proportionate share of total costs.

Another problem rises in particular in markets in which the first movers have substantial advantages, it is important not to allow additional anticompetitive advantages to be obtained by a merger or joint venture, or to allow the company to obtain mutually reinforcing first mover advantages in several related markets at once.

Lastly, a problem could arise if the cable network or the relevant satellites are a monopoly, the antitrust problems are particularly serious.

It will be seen that convergence is essentially a horizontal or conglomerate phenomenon, distinct from the second category of mergers mentioned here.

It will be seen that, at least in theory, some, but not all, of these problems could be tackled, if they arise, by regulatory measures as well as, or instead of, antitrust measures.

It is not yet clear how many systems of pay-TV and related interactive and other services will be profitable in each Member State in the Community. The aim of Commission antitrust pol-

icy should therefore presumably be as far as possible to facilitate further entry and to ensure that no unnecessary barriers to entry are created, and that no group of companies is allowed to include its main potential competitor.

For clarity, it should be said that extension of a dominant position into a related market is not prohibited by Community antitrust law. It is prohibited only when it is carried out by means other than legitimate competition, such as offering new or better bargains. It may be prohibited, therefore, if it is achieved by mergers, joint ventures, obtaining regulatory permissions, or abuse of dominant power in one of the markets. Acquisition of dominance by means other than normal competition is always prohibited. The question whether dominance, once acquired, is likely to be abused does not arise under Community competition law except under the rule that State measures making a State-owned company or one holding special or exclusive rights dominant are contrary to Article 90 if they make it sufficiently likely that the dominance will be abused.⁹⁴

B. *Merger and Joint Venture Cases Within the Media Sector*

1. Screensport-EBU

In *Screensport-EBU*,⁹⁵ the Commission refused to authorize, under Article 85(3), a joint venture between Sky Television, News International and a consortium of broadcasters which were members of the European Broadcasting Union. The consortium and Sky were potential, later actual, competitors in the market for transnational sports channels, and the agreement eliminated competition between them. The anticompetitive effects were out of proportion to the benefit from setting up a transnational commercial satellite TV channel dedicated to sports. Sky had already announced that it would anyway broadcast sports extensively. The joint venture would have involved a group of EBU members, with the E.B.U.'s backing, and the most likely main competitor of E.B.U. capable of creating an alternative venture. The joint venture would also have had a privileged position, due to its links with E.B.U., in comparison with its competitors. It

94. See, e.g., Höfner and Elser v. Macrotron GmbH, Case C-41/90, [1991] ECR I-1979, [1991] 4 C.M.L.R. 306; *Merci Convenzionali Porto Genoa SpA v. Siderurgica Gabrielli SpA*, Case C-179/90, [1991] E.C.R. I-5889, [1991] 4 C.M.L.R. 422.

95. *Screensport/EBU Members*, O.J. L 63/32 (1991), [1991] 1 C.E.C. 2092.

would have extended the advantages of E.B.U. membership to a company which did not comply with E.B.U.'s membership criteria.

2. MSG Media Service

*MSG Media Service*⁹⁶ concerned a proposed joint venture involving Bertelsmann, a leading German media group with interests in book and music publishing, sound recording and commercial television, Kirch, the principal German supplier of feature films and TV programming, and Deutsche Telecom, the public telecommunications company. The three relevant markets were for services for suppliers of pay TV and other television services financed through payments by viewers, the market for pay TV and similar services themselves, and the market for cable TV networks, in Germany. To operate a pay TV system, a decoder, conditional-access technology and a subscriber management system are needed. Additionally, since most existing TV sets are analog, the decoder needs to be accompanied by digital-analog convertor. Conditional access involves smart cards or other devices enabling the subscriber to have access to the particular channels or programs he or she has subscribed for. MSG would have provided all these services. Pay-TV was regarded by the Commission as including pay-per-channel, pay-per-view and near-video-on-demand, by which a certain number of feature films are available for selection, each repeated at specific times. A separate market existed for cable TV networks. The Commission concluded that the joint venture would create a dominant position in all three markets. In the market for services to pay TV companies, MSG would become and probably remain the only supplier in Germany, involving all the companies in a position to provide such services. The Commission rejected the argument that three parent companies, all of which are very large, would not have been able to enter this market separately. Any competitor would have had to compete against the combined advantages of Deutsche Telecom on the telecommunications side and Kirch and Bertelsmann on the television side. The Commission also said that if MSG dominated the market for

96. *MSG Media Service*, O.J. L 364/1 (1994), [1995] 1 C.E.C. 2509; see also COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH REPORT ON COMPETITION POLICY 1994, at 151 (1995).

services to pay TV companies, this would strengthen the positions of both Bertelsmann and Kirch in the downstream market for pay-TV. New pay-TV companies would not be able to provide the necessary services for themselves, and would have to buy MSG's services. The program resources of Bertelsmann and Kirch enabled them to put together different packages tailored to specific target audiences. They could use technical problems to delay the launch on the market of programs which were contrary to their interests, and could get valuable information through MSG about their competitors. By jointly operating the pay-TV structure with the leading pay-TV companies, Deutsche Telecom would strengthen its position as a cable operator. Undertakings offered by the parties were regarded as inadequate to avoid the anticompetitive effects of the joint venture, and so it was prohibited.

3. Nordic Satellite Distribution

*Nordic Satellite Distribution*⁹⁷ concerned a joint venture between subsidiaries of the Norwegian and Danish national telecommunications companies and Kinnevik, a television and media conglomerate. The joint venture was to provide satellite transmission services and distribution services by cable and direct-to-home television broadcasts. The product markets affected were provision of satellite television transponder capacity to broadcasters, distribution of pay-TV and other encrypted TV direct-to-home, and operating cable TV networks. The geographical markets were in the Nordic countries. The joint venture would have had the right to transmit some of the most important TV channels in the region, and an integrated infrastructure for the provision of TV services to the Nordic countries. The Commission said that through its control over satellite transponder capacity, its links with its parents as cable TV operators, and its links with Kinnevik as a broadcaster, the joint venture could foreclose other satellite operators from leasing transponder capacity to broadcasters. Kinnevik controlled four out of five transponders. As far as cable networks were concerned, cable TV operators would have to carry the joint venture's package of programs and would have to negotiate prices with a com-

97. *Nordic Satellite Distribution*, O.J. L 53/20 (1996); see also COMMISSION OF THE EUROPEAN COMMUNITIES, XXVTH REPORT ON COMPETITION POLICY 1995, at 173-4 (1996).

petitor. The parties would have had a single joint Nordic encryption system and the joint venture would be gatekeeper in distribution of pay-TV. The joint venture would also have foreclosure effects. Undertakings to reduce these anticompetitive effects were offered, but rejected by the Commission as insufficient and too difficult to enforce effectively since they were mostly behavioral and not structural. The joint venture was prohibited.

The Commission made the following comment in its Annual Report on Competition Policy.

The vertically integrated nature of the operation means that the down-stream market positions (cable TV operations and pay-TV) reinforce the up-stream market positions (satellite transponders, provision of programs) and vice versa. Overall the parties would achieve such strong positions that they would be able to foreclose the Nordic market for satellite TV. In this respect the operation to some extent resembles the joint venture MSG Media Service, proposed by Bertelsman, Kirch Group, and Deutsche Telecom, which was blocked by the Commission in the autumn of 1994.

The affected markets are currently in a transitional phase, since the telecommunications markets were about to be liberalized and new technologies and services were continually being developed and some were about to be introduced. In this situation the decision of the Commission took on a particular importance, because future market structures were being defined. The Commission therefore acted to ensure that these future markets were not foreclosed.

However, the Commission recognized that joint ventures and particularly transnational joint ventures can be instrumental in developing the media and telecommunications sectors to their full potential. Furthermore it is the Commission policy to take new developments into account. The parties were therefore invited to present a modified project compatible with the Common Market and the functioning of the EEA agreement.

4. RTL-Veronica-Endemol

The first *RTL-Veronica-Endemol*⁹⁸ decision involved a joint

98. *RTL-Veronica-Endemol*, O.J. L 134/32 (1995); COMMISSION OF THE EUROPEAN COMMUNITIES, XXVTH REPORT ON COMPETITION POLICY 1995, at 174-5 (1996).

venture between a Dutch-language commercial broadcasting corporation in Luxembourg, a public broadcasting association in the Netherlands, and Endemol, a TV program producer. The joint venture to be called Holland Media Groep, ("HMG"), would have affected three markets, namely TV broadcasting, TV advertising, and the market for independently produced Dutch language TV programs, that is, separate from in-house productions by Dutch broadcasters. The joint venture would have combined the two biggest broadcasting companies, commercial and public, and the biggest independent program producer, giving HMG a market share in TV broadcasting of over 40%. HMG would also have obtained a dominant position of about 60% in TV advertising market, by coordinating its three channels, in particular because advertising in public channels was limited by law. In the market for producing programs, the combination of the biggest producer and the three of the most important channels would have further strengthened the already dominant position of Endemol. Again, undertakings were proposed but considered insufficient. The joint venture was prohibited.

Endemol then decided to withdraw from HMG, and modified its agreement with HMG to reduce the proportion of HMG's programs which Endemol would provide. RTL5, one of RTL's channels, was to become a news channel rather than a general interest channel, and, thus, creating an opening in the market for an independent general interest channel to enter. Accordingly the joint venture between RTL and Veronica was authorized.⁹⁹

A third case involving the same parties arose in 1997 because a Swedish company, BS, claimed that RTL had not carried out its undertaking to convert RTL5 into a news channel as defined in the second decision just summarized.

In CLT/Disney/Super RTL¹⁰⁰ the Commission approved a joint venture to operate a free access general interest TV channel in Germany using both cable and satellite. Although Disney has a strong position on the market for film and TV rights, there

99. Commission Decision No. 96/649/EC, O.J. L. 294/14 (1996) [hereinafter *RTL-Veronica-Endemol*].

100. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVTH REPORT ON COMPETITION POLICY 1995, at 170 (1996).

were other suppliers available to provide content for other channels.

In another merger,¹⁰¹ the Commission found that the relevant market was pay-TV, which is separate from free access TV. This market was the national market in Italy because broadcasting rights are bought on a national or language-area basis, the rights to broadcast films are exercisable on different dates in different States, the program-mix of TV channels is designed for national audiences, programs are broadcast only in the State where the language of the program is spoken, and subscriber management systems are organized on a national basis. The merger involved no significant increase in market power in Italy.

In 1996, a joint venture was notified by Telefonica, the Spanish telecommunications company, and Sogecable, a subsidiary of Canal+, the leading French pay-TV company. The aim was to provide television and audiovisual services by cable in Spain. The Commission objected and the joint venture was abandoned. The Commission believed that the joint venture would have reduced competition too much in several markets for telephony, pay-TV, and cable services. Since the joint venture was called off, no formal Commission decision was taken.¹⁰² This was the fifth big media concentration to be stopped by the Commission.

In 1996, the Commission also approved¹⁰³ a merger of the radio and television activities of the two groups Bertelsmann-UFA and CLT. In Germany, the two groups had 38% of the market, and were in competition with the Kirch group, which had a 50% market share, and the public television channels. The joint operation did not plan to go into digital TV and was to concentrate on TV financed by advertising and broadcast as unencrypted free access TV, as distinct from pay TV. A dominant position in the TV advertising market would not be created. Kirch is the leading supplier of feature films and entertainment programs for television in Germany, and the parties were unlikely to obtain a stock of programs comparable to that of Kirch. The effect of the merger was assessed in relation to free access TV, pay-TV, TV licences, free access radio, and TV productions.

101. See Commission Notice, O.J. C-129/6 (1995) [hereinafter Kirch/Richemont/Multichoice/Telepiu].

102. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVITH REPORT ON COMPETITION POLICY 1996, ¶¶ 150-51 (1997).

103. O.J. C 364/3, (1996).

The Commission approved Channel Five, a joint venture to operate the U.K.'s fifth terrestrial free access TV channel. Only one of the parent companies was already in the relevant product market. Coordination of programming was excluded. The only market in which more than one parent was present was TV programming, and in that market the parties' shares were small.¹⁰⁴

The Commission also approved a merger uniting the U.K. cable TV activities of Videotron, Cable & Wireless, Nynex and Mercury Communications, to operate in pay-TV, cable and Telecoms. BSkyB is dominant in pay-TV and British Telecom in Telecommunications.¹⁰⁵

At the end of 1996, the Commission put an end informally to the use of a joint venture between Paramount, MGM, and MCA for distribution of films for pay-TV.

In 1997, the Commission authorized a small merger to run multiscreen cinemas involving Warner Bros., Sogecable, and a Portuguese company.¹⁰⁶

C. *Satellite Capacity*

In *Astra*,¹⁰⁷ the Commission prohibited an agreement between British Telecommunications and the Luxembourg satellite company SES on the sale of capacity on SES's Astra Satellite to U.K. television program providers. SES and BT were direct competitors in the markets for satellite capacity and up linking services. Under the agreement, SES allowed BT to make contracts with U.K. program providers on both capacity and uplink. The deal denied U.K. providers direct access to SES, aligned the prices of BT and SES, and kept SES out of the U.K. market. The Commission specifically provided that customers who made contracts with BT while the unlawful joint venture was operating should be able to renegotiate them. This decision was appealed by BT.

104. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVITH REPORT ON COMPETITION POLICY 1996 (1997).

105. *Id.*

106. 1997-5 E.C. BULL. at 24; *see also* 1997-1-2 E.C. BULL. at 26 (discussing joint venture in Poland between CLT-UFA and Universal).

107. *RTL-Veronica-Endemol*, O.J. L. 294/14 (1996).

D. *Joint Ventures when Article 85(3) Does Not Apply*

Companies which have made a restrictive agreement are not obliged to notify it, and they are free to act on a notified agreement at their own risk. Only mergers under the Merger Regulation, which was modified in 1997 and is soon to be a wider category than before, require approval before being acted upon. In some circumstances, however, at least, parties to a restrictive joint venture or other agreement can be prohibited from acting on it before the conditions of Article 85(3) are fulfilled. The Commission may prohibit them from acting on it, or a national court may do so if the situation is clear enough, or a national court may award compensation for any loss caused by their activities before the requirements of Article 85(3) are fulfilled.

This situation has arisen in several cases in which companies in the media and telecommunications industries went ahead and acted on an agreement in spite of being warned by the Commission that Article 85(3) was not complied with.¹⁰⁸ It is irrelevant whether it is the parties themselves or others who can cause the requirements of Article 85(3) to be met. In such situations, non-parties which are suffering loss may need to ask for interim measures or immediate contractual relationships with the parties to the restrictive agreement, such as sublicenses of the right to broadcast sports events, or they risk losing their rights to anything other than damages.

E. *Conditional Access Systems: Essential Facilities Under Article 86*

The question has often been asked informally in Europe as to whether television decoding systems, set-top boxes and their related systems, be essential facilities to which competitors are entitled to have access, and if so in what circumstances? The question has not yet been raised directly in any complaint to the Commission. The answer is complex, depends on the precise circumstances and on the view which competition authorities might take of the future of the industry, and may be different in different Member States.¹⁰⁹ The following comments concen-

108. See the judgments of the Dusseldorf High Court in *British Telecommunications and VIAG 23, Intercom v. Deutsche Telekom and Atlas GmBh*, on December 23, 1996 and April 1997.

109. See Council Directive, No. 95/47/EC, on the use of standards for the transmission of television signals, O.J. 281/51 (1995) (applying only to digital TV). In the

trate on digital TV.

In its simple form, the argument goes like this. To establish a system for decoding pay television signals requires a huge investment, and the company doing it has to persuade a large number of householders to buy or to rent relatively expensive equipment. Once this is done, or when it is clear that it will be done, it becomes uneconomic, or at least too risky, for any second company in the State in question to launch a competing system, and anyway the first one has an unbeatable first mover advantage. So duplicating such a system is not realistically possible.

This may sometimes be correct, but the problem is not a simple one.

A number of facts need to be noted. Set top boxes vary greatly in price and sophistication. Some are merely decoders, as well as being devices which convert digital signals into analogue which can be seen on current television sets. Others are, or soon will be, suitable for use in interactive services, such as home shopping, home banking, home betting, holiday booking,

United Kingdom, BSkyB has undertaken that its encryption technology will be licensed on non-discriminatory terms to all users. Conditional access systems are not the only things which may raise essential facilities issues: access to satellite transponder capacity may do so also. If all or most viewers' satellite reception "dishes" (parabolic aerials) are pointed at a given satellite, new channels which wish to transmit by satellite may be forced to use that satellite. Therefore, the antitrust problem is not merely due to the cost of launching another satellite, but to the difficulty of getting viewers to switch to it, and the problem that satellite controllers or owners do not always allow transponders designated for one national market to be used for another, even if the new market is more profitable. Competition problems caused by shortage of transponder capacity are also linked to, and tend to accentuate, competition problems due to encryption technology. However, transponder scarcity will be reduced or ended by digital satellite broadcasting. Essential facilities issues may also arise in connection with applications programming interfaces and telecoms return path, which are components of interactive services, and the electronic program guide, the viewers' aid to select and find the programs they want to see. Some interests in Europe, including the BBC, advocate functional separation of essential facilities from content provision. The Commission's notice on access to telecommunications networks does not apply to conditional access systems, *see* O.J. C 76/9, (1997) although the principles are broadly similar; *see also* Commission's Proposal for a Directive on Legal Protection of Services based on, or consisting of, conditional access, COM (97) 356. Yet, another issue is whether cable networks can be essential facilities under EC antitrust law. This question has not yet been decided because many cable companies are not large enough for their conduct to affect trade between Member States, and because the issue is or can be dealt with by national regulatory rules. *See* Dutch Ministry of Economic Affairs Annual Report Competition Policy 1995-1996, at 13-16 (accepting that cable operators have dominant positions under Dutch competition law, and therefore have "must-carry" duties).

computer games, buying of shares, video on demand, access to Internet, interactive language learning and home education, automatic selection of news items, and options in the ends of feature films.

Broadcasts may need to be encrypted to prevent rights over-spill, reception of programs outside the State for which they are intended and without a copyright licence for the unintended State. There are also several conditional access systems available in Europe including SECA, Nabravision (SECAM), Mediaguard, Videocrypt, Irdeto, and Viaccess. Conditional access is any encryption and decoding system which is individually addressable. Less technically, it is the technology which allows TV signals to be broadcast so that only subscribers can unscramble them. There are systems such as Simulcrypt and Multicrypt which allow broadcasts through two or more conditional access systems. Digital encryption systems include SECA, Cryptoworks, Viaccess, and Irdeto. A number of cable companies in various European States are introducing a conditional access system which they hope will become a standard open to every company which wishes to use it.

To assess the situation fully, it is necessary to look not only at the conditional access system and electronic program guide, and the householder's satellite dish, but also at the relevant satellite position and the transponder capacity available in it. Additionally, the first conditional access system on the market does not always or automatically become dominant, and even if it does, it does not necessarily do so quickly. Many other factors are relevant to dominance.

One key issue may be whether the conditional access system includes a common interface. Also, some set-top-box technology is proprietary and some is not. One of the justifications put forward for proprietary technology is that it is said to be necessary to subsidize set top boxes to get viewers to rent or buy them, and it is then necessary, to prevent free riders from transmitting programs which the subsidized boxes would decode, to have proprietary technology.

Finally, a competing encryption technology would be able to sign up existing viewers of encrypted programs only if they bought a second decoder, which they would do only if the new technology give them access to a large range of attractive chan-

nels. Of course, no second decoder would be needed if there is a common interface or general licences.

Companies controlling conditional access systems argue that they have no incentive to reject any channel which would increase the attractiveness of the complete package of services to which their systems give access. With digitalization, there will be a huge amount of capacity in search of marketable content. However, this does not exclude the temptation to make use of the control of conditional access systems to obtain exclusive rights or to put pressure on broadcasters to agree to terms excessively favorable to the system controllers. It would be tying, for example, if a controller insisted on acceptance of its subscriber management services as a condition of using its conditional access system.

Two issues must be clearly distinguished. First, as a matter of Community competition law, can conditional access system be considered as an essential facility to which a dominant company is obliged to give access, and if so in what circumstances and in which Member States? Unless the company is dominant, this question cannot arise. Second, as a matter of regulatory policy in the television or telecommunications sector, should the owners of any conditional access systems be required to give access to it? The answer to the second question is outside the scope of this Article.

A competitive advantage is not the same as an essential facility. Several conditions must be fulfilled for any facility which is owned by a single dominant enterprise. The rules on consortia and joint ventures are broader to be regarded as essential.¹¹⁰ The crucial condition in this context seems to be whether a normal reasonably efficient competitor following an appropriate strategy could be expected to provide an alternative facility or system itself. This is an objective question which does not depend on the attitudes, policies, or weaknesses of any particular competitor or complainant. This basic principle has several consequences.

First, the hypothetical company must be big enough to be able to contemplate setting up a facility of the kind in question. Some markets can only be entered by large companies. The fact that there are companies which are too small to set up a facility

110. *Defining Legitimate Competition*, *supra* note 93, at 283-86.

of the relevant kind does not prove that no competitor of appropriate size could do it. In particular, it does not prove that no consortium or group of companies or joint venture could do it. Subject to Article 85, there are some markets in which entry is best done, or can only be done, in some kind of partnership, and the market for conditional access systems, for both technical and financial reasons, may prove to be that kind of market.

Second, the facility in question is one to which there is a duty to give access, under Article 86, only if a suitably large competitor or consortium, adequately financial and objectively advised, would not consider it economic to invest in a second facility of the same kind in the geographical market in question. This might be because that market was too small to support a second facility, or because the incumbent had advantages which were unbeatable within the time scale of an objective long term investor, or for any other reason. This necessitates an analysis of why the incumbent is dominant, and how long it would take to overcome the difficulties for competitors which are associated in the dominance. This would depend, among other things, on the extent to which other companies, cable companies, content providers, broadcasters, providers of interactive services, software companies, computer manufacturers, and network operators, had committed themselves to the conditional access system of the dominant company. But the mere fact that capital costs are large, start-up losses likely, and a return on capital delayed is not enough in itself to create a duty to give access.

In fact, it seems that there will be an alternative decoder available for digital cable TV in Europe, at least in some countries. In 1997, as already mentioned, a group of cable companies combined to launch what they hope will become a standard decoder in most of Europe. This is intended to compete against digital satellite decoders. It is based on the Viaccess system. If it is a success, it might have the effect of making existing rival systems, in the States where it is introduced as the second system, no longer essential facilities to which access must be given. Several consequences of will arise because of this.

First, since conditional access systems vary in cost and sophistication, a number of questions arise about what minimum investment would be necessary for the second competitor, and what would be the minimum functions which its system would need to be able to perform, in the State in question.

Second, if the incumbent's system has functions relevant to more than one product or service market, as sophisticated access systems have, it would be necessary for the competitor to prove that the requirements of Community law were fulfilled in respect of each of those functions and markets, if it was seeking access to all of the functions.

Third, one of the difficulties facing a new entrant is that, in some States, the incumbent has persuaded householders to buy the hardware for its conditional access system. A new entrant might therefore find it necessary or at least easier to enter the market by renting its hardware to householders who already have bought hardware, since they are unlikely to buy two. This changes the financial picture, and one would have to determine which strategy was the most efficient for the new entrant to adopt. That would depend on, among other things, the relative merits and sophistication of the two kinds of hardware, the cost of each, the prevailing rates of interest, the relative attractiveness of the content or functions obtainable through the two competing systems, and the proportion of all households likely to subscribe which had already committed themselves to the dominant company, and were therefore unlikely to sign up with its competitor.

Fourth, even if there is only one set top box which provides all the functions in question, it may be in competition with several other conditional access systems which together provide all or most of those functions. To assess the dominance of the single box, it would be necessary to look at the cumulative cost and inconvenience of having several systems, consumer preferences, advantages and disadvantages, etc.

Another question raised is if there is a duty to give access, what classes of competitors are entitled to obtain it? In the television market alone, there are two distinct groups of companies which might be interested: cable companies, and other broadcasters. The Advanced Television Services Directive gives rights only to digital broadcasters, and this apparently does not include cable companies which merely transmit programs they receive or obtain from outside their cable networks. The arguments to be made on behalf of the two groups are different. A broadcaster transmitting an encoded program must arrange somehow for households to have decoders to see its programs: it needs only access to a suitably programd decoder. A cable television com-

pany, on the other hand, also needs access to programs, and so it must have access specifically to the decoder of the broadcaster of those programs. Broadcasters need obtain only part of the carriage: cable companies need content as well, and so they must prove a different kind of dominance, although in practice only broadcasters so far have provided conditional access systems for satellite TV. If there is a legal duty to provide access, what is it access to? Again the question is complicated, because conditional access systems have, or can have if they are sophisticated, several uses which may fall into separate markets. The use for which a plaintiff wants access may not correspond precisely to the similar use which the dominant owner provide, and the interface which the dominant company has may not be that most suited to the plaintiff's need. It is clear that it would be contrary to Article 86 for a dominant owner deliberately to design its system so that it could not be used by competitors. However, subject to that, if neither the owner in question or any other owners of similar systems had ever provided substantially the type of access required by a plaintiff, and if that access did not correspond to a licence, contract, or other relationship within the owner group or to a difference of tasks within that group, there might be no right to that particular kind of access. A plaintiff, even if it has a right to some kinds of access, has not necessarily got the right to insist on the kind of access which suits it best.¹¹¹ It may however get what the dominant company's downstream operation gets.

Another, related, issue is whether access entitles the plaintiff to have disclosed to it a proprietary operating system of a set top box, so that it can design its own application program. Probably the answer is that the intellectual property right maybe a justification for refusing to grant a licence, but that if refusal to licence is a violation of Article 86, the licence must grant everything which is necessary to end or avoid the abuse. Yet another issue which has been raised is whether antitrust law can impose an obligation to disclose proprietary technology so that the plaintiff can use it to design a dual-use decoder. This would take

111. JOHN TEMPLE LANG, *THE PRINCIPLE OF ESSENTIAL FACILITIES AND ITS CONSEQUENCES IN EUROPEAN COMMUNITY COMPETITION LAW* 23-25 (1996); John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 *FORDHAM INT'L L.J.* 437 (1994).

the essential facility principle further than it has ever gone, and probably could not be required on the basis of antitrust law.

Other issues are whether the plaintiff ever has a right to have a dominant company's decoder modified. This might be demanded in order to enable the decoder to do the same job as it already does for the dominant company, and therefore perhaps to accept the plaintiff's smart card. This seems the minimum if there is a right at all, and would certainly be the remedy if the decoder had been deliberately and artificially designed to be incompatible with the plaintiffs' technology. However, there seems to be no right to insist on having a facility modified to enable it to provide a different function from that which it performs for the dominant company, even if the plaintiff is willing to pay for the modification.

Still another issue, which it is convenient to mention here, is whether the dominant owner of an electronic program guide can be required to display competitors' programs in some non-discriminatory way, like an airline computerized reservation system. This raises a separate issue, whether an electronic program guide could be an essential facility.

If dominance is proved and a *prima facie* duty to grant access is shown, possible justifications for refusal must be considered. As with all access issues, these justifications include the lack of creditworthiness of the applicant, any insoluble technical problems which granting access would cause, or the fact that the applicant wished to broadcast, for example, pornography with which the dominant company did not wish to be associated.

The basic principle is that if a reasonable owner of the facility who had no interest in any downstream operation would have a substantial interest, acting rationally, to refuse access, the owner is entitled to do so. So if giving access would reduce the efficiency of the facility or would cause it to be used uneconomically, access can be refused. There is no duty to subsidize a competitor.

Another possible justification would be the intellectual property rights of the dominant owner. In essence, the result of the BBC-RTE-case¹¹² as far as relevant seems to be that for com-

112. *Radio Telefis Eireann and Independent Television Publications v. Commission, Magill*, Joined Cases C-241/91P & C-242/91P, [1995] E.C.R. I-743, [1995] 4 C.M.L.R. 718 [hereinafter RTE-ITP].

pulsory licensing to be ordered there has to be additional conduct, whether exclusionary or exploitative, as well as the simple refusal to licence by a dominant company. This additional conduct can be use of intellectual property rights in one market to restrict competition in another related market. Probably this means, in practice, that an intellectual property right in the conditional access system itself, which is licensed to companies, could not be used to monopolize the downstream markets for the services which companies using the system offer to households or individuals. Such a system is only a device through which services are provided, and it does not constitute or embody the services itself. The market with which intellectual property rights in the conditional access system are concerned is the market in which the owner of the system licences it to companies wishing to transmit data or pictures or to provide interactive services to individuals who are not, and do not need to be, parties to the licence. The Commission has drawn similar distinctions between other markets in which different buyers were concerned with related, but distinct services. But much might depend on the nature of the patented features of the system in any individual case.

Access in itself is not necessarily very valuable, it all depends on the terms of the access agreement. Where the dominant television company is fully integrated, it is not particularly meaningful to order access to be given on non-discriminatory terms, because in a vertically integrated dominant company the terms on which access is provided to its downstream operation may never have been formulated, and it might take a complex, time-consuming, and controversial cost-accounting exercise to decide what they were. The Commission may have no power under Community antitrust law to fix the right price. Its powers are limited in practice to seeing whether the price of access is not excessive or exclusionary, seeing that there is no price squeeze, combining the price for access with a downstream price so close to the access price that a reasonably efficient downstream competitor cannot make a reasonable profit,¹¹³ and detecting any

113. See Commission Decision No. 76/185/ECSC, O.J. L 35/6 (1976) (National Carbonising); *National Carbonising Co. Ltd. v. Commission*, Case 109/75R, [1975] E.C.R. 1193; Commission Decision No. 88/518/EEC, O.J. L 284/41 (1988), [1990] 4 C.M.L.R. 196 (Napier Brown—British Sugar); COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 1989, ¶ 73 (1990).

hidden subsidy to the downstream operation of the dominant company itself. In practice the Commission might well either leave the matter in the hands of a national regulator or order access on an interim basis to allow time for all the issues to be negotiated or determined in detail.

F. *Conditional Access Systems: Essential Facilities Under Article 85*

When a conditional access system is set up by a joint venture or consortium to which Article 85 applies, as is often the case, the legal issues which arise are similar but not identical. Strictly, the main legal issue usually is whether, if the parties do not grant access, they have the possibility of eliminating competition in respect of a substantial part of the products in question within Article 85(3)(b). If they have, they can be obliged to licence as a condition of any individual exemption. This threshold for compulsory licensing is lower than that for a single dominant firm, but the obligation, if it arises, is the same, to licence on non-discriminatory terms. In practice this is easier than under Article 86 because such a joint venture is usually licensing already to associated or unrelated companies, and the compulsory licences can simply be in the same terms, in all respects.

Even if granting access is not an absolute necessity due to Article 85(3)(b), the Commission may properly make it a condition of an individual exemption when in all the circumstances it is reasonable to do so, to ensure that the benefits of the agreement outweigh its disadvantages for competition.

Whether such a duty should be imposed depends, among other things, on the combined market shares of the parents and the joint venture in both the relevant markets, on the extent of the disadvantage imposed on competitors the extent of foreclosure, the extent to which competitors need to cooperate with the parties and are thus dependent on satisfactory cooperation from them, what alternatives are available to competitors, whether membership in the arrangement is really open to competitors, and on any justification that may be available for denying the benefit of the arrangement to non-parties. A duty may be imposed even if the parties are not controlling a facility that is so essential that non-parties could not do business without it. Access on non-discriminatory terms may of course involve the competitor complying with certain criteria or requirements or mak-

ing an appropriate contribution to the joint operations: there is never a duty to provide better terms to non-parties than to parties. It is also relevant to know whether the parties could share with competitors the same services on the same terms without lessening the benefits of the arrangement to themselves, apart of course from the fact that they would no longer have that particular advantage over their competitor. It is always relevant to ask also whether the benefits of the arrangements are obtained primarily by the parties, or whether benefits are obtained directly by consumers as well. The duty to grant access arises only if without it the market would not be competitive, for example, there would be too few companies left that did not suffer from a significant handicap as a result of being denied access to the joint arrangement. It is also relevant how far the joint arrangement reduces competition between the parties to it, and how far, if at all it would be possible, satisfactory and pro-competitive for competitors not involved in one joint operation to set up a rival one of their own which would do substantially the same things in the same geographical area in competition with the first joint operation.¹¹⁴

In particular, of course, as has been pointed out earlier in

114. See ABUSE OF DOMINANT POSITIONS, *supra* note 78, at 43. In a series of Article 85 cases, the Commission imposed or took note of duties or accepted undertakings not to discriminate against non-parties. COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 1981, 63 (1982) (IGR Stereo Television-Solara); Amadeus-Sabre, *reprinted in* John Temple Lang, *Air Transport in the EEC-Community Antitrust Law Aspects*, in 1991 FORDHAM CORP. L. INST. 287, 317-22 (1992); COMMISSION OF THE EUROPEAN COMMUNITIES, XXIST REPORT ON COMPETITION POLICY 1991, ¶ 88 (1992) (DHL International); Commission Decision No. 91/562/EEC, O.J. L 306/22, ¶ 20 (1991); COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIND REPORT ON COMPETITION POLICY 1992, 416 (1993) (Infonet); *EBU Eurovision*, O.J. L 179/23 (1993); *Metropole Television*, [1996] E.C.R. at II-649, [1996] 5 C.M.L.R. at 386 (citing *Metro-SB-Grossmärkte GmbH & CO KG v. Commission*, Case 26/76, [1977] E.C.R. 1875, [1978] 2 C.M.L.R. 1); Commission Decision No. 94/579/EC, O.J. L 223/36, ¶ 57 (1994), [1995] 5 C.M.L.R. 285 (BT-MCI); Commission Decision No. 94/594/EC, O.J. L 224/28 (1994) (ACI); Commission Decision No. 94/663/EC, O.J. L 259/20, art. 2, (1994) (European Night Services); COMMISSION OF THE EUROPEAN COMMUNITIES, XXVTH REPORT ON COMPETITION POLICY 1995, ¶ 82 (1996) (Gas Interconnector); Commission Decision No. 96/546/EC, O.J. L 239/23 (1996) (Atlas-Phoenix-Global One); Commission Decision No. 96/547/EC, O.J. L 239/57 (1996); *Nordic Satellite Distribution*, O.J. L 53/20 (1996). In *Nordic Satellite Distribution*, the parties were willing to give an undertaking not to discriminate, but the agreement was ultimately prohibited. O.J. L 53/20 (1996). Similar undertakings were also offered in *MSG Media Service*. O.J. L 364/1 (1994). This is because a merger which creates a dominant position contrary to Reg. 4064/89 cannot be made lawful merely by assurances that it will not abuse its dominance.

this Article, a duty to grant access is likely to be imposed when one of the partners in the joint venture is a telecommunications company and the others are carriers or content providers for television.

CONCLUSION

In general, it seems that the media industry has not yet fully understood the implications of Community antitrust law. Agreements which should be notified are not being notified, mergers which had no chance of being approved have been negotiated, and practices which appear open to serious criticism are continuing. There are several possible explanations, but the facts seem clear. Although many of the issues which arise are complex, the basic principles of antitrust law do not always seem to have been understood.

It therefore seems certain that the legal issues outlined here, and no doubt others, will arise again in cases before the Commission, the Community Courts, and national courts. They may also arise in proceedings before national regulatory authorities, insofar as they have power to apply antitrust principles. This Article has not discussed the national case law which already exists since that would make this Article unmanageably long. But on any issue which they have to deal with, lawyers should check the national precedents as well as the cases cited here. The Commission has already looked at national practice on televising sports events, and will look at it on other issues whenever it seems worth while. If the Commission leaves a case to be dealt with by national authorities, in the expectation that the result will be substantially similar to what it would be if the Commission handled it, as the *Ahmed Saeed* judgment¹¹⁵ sometimes requires, the effect may be that both national law and Community are applied.

Some of the most difficult antitrust issues, such as on pricing, are more easily dealt with as regulatory issues, by national regulators, than by antitrust authorities.

It follows that at least some and perhaps all media companies and performing rights societies would be wise to set up Community antitrust compliance programs, or to review any pro-

115. See *Ahmed Saeed*, [1989] E.C.R. at 803, [1990] 4 C.M.L.R. at 102.

grams which they already have. No doubt there are also potential plaintiffs which are considering, or will soon consider, their options, although not all the plaintiffs' arguments mentioned here are necessarily soundly based enough to lead to successful complaints.

At present it seems that, at least in Europe, media lawyers and antitrust lawyers are not the same people, and a strong legal team may need to include one of each. Community antitrust law has not yet fully entered the consciousness of lawyers specialized in other areas, at least in the media industry.