EUROPEAN MERGER POLICY IN ELECTRONIC COMMUNICATIONS MARKETS: PAST EXPERIENCE AND FUTURE PROSPECTS

ALEXANDRE DE STREEL*

Draft 4 September 2002

Summary

The wave of mergers and acquisitions has certainly reshaped the face of the electronic communications sector (telecoms, media and Internet infrastructure). But the reviews of these concentrations by antitrust authorities, and the conditions that they have imposed, have probably played the same influence in the re-shaping of the sector than the mergers themselves.

The paper will review the important electronic communications merger decisions adopted by the European Commission since the beginning of the nineties, going from the early European telecom joint-ventures (Atlas, Global One) and the German digital television consolidation (MSG Media Service, Premiere) to the recent American Internet mergers (AOL/TimeWarner). The paper aims to understand the rationale of the antitrust authorities when dealing with vertical integration and networks effects, and the justifications given to the extensive party access conditions that could have been imposed.

Confronting the antitrust practice with the economic literature on networks effects and vertical integration (Tirole, Economides, Katz, Shapiro), the paper advocates that authorities face the risk of being overly cautious, and imposing too stringent conditions on the merging parties, hence their interventions being detrimental to the overall welfare.

The paper also show that some authorities have the tendency to behave much more like an interventionist sectoral regulator, rather than a self-restrained antitrust body, hence going further their legitimate mandate. This critique could shed some light on the on-going debate on the relationship between sector-specific regulation and antitrust policy in the electronic communications markets.

* Expert at the European Commission, Brussels and Researcher at the European University Institute, Florence. The opinions expressed in this paper are purely personal and do not necessarily reflected those of the European Commission Many thanks to Tony Shortall for useful comments and stimulating discussions, any error remaining mines.

During these last ten years, European ICT sector saw a wave of joint ventures and mergers between operators to provide new services that technological progress made possible and consumers were supposedly keen to obtain. After this decade, it is interesting to note that all the first alliances have been abandoned and initial partnerships have changed, and that no pan-European operators have emerged, except perhaps in the mobile industry. Another striking feature of this period is the role that antitrust authorities, in particular the European Commission, played in reviewing these alliances by imposing far reaching conditions, that probably had as much influence in re-shaping the sector than the alliances themselves.

Therefore, this paper aims to review the approach adopted by the European Commission during this last decade and propose some suggestions for the future. Section 1 briefly describes the antitrust control of joint ventures and mergers in the European Union and proposed some guidelines when imposing remedies. Section 2 reviews some of the most important decisions adopted by the Commission concerning alliances in telecoms (joint ventures to provide global telecom services or full mergers between incumbents), in media (joint venture to provide technical pay TV services or advanced interactive digital TV services), or between media and Internet companies. Finally, Section 3 summarises the approach of the Commission and concludes that it should more strictly prove vertical foreclosure before imposing remedies and rely more in the future on sector-specific obligations.

1. Control of joint venture and merger in the European Union

Under European law, the creation of a joint venture or a merger having a Community dimension is controlled by the European Commission either under Article 81 of the EC Treaty or under the Merger Regulation[1]. If the joint venture performs on a lasting basis all the functions of an autonomous economic entity[2], it fall under the Merger Regulation, otherwise it fall under Article 81. On the other hand, all mergers or acquisitions of joint or sole control also fall under the Merger Regulation.

Under Article 81(1) of the EC Treaty, all agreements between undertakings that affect trade between Member States and have the object or the effect to prevent, restrict or

[1] Council Regulation 4064/89 on the control of concentrations between undertakings, OJ 30.12.1989, as amended by Regulation 1310/97. On this Regulation, see: C.J. COOK and C.S. KERSE (2000*), E.C. Merger Control*, Sweet & Maxwell.

[2] Until the Merger Regulation was amended in 1997, its scope was narrower, hence the scope of Article 81 EC Treaty broader: all joint ventures, even the full function autonomous ones, that had the object of effect to co-ordinate the competitive behaviours of the parents fall under Article 81. This explains why the joint ventures set up between incumbents during mid-nineties to provide global telecoms services were analysed under Article 81.

distort competition are prohibited. Nevertheless, under Article 81(3), the Commission may exempt certain agreements from the prohibition if they contribute to the production or distribution of goods, allow consumers a fair deal of the resulting benefits, do not eliminate competition and only impose proportionate restriction to competition. Therefore when an agreement distorts competition, the Commission could nevertheless exempts it, under conditions that minimise the restrictions to competition. As we will see in more detail below, the conditions can be structural, quasi-structural or behavioural.

Under the Merger Regulation, a concentration shall be prohibited if it creates or strengthens a dominant position as a result of which effective competition would be significantly impeded. The case-law has defined the dominant position as the ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers[3]. In practice, a concentration creates or strengthens a dominant position in three ways: horizontal overlap that gives the merging entities market share above 40 p.c.[4], vertical relationships that enable parties to leverage their position and foreclose entry on some markets, or loss of potential competition that existed between merging entities.

In order to alleviate the radical solution of prohibiting the merger, the Commission can impose, on proposal of the parties, some commitments that will remove the dominant position and ensure that the level of competition will not be impeded by the concentration. Remedies can be structural (mainly divestiture), quasi structural or contractual, or behavioural. The first type covers divestment of viable business to a suitable purchaser able to actively compete against the merging entities. It could also include divestiture of an existing shareholding in a joint venture or minority shareholding. Commission often favours this remedy[5], as it acts on the structure of the market and does not require any on-going monitoring. But if the divestiture is impossible or ineffective, Commission will turn to the second type of remedy and impose for example termination of existing agreements, or to the third type and ensure that competitors will have access to necessary infrastructure or key technology. If useful, Commission could also impose a package of remedies of different types.

As the European test is very strict[6] and a concentration should only be allowed if it does not create or strengthen a dominant position, mere behavioural remedies may be questionable as they imply that a dominant position is allowed even though competition would not be impeded because of the committed behaviours. In *Gencor*[7],

---

[3] *United Brands* 27/76 [1978] ECR 207; *Hoffman-La Roche* 85/76 ECR [1979] 461.

[4] *AKZO* C-62/86 [1991] ECR I-3359, paragraph 60; *Irish Sugar* T-228/97 [1999] ECR II-2969, paragraph 70. Nevertheless, 40 p.c. is not an absolute limit and is some cases dominance can be found below this threshold.

[5] Commission Notice on remedies acceptable under Council Regulation 4064/89/EEC and under Commission Regulation 447/98/EC, OJ 2.3.2001 C 68/3.

[6] On the face of it, the test appears to be stricter than in the US which only focus on effective competition and could allow a merger that create dominance provided competition law is deemed to be sufficient to deter any abuse or parties expressly commit not to abuse. As noted by Jenny, "*There is a built-in tendency in Europe for the merger control to lead, ceteris paribus, more frequently to prohibitions or to more extensive use of merger remedies*": F. JENNY (2002), *The Design and Implementation of Merger Remedies in High Tech Industries*, p. 12 available at: http://www.cerna.ensmp.fr/cerna_regulation/Prog/PastEvents.htm

[7] *Gencor*, T-102/96 [1999] ECR II-753, at paragraphs 316-320.

the Court of First Instance addressed this question in a very subtle way. It stated that that behavioural remedies should not always be deemed to be unacceptable as the categorisation between structural or behavioural remedies is immaterial and commitment which are *prima facie* behavioural could be accepted if they would be capable of preventing the emergence or the strengthening of a dominant position. Therefore, the bottom line is that even if the European test (and constraint of the choice of remedies) is strict, behavioural remedies could be acceptable provided they have some sort of structural effects.

The appropriate choice of remedies should follow the general principle of proportionality, i.e. must pursue a legitimate aim (not creation or strengthening of dominance) and the means employed must be both necessary and the least burdensome. This principle has several consequences. Firstly, the Commission should only intervene if a dominant position is at stake. Secondly, the Commission should try to find all possible remedies to clear the concentration. For example, if a structural remedy is not possible, it would be better to impose behavioural remedies than to prohibit the merger. Thirdly, the Commission should choose the remedies that minimise the costs of implementation by the undertakings, the costs of monitoring by the authorities and risks of the type 1 errors[8]. Therefore, in a number cases, behavioural remedies may be justified because structural remedies are not possible or bear a greater type 1 errors risks (as they are irreversible). This is particularly true for the ICT sector when the parties to a concentration propose to create a monopoly in a emerging platform market and the establishment of another platform is not possible in the short or medium term (or is even not desirable due for example to network effects), and where the future of the industry is so uncertain that type 1 errors risks can be very important. Nevertheless, as explained in Section 3, this conclusion is only valid within the limits of competition law, but if the scope of possible remedies is extended to sector-specific obligations, it would very often be more efficient to rely on the latter.

2. Review of some cases [9]

2.1. Joint ventures between incumbents to provide global telecoms services[10]

During mid-nineties, most of the European incumbents concluded several strategic alliances to provide global telecoms services to multinationals, and notified their

[8] A type 1 error consists of a regulatory intervention where none is required. A type 2 error consists of a failure to impose an obligation where one is justified.

[9] For a review of the cases, see: C.D. EHLERMANN and L. GOSLING - Ed (2000), *European Competition Law Annual 1998: Regulating Communications Markets*, Hart; J. FAULL & A. NIKPAY -Ed (1999), *The EC Law of Competition*, OUP, Chapter 11; L. GARZANITI (2000), *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, Sweet & Maxwell; P. LAROUCHE (2000), *Competition Law and Regulation in European Telecommunications*, Hart; P. ROTH-Ed (2001), *Bellamy and Child: European Community Law of Competition*, 5e Ed, Sweet & Maxwell, Chapter 14; J. TEMPLE LANG (1998), "Media, multimedia and European Community antitrust law", *Fordham Institute*, 377-448; H. UNGERER (1996), "EU Competition law in the telecommunications, media and information technology sectors", *Fordham Institute*, 465-519.

[10] M. PENA CASTELLOT (1995), "The application of competition rules in the Telecommunication sector: Strategic Alliances", *Competition Policy Newsletter 4*, 1-6; M. STYLIADOU (1997), "Applying EC competition law to alliances in the telecommunications sector", *Telecommunications Policy 21*, 47-58.

agreements to the European Commission under Article 81 (ex 85) of the EC Treaty in order to get a negative clearance or an exemption. In the three most important cases, the Commission considered that the agreements restrict competition, hence fall within the scope of Article 81(1). Nevertheless, as they permit new services to be brought more quickly, Commission exempted them under conditions. Those were dependent on the telecom regulatory framework in place in the country of the parties at the time of the decision, and aimed at alleviating any leveraging from the control of basic infrastructure to the newly emerging markets of global telecom services.

In *Concert*[11], BT and MCI notified in 1993 a joint venture to develop and market new international value added telecom services for large multinationals to be distributed by MCI in America and BT in the rest of the world, with additional provisions (acquisition by BT of 20 p.c. shareholding in MCI and a commitment by BT and MCI not to engage in the business of the other in its territory). The Commission exempted the joint venture for five years as Concert would face significant competition from strong players (AT&T, Atlas, Unisource and International Private Satellite Partners) and existing telecom regulation to which BT and MCI were subject in their own countries would prevent cross-subsidiation and discrimination in favour of the joint venture. It only requested modification of the clauses in the agreement concerning the MCI obligation not to compete with BT in EEA country and ensured that passive sales of MCI in EEA countries were permitted.

In *Atlas*[12], France Telecom and Deutsche Telekom notified in 1994 a joint venture to provide non reserved global telecom services to large users in Europe. The Commission exempted the joint venture for five years but imposed far more stringent conditions than under *Concert* due to the difference in the regulatory context (at the time of the notification, telecom and alternative infrastructures were not yet liberalised in France and Germany and telecom regulators were in their infancy). Firstly, France and Germany, which were the main shareholders of FT and DT, undertook to liberalise alternative infrastructures, making Atlas' competitors less dependant of the networks of its parents and the exemption was only valid from the date on which two or more infrastructure licences would have been granted (in effect 1 December 1996). Secondly, the parties agreed to postpone the transfer of their domestic data transmission networks to Atlas pending full liberalisation of French and German infrastructures (in effect 1 January 1998). Finally, the parties took several behavioural commitments because liberalisation and suppression of legal monopolies do not remove the control of basic infrastructure and the possibility to leverage it to the emerging market of global telecom services. FT and DT agreed not to discriminate in favour of Atlas for the provision of leased lines and data interconnection, not to pass customers confidential information between the parents and the joint venture, not to use income generated by any monopoly business to cross-subside the activities of

[11] Commission Decision of 27 July 1994, *Concert*, OJ 1994 L 223/36. This transaction was the first step of a process that led to the proposed merger between BT and MCI (see Commission Decision of 14 May 1997, M. 856, *BT/MCI (II)*, OJ 8.12.97 L 336/1) , that was abandoned due to the rejection of BT shareholders and successful take over bid on MCI by WorldCom (see Commission Decision of 8 July 1998, M. 1069, *WorldCom/MCI*, OJ 4.5.1999 L 116/1).

[12] Commission Decision of 17 July 1996, *Atlas*, OJ 19.9.1996 L 239/36. In parallel of this operation, Atlas and Sprint from the US notified another joint venture, Phoenix/Global One, which was an extension of Atlas services world-wide: Commission Decision of 17 July 1996, *Phoenix/Global One*, OJ 19.9.1996 L 239/57.

Atlas and not to bundle any of their services with the ones of Atlas. To ensure compliance, use of analytical system and separate accounts was also agreed.

In *Unisource*[13], Telia (the Swedish incumbent), PTT Telecom (now KPN, the Dutch incumbent) and Swiss Telecom notified in 1996 a joint venture where the parties combined their sales, marketing and services functions to provide a number of telecoms services (mobile, satellite, data and corporate voice) on a global basis. The Commission exempted the joint venture for five years after the parties took similar behavioural commitments than under *Atlas*: no discrimination and cross-subsidiation in favour of Unisource, no exchange of confidential information, no tying and use of separate analytical accounts. Following the reduction of Unisource's scope to valued added services to multinationals, the possibility of the parties to compete with the joint venture on that market, the increase in competition on the market and the increased regulatory safeguards in the Netherlands and Sweden, the Commission repealed all the obligations in 2001[14].

2.2. Mergers between incumbents

During these last three years, Telia from Sweden notified two different concentrations with its Nordic counterparts, that were the first complete merger between European incumbents. The Commission considered that these operations created or strengthened dominant position in several telecoms and media markets mainly for three reasons: overlapping activities, loss of potential competition, and possibility of leveraging the dominant position in the home country of one incumbent to increase market power in the home country of the other merging incumbent. Therefore, the Commission cleared the mergers under very stringent conditions: divestiture of any overlapping business, divestiture of cable TV in order to stimulate infrastructure competition, and third party access to telecom infrastructure (with additional conditions ensuring compliance) to stimulate service and infrastructure competition. It appears that most of the obligations imposed would not only maintain the level of competition but actually increase it, and indeed some of them were later taken over by sector-specific regulation on a more general basis. As regard to mobile operators, some important mergers also took place, but contrary to the fixed sector, Commission mainly imposed behavioural and not structural remedies.

In *Telia/Telenor*[15], the incumbents from Sweden and from Norway notified their merger in 1999. The Commission considered that it would strengthen the dominant position of the incumbents on several Swedish and Norwegian markets for telecoms services (fixed switch telephony, PABX distribution, mobile telephony, Internet access, and local telephone directories) and for television services (wholesale rights to content, content buying, satellite transponder capacity, technology for scrambling and unscrambling of TV signals, retail distribution of TV services). The Commission only

---

[13] Commission Decision of 29 October 1997, *Unisource*, OJ 20.11.1997 L 318/1. In parallel of this operation, Unisource and AT&T from the US notified another joint venture, Uniworld, which was an extension of Unisource services world-wide: Commission Decision of 29 October 1997, *Uniworld*, OJ 20.11.1997 L 318/24.

[14] Commission Decision of 29 December 2000, *Unisource (II)*, OJ 22.02.2001 L 52/30.

[15] Commission Decision of 13 October 1999, M. 1439, *Telia/Telenor*, OJ 9.2.2001 L 40/1. As a result of a disagreement between the parties, the transaction was subsequently abandoned.

approved the merger after the parties agreed to divest any overlapping telecoms interests (sale of the Swedish Telenor business and Norwegian Telia business, and sale of the shareholding in one of the Irish mobile operator). They also agreed to divest their cable TV interests in Sweden and Norway, going thus further than the sector-specific regulation which only requires that telecommunications networks and cable TV networks owned by a single operator are separate legal entities[16]. Moreover, the Swedish and Norwegian governments (which were the major shareholders of the merging parties) committed to implement local loop unbundling in their countries, obligation that was then imposed on 1 January 2001 on a more general basis in all Members States[17].

In *Telia/Sonera*[18], after the failure of its merger with Telenor, Telia notified in 2002 another concentration with Sonera of Finland. The Commission considered that it would strengthen the dominant position on three Finnish markets (mobile services international roaming and WLAN) due to the overlapping activities of the parties, and on the markets for fixed international calls, fixed termination, mobile services, international roaming and mobile termination, and business data communications in Sweden and Finland due to the possibility of leveraging their market power from the mobile and fixed markets in Finland and Sweden respectively. Therefore, the Commission only cleared the merger after the parties agreed to divest any overlapping business, i.e. mobile and WLAN activities of Telia in Finland. In order to ensure that no leveraging would take place, the parties had also to agree to divest cable TV in Sweden, ensure a legal separation between the operation of networks and services of their fixed and mobile activities in Sweden and in Finland, and a non discriminatory access to fixed and mobile termination for 3 years with a fast track dispute resolution procedure.

In *Vodafone/Mannesmann*[19], Vodafone of the UK notified its acquisition of Mannesmann of the Germany in 2000. The Commission considered that it would create a dominant position on the English and Belgian mobile services markets, due to the overlapping activities of the merging parties, and on emerging market for seamless pan-European mobile services to international customers, due to the footprint of the merging parties in most of the European countries and their ability to integrate their national mobile networks to develop pan-European services. Therefore, the Commission only cleared the merger after the parties agreed to divest any overlapping activities. They also took a 3 years behavioural commitment to give third party access on a non discriminatory basis to their integrated networks (wholesale services like interconnection, and roaming), with a fast track dispute resolution procedure.

---

[16] Commission Directive 1999/64/EC of 23 June 1999, amending Directive 90/388/EEC, OJ 10.7.1999 L 175/39.
[17] Regulation 2887/2000/EC of the European Parliament and of the Council of 18 December 2000 on unbundling of the local loop, OJ 30.12.2000.
[18] Commission Decision of 10 July 2002, *Telia/Sonera*, M. 2803.
[19] Commission Decision of 12 April 2000, *Vodafone/Mannesmann*, M. 1795.

2.3. Joint ventures to provide pay TV services or advanced interactive digital TV services[20]

During the nineties, some European media companies, sometimes joined by network or services companies, set up joint ventures to enter into emerging TV markets, in a first stage pay TV and related technical services (like the provision of set top boxes), and in a second stage interactive TV services. Dealing with these agreements, the Commission has been extremely cautious (and interventionist) as it was concerned that the parties would leverage their market power from the traditional content or infrastructure markets to the new TV services, foreclose entry on these markets and mutually reinforce their dominant positions. Therefore, the Commission either prohibited joint ventures or imposed stringent structural and behavioural remedies. It was stricter than in telecom for several reasons: the geographical dimension of most markets are still national for cultural reasons, regulation and monopoly are still prevailing, and important objectives of cultural diversity and pluralism are at stake.

In *MSG Media Service*[21], Bertelsmann and Kirch, two big German media group offering pay TV and holding important content rights, and Deutsche Telekom, still enjoying a legal monopoly for telecom infrastructure and owning the vast majority of German cable TV networks, set up in 1993 a joint venture to provide in Germany technical, business and administrative handling of mainly pay-TV and other communications services. The Commission considered that the concentration would create or strengthen a dominant position on three related markets. Firstly a dominant position would be created on the market for administrative and technical services for pay TV because MSG would be the first supplier of such services and the parties could leverage their market power from the content, infrastructure and pay-TV markets to foreclose any entry by third party. Subsequently, the dominant position would be strengthened on the markets for cable and pay-TV as the parties controlling technical services (hence enjoying a sort of gate keeper function) could impede any entry on related markets. In other words, the Commission was concerned with mutually reinforcing market power where the parties would use their dominant position in established markets to acquire market power in new markets and, in turn, use this market power to secure their previous dominance. The Commission rejected the undertakings proposed by the parties (like adoption by MSG of a decoder base with common interface, non-discriminatory policy towards other pay-TV suppliers, commitment by MSG not to disclose to its parents any competitive information gathered about competing pay-TV suppliers) because they were deemed to be insufficient or merely behavioural, and consequently prohibited the merger.

In the two parallel cases *Bertelsmann/Kirch/Premiere* and *Deutsche Telekom/Beta Research*[22], the same parties as in MSG joined their forces in 1997 in the German markets for pay-TV administrative and technical services and also for pay-TV

---

[20] L. MC CALLUM (1999) "EC Competition Law and Digital Pay Television", *Competition Policy Newsletter 1,*4-16.

[21] Commission Decision of 9 November 1994, *MSG Media Service*, M. 469, OJ 31.12.1994, L 364/1.

[22] Commission Decision of 27 May 1998, *Bertelsmann/Kirch/Premiere*, M. 993, OJ 27.02.1999 L 53/1 and Commission Decision of 27 May 1998, *Deutsche Telekom/Beta Research*, M. 1027, OJ 27.02.1999 L 53/31. For a critical appraisal of these decisions: P.D. CAMESACA (2000) "Mayday or Heyday? Dynamic Competition Meets Media Ownership Rules after Première", *European Competition Law Review 2*, 76-93.

services. Firstly, Bertelsmann and Kirch were to acquire the joint control of Premiere, the leading German pay TV channel and Kirch was abandoning its own pay TV operation; and secondly, Bertelsmann, Kirch and DT were to acquire control of Beta Research, active in access technology on the basis of the d-box decoder. Following the same reasoning than in MSG, the Commission considered that the concentration would create or strengthen a dominant position in the markets for pay-TV technical services, cable networks and pay-TV. The parties proposed several remedies, like third-party access to content's rights, unbundling of the offer of the various channels, cooperation with cable operators for the distribution of Premiere channels, compulsory licence to BetaReserach's access technology, but there were judged insufficient by the Commission. While Kirch and DT were willing to further to satisfy the Commission by ceding programming rights and allowing private cable operators to independently market Premiere in combinaison with their own channels, Bertelsmann was not, and therefore, the operation was prohibited.

In *BiB/Open case*[23], BSkyB (the dominant UK pay TV operator), BT (the dominant telecom operator owing most of the copper loops and some cable TV), Midlands (now HSBC, a important banking institution) and Matsushita (a producer of electronic equipment and technology) were setting up a joint venture, British Interactive Broadcasting (later renamed Open) in 1999. The joint venture aimed to provide in the U.K. digital interactive TV services (like information services, home shopping, home banking or walled garden Internet access) by means of digital satellite broadcasting with a telecommunications return path, and the related technical services with a set-top box to be provided to consumers on a subsided basis. The Commission raised several concerns. Firstly, the joint venture would remove the incentive of BT to upgrade its cable TV or copper pairs in order to enable them to provide interactive services. Secondly, the joint venture would be dominant (if not monopolist) on the emerging set top boxes market and could maintain this position through leverage from the position of its parents on the interactive TV services and pay TV markets. In turn, this control on the set top boxes would allow the parties to foreclose any entry on the newly emerging market of interactive TV services. Finally, the market power on pay TV market could be enhanced by the power on interactive services by bundling both products together. Again, the Commission faced the risk of mutually reinforcing dominant position and foreclosure of emerging markets.

As the joint venture allowed new services to be provided more quickly, the Commission exempted it for seven years but imposed a package of structural and behavioural remedies, some of which were based on sector-specific regulation[24]. To address the first concern, BT undertook not to extend its operations in cable TV and indeed divest its existing cable interests. Moreover, the Commission would monitor closely whether the BT's participation was not impeding the supply of broadband service on telecom infrastructure and could require, if necessary for BT to choose between its continued participation in Open and the provision of unbundled access to its local loop. To address the second concern, the Commission imposed an open

[23] Commission Decision of 15 September 1999, *British Interactive Broadcasting/Open*, OJ 6.12.1999 L 312/1. For a commentary of the Decision, see: A. FONT GALARZA, "The British Interactive Broadcasting Decision and the application of competition rules to the new digital interactive television services", *Competition Policy Newsletter 1999/3*, 7-15.

[24] See in particular Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals.

access to the set top boxes (including simulcrypt agreement and supplying of technical information) and a legal separation between Open's activities with respect to the boxes and those related to interactive services, and the possibility of BSkyB channels to include other interactive services than the one of Open. Finally to address the third concern, the parties agreed that Open's customers would not be forced to subscribe to BSkyB as well.

In *BSkyB/Kirch Pay TV* case[25], BSkyB decided in 2000 to invest and acquire joint control of Kirch Pay TV which offered pay TV (and the related technical services) and was planning to offer digital interactive services (and the related technical services). Following a similar reasoning than in *BiB/Open*, the Commission considered that the operation would strengthen the dominance of Kirch Pay TV on the pay-TV market because of the financial influx of BSkyB and the future market power on interactive services. Moreover, it would create a dominant position for digital interactive TV services, as Kirch would benefit from the experience of BSkyB (and its affiliated Open) and could foreclose any entry due to its control of technical access services and pay TV markets. Therefore, to secure entry on interactive services market, the Commission required compulsory third party access to technical services (via access to API, use of open standardised API, simulcrypt, and compulsory licence) and to pay TV services, with arbitration process. Moreover, Kirch undertook not to apply for further digital cable capacity.

2.4. Mergers between media and Internet companies in a convergence world[26]

At the height of the new economy paradigm and the great expectation brought by convergence whereby every content and services could be provided on every infrastructure, several media groups merged with Internet companies to control all the value chain from content production to the final distribution to the consumers. Reviewing these concentration, the Commission was concerned that the vertically integrated group would leverage their market power on the content side to foreclose entry on the emerging Internet distribution markets, and then mutually reinforce their positions on these two type of markets. Therefore, it required to divest some content operation or ensure third party access this content.

In *AOL/Time Warner* case[27], Time Warner (one of the biggest media companies with interest in music, film, magazine, cable and television networks) and AOL (the leading Internet access provider and linked in Europe with Bertelsmann) notified their merger in 2000. The Commission considered that the concentration would create a dominance on the new markets for Internet delivery on-line music (including digital downloads and streaming) and music player software and that the parties would be able to impose their proprietary technology because of the possibility to leverage their dominant position in the music publishing rights and Internet know how and

---

[25] Commission Decision of 21 March 2000, *BSkyB/Kirch Pay TV*, JV. 37.

[26] G.B. ABBAMONTE and V. RABASSA (2001) "Foreclosure and Vertical Mergers - The Commission's Review of Vertical effects in the last wave of media and Internet mergers", *European Competition Law Review 6*, 214-226.

[27] Commission Decision of 11 October 2000, *AOL/Time Warner*, M. 1845.

community[28]. In order to deal with these concerns, the Commission imposed that the parties would severe, under the control of an independent compliance monitor, their links with Bertelsmann, one of the leading content rights owners.

In *Vivendi/Seagram* case[29], Seagram (which controlled Universal, hence one of the most important films and music producer) notified in 2000 a merger with Vivendi (a media and telecoms company active in pay TV with Canal+, mobile telephony with Cegetel, and multi-access Internet portal with Vizzavi). The Commission was concerned that the concentration would create or strengthen the dominant position of Canal+ in the pay TV markets of several European countries, as the newly integrated group could leverage its position from the films content rights. Moreover, the group could acquire a dominant position on the emerging markets for Internet portals and for online music distribution, by leveraging its position from the music content rights. To meet the first concern, the parties agreed to provide access to Universal's films on a non discriminatory basis, to limit, for 5 years, up to 50% what Canal+ may get, and to severe the links with Fox. To meet the second concern, the parties agreed to provide, for 5 years, access to Universal's music content on a non-discriminatory basis, with an arbitration procedure.

3. Analysis and comments

3.1. General approach of the Commission

Faced with mergers or joint ventures in the ICT sector, the approach of the European Commission has been fairly consistent, and the remedies imposed aim at dealing with the horizontal and vertical effects of the operation, so that the operation would not create or strengthen a dominant position. The anti-competitive horizontal effects arise when the sum of the overlapping activities of the parties attained the dominance level. In this case, the Commission requires divestiture of all overlapping business.

The anti-competitive vertical effects are more complex and usually create an vicious circle of self re-enforcing market power. Firstly, the parties, joining their forces to enter an emerging market, foreclose any entry by leveraging their market power from the traditional content or infrastructure markets. Secondly, the parties reinforce their power in the traditional market, by leveraging from their secured position in the emerging market.

This vicious circle is particularly worrying in ICT sector for the following three reasons[30]. Firstly, a lot of markets are only emerging and their development should not be controlled by a particular company but be left open. Secondly these markets are evolving very quickly and any anti-competitive behaviours could have rapid and irreversible effects. Thirdly, most of the markets are characterised by networks

[28] The Commission also examine the market for broadband content, Internet dial-up access, Internet broadband access and concluded that no dominant position was created or strengthened.
[29] Commission Decision of 13 October 2000, *Vivendi/Canal+/Seagram*, M. 2050.
[30] See *inter alia* the speech *Competition and Information Technologies* of 18.09.2000 by the Competition Commissioner M. MONTI: "*Competition rules are all the more necessary in the area of the Internet ... The rapid growth of Internet may unduly reward first movers onto these markets, closing down subsequent competition, and it is this that we should be concerned about.*"

effects[31], which arise when the value of the network to its users increase with the aggregate number of users connected to it. These demand side economies of scale generate positive feedback effects as more join a network, ultimately tipping the markets so that one network dominates. In turn, that could lead to path dependence which can see early developers (first mover advantage) becoming dominant by capturing new growth (bandwagon affect) so that the economy may adopt an inefficient solution.

To alleviate the vicious circle, the Commission imposed structural remedies that stimulate infrastructure competition such that parties would lose their dominant position on the traditional markets and their ability to leverage and foreclose entry on emerging markets. Therefore, the Commission imposed cable divestiture, hoping that the new owner will upgrade cable and compete with the other delivery platforms, or the unbundling of the local loop, which to some extent can be seen as transitory step towards infrastructure competition. As the effects of these measures could only happen in the long run, the Commission complemented them with behavioural remedies aiming at giving access to key facilities: content, fixed telecom infrastructure, in particular the local loop, mobile infrastructure, technical services for pay TV or interactive TV services. In the majority of the decisions, access should be given on non discriminatory terms, but not necessarily on a cost based prices, and in the most recent decisions, an fast track dispute resolution process was provided to efficiently ensure that obligations will be complied with.

Therefore the priority of the Commission has always been to maintain markets open, particularly the emerging ones. Surprisingly, the creation of pan-European operators was not considered to be an equal priority. This approach may be reasonable as most of the markets are still national in scope and a pan-European competition between trans-national operators should not be expected in the short run, yet it is regrettable that the Commission did not encourage more actively the establishment of these operators.

Given the extent of the remedies that have been imposed, in particular the behavioural ones, their relevance may be questioned. Was there a risk of anti-competitive vertical leveraging ? If it was the case, was there a need for a competition authority to intervene *ex-ante*, or would it have been more appropriate to rely on *ex-post* competition law and sector-specific regulation. These two questions are addressed in turn in the following sections.

3.2. Vertical foreclosure in mergers and joint ventures

The effects of vertical mergers and joint ventures, and the incentives to foreclose, have been heavily debated and thinking has evolved in the economic and legal communities[32]. In the sixties, the US antitrust authorities were very suspicious

[31] N. ECONOMIDES (1996) "The Economics of networks", *Int. Jour. Ind. Org. 14*, 673-699; S.J. LIEBOWITZ and S.E. MARGOLIS (1999) "Network externalities" in P. NEWMAN, *The New Palgrave Dictionary on Economics and the Law;* C. SHAPIRO and H.R. VARIAN (1999), *Information Rules: A Strategic Guide to the Network Economy*, Harvard Business School Press.
[32] S.C. SALOP (1999), "Vertical Mergers and Monopoly Leverage", in P. NEWMAN, *The New Palgrave Dictionary on Economics and the Law*, 669-673.

towards vertical integration as parties could have incentives to leverage their market power from one market to vertically related markets where they would foreclose entry . In the seventies, the Chicago School argued that vertical integration is in general efficient as there is no incentive to leverage market power. Indeed, if a company enjoys monopoly on one market, there is only one rent to be gained and it could be reaped on the monopolised market without having to leverage. This thinking received some echo by the US authorities which became more lenient towards vertical integration. In the nineties, the new industrial economists[33] refined the Chicago analysis and shows that under a number of hypothesis, that are not so uncommon in the real world, companies could have incentives to leverage because they could not reap their monopoly profit on the dominated market (for example, if the monopolist can not commit that it will only sell monopoly quantity because contracts are secrets or may be privately renegotiated, or if the prices on the dominated markets are regulated). Again, this new thinking got some echo by the antitrust authorities. Whatever the evolution of the thinking was, it appears that leverage has always be more problematic for EC authorities than for that American counterparts[34] and for lawyers than for economists.

Economic literature has thus shown that leverage should be based on a monopoly as it is just one mean to reap the associated rent. Hence, instead of focusing on the leveraged markets as it used to do, the Commission should first and foremost focus on the supposed monopolised market and strictly prove that the parties enjoy a dominant position. Only when monopoly has been proved, the Commission could turn to leverage and explain why monopoly rent could not be reaped on the monopolised market and leverage would take place. If there is any doubt on the leverage incentives, the authorities should better refrain from intervening *ex-ante*, having always to intervene *ex-post* if an abuse is proven. When these two steps have been passed and remedies are thus justified, their choice should aim at solving the monopoly problem more than the leverage which is only one of its effects. For example, when imposing an compulsory access, it may be more appropriate to impose cost based access than a mere non-discriminatory one.

Therefore, the Commission practice in the ICT sector appears to be too stringent, or at least insufficiently motivated[35]. Instead of focusing on the emerging markets (like global telecom services, interactive TV services, Internet distribution platforms) and their risks of foreclosure, the Commission should have based its analysis on the markets where access obligations were imposed (content, fixed and mobile networks)

---

[33] O. HART and J. TIROLE (1990), "Vertical Integration and Market Foreclosure", *Brookings Paper, Microeconomics*, 205-286; P. REY and J. TIROLE (1996), *A Primer on Foreclosure*, Mimeo.

[34] J. ALONSO BRIONES (1998) "Vertical aspects of mergers, joint ventures and strategic alliances", *Fordham Institute*, 129-145; B.E. AMORY (1998) "Vertical aspects of mergers, joint ventures and strategic alliances", *Fordham Institute*, 147-152; M.J. REYNOLDS (1998) "Mergers and joint ventures: The vertical dimension", *Fordham Institute*, 153-159. In European law, see also: Commission Regulation 2970/1999/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 29.12.1999 L 336/21 and Commission Guidelines on Vertical Restraints, OJ 13.10.2000 C 291/1. On the Guidelines see: S.C. SALOP (2001) "Analysis of foreclosure in the EC Guidelines on vertical restraints", *Fordham Institute*, 177-200.

[35] See also: C. VELJANOVSKI (1999) , "Competitive Regulation of Digital Pay TV", in J. Grayson-Ed, *European Economics and Law*, Palladian, 54-85; C. VELJANOVSKI (2001) "E.C. Antitrust in the New Economy: Is the European Commission's View of the Network Economy Right?", *European Competition Law Review 4*, 115-121.

by showing that were enduringly monopolised. For example, in *Vodafone/Mannesmann*, the control of the merging parties on the networks covering all Europe give them only a temporary advantage and not an lasting monopoly justifying the imposed access obligations[36]. Indeed, in practice, some other pan-European offer were quickly made by other operators.

3.3. Merger remedies and sector-specific regulation

The relationship between merger remedies (and in a broader sense competition law), and telecom sector specific regulation is complex one, but both instruments have always be complementary in the European context.

On one hand, remedies have been used to shape the future of regulation. Sometimes, they have been used to help the adoption of sector-specific legislation by the Member States. For example, the *Atlas* case encouraged France and Germany to pursue and support the liberalisation program initiated by the Commission in 1987[37]. Similarly, remedies can announce or pave the way of the future regulation. This was the case in *Telia/Telenor* where Sweden and Norway commit to implement the unbundling of the local loop, which was then imposed under specific regulation two years later. That could also be the case with *Telia/Sonera* if future regulation will impose that wholesale networks and retail services should be operated on a separate basis. Finally, remedies could also go further than the regulation but pursue the same objective. For example, the cable divestiture imposed in *Telia/Telenor*, in *Telia/Sonera* or in *BiB/Open* go one step further than the cable directive which just imposes separate legal entities.

On the other hand, regulation has been taken into account when deciding the appropriate remedies. If the behaviours of the parties to a joint venture are strictly controlled by a sector specific authority, there is less risk of abuse and leverage, hence remedies could be less intrusive. For example, the remedies imposed in *Concert* were less important than those in *Atlas* or *Unisourc*e because BT and AT&T were under

---

[36] B. BISHOP and C. CAFFARA (2001), "Merger control in 'new markets'", *European Competition Law Review 1*, 31-33.

[37] As noted by one senior Commission official commenting the *Atlas* decision: "*A major factor in the success of the liberalisation programme was the screening of the major strategic alliances which started to take shape during the mid-nineties in anticipation of liberalisation and which commanded substantial Member States interests and attention (…). The basic situation was that in the existing pre-1998 market environment (with monopolies still persisting) these preparatory moves by the large incumbents would not have qualified for exemption under Article 81(3), given the potential of leveraging existing monopoly power into the new markets shaped by liberalisation and technological development. However, instead of taking a static approach, a dynamic solution was chosen. The Member States concerned were encouraged to change market conditions (by accelerating liberalisation), in order to make a clearing of the alliances (with conditions) possible. The dynamics of the process thus created a parallelism of interest (in accelerating liberalisation) between incumbents (in order to have their alliances cleared), Member States (in order to allow the development of the potential of their national markets) and the Commission (in order not to be obliged to block new services and new technologies). This was probably the turning point in the liberalisation exercise. It created substantial political impetus for rapid implementation of the legislative liberalisation framework by key Member States, both in Council and at national level for preparing national legislation in time and creating a national infrastructure of National Regulatory Authorities.*": H. UNGERER (2001) *Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector*, p. 7-8, available at: http://europa.eu.int/comm/competition/speeches/

strict control of Oftel and the FCC respectively[38]. Similarly, the Commission lifted in 2001 the obligations imposed in *Unisource*, partly because, since the initial decision, telecoms have been fully liberalised and each Member State has national regulatory authority with wide power to intervene[39].

We may then question the efficiency and the legitimacy of these imposed competition law remedies, particularly in comparison with those that may be imposed under sector specific regulation. Competition law remedies appear to be efficient (hence justified) when the competitive structure of the market is satisfactory or when this structure can be changed rapidly and easily. On the other hand, when the structure of the market is not satisfactory and can not be changed easily, there is a need for on-going intervention, hence sector-specific regulation are more efficient. Therefore, when an intervention is justified because of an enduring monopoly and the possible risk of leveraging, obligations imposed under sector-specific regulation appear to be more efficient and more legitimate than merger remedies[40].

Nevertheless, an European competition authority could only hand off if two conditions are met: sector specific obligations are available and will be applicable in a consistent way across Europe. Otherwise, it is better, even if it is a second best, to impose merger remedies than do nothing at all. The approach of the Commission in the ICT sector therefore seems reasonable because, during the nineties, the two mentioned conditions were not always fulfilled and indeed the Commission relied on sector specific regulation when available. For example, at the time of *Atlas* and *Unisource* decisions, infrastructure were not liberalised and compulsory access to the data network were not provided, hence imposing access was appropriate. Similarly, at the time of the *Telia/Telenor* decisions, unbundling of the local loop was not yet imposed under sector-specific regulation.

But the European Union has a brand new regulatory framework[41] that will be applicable in July 2003. The scope of the framework is very broad and covers all electronic communications networks, services and associated facilities, for example fixed and mobile telecoms, satellite, cable TV, conditional access systems and application program interface for digital TV[42]. Sector-specific obligations (including compulsory access, non-discrimination, price control, advanced and public reference

---

[38] Paragraph 57 of the *Concert* Decision.

[39] Paragraph 9 of the *Unisource II* Decision

[40] In addition, some pointed out that competition authorities do not have the legitimate mandate to impose far reaching remedies that really shape the future of an industry. These obligations needed to be discussed openly and not by some involved parties in the context of a specific problem, designed by a experienced body and not an horizontal authorities, and imposed on a general basis and not on case by case: P. LAROUCHE (2000), *Competition Law and Regulation in European Telecommunications*, Hart, pp. 353-359.

[41] See the four main Directives: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ 24.4.2002, L 108/33; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and services, OJ 24.4.2002, L 108/7; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ 24.4.2002, L 108/51. On the framework, see: C. HOCEPIED (2002) *The new EU regulatory Framework for Electronic communications: From sector specific regulation to Competition Law*, available at http://europa.eu.int/comm/competition/speeches/

[42] Article 2 of the Framework Directive.

offer, separate accounts[43]) could be imposed by National Regulatory Authorities on every market within the scope where one or more operator enjoy a dominant position and competition law remedies would be less efficient than sector-specific obligations[44]. This last criterion is the key, making the new framework extremely flexible and permitting that competitive problems are addressed by the most efficient regulation, being either competition or sector-specific law. As I showed that remedies, supposedly dealing with leveraging are only justified with enduring monopolies[45], and that these remedies are more efficiently dealt with sector-specific regulation, it follows that the criterion should at least cover markets with enduring monopolies[46].

Therefore the first condition for abstention of the competition authorities (i.e. availability of sector-specific remedies) will always be fulfilled in the future. We should thus expect, less behavioural remedies addressing leverage issues and more reliance on sector-specific regulation. Unfortunately, we could not expect no behavioural remedies at all as the second abstention condition (i.e. consistent application across Europe is not met. The new framework does not provide for an European telecom regulator, but only an enhanced cooperation between NRAs and a veto power of the Commission on some NRAs decisions[47]. Therefore increased cooperation between the Commission, and in particular the department responsible for merger control, and the NRAs are of the utmost importance, so that the Commission could rely with confidence on the NRAs[48]. This evolution would probably happen in the future due to two combined effects: on one hand, the intensive use of competition law methodology in the sector-specific regulation and the consequent increased cooperation between national competition authorities and NRAs, and on the other hand, the enhanced cooperation of the Commission with the NRAs (in the context of new regulatory framework) and with the national competition authorities (in the context of the decentralisation of European competition law[49]).

3.4. Conclusion

[43] Articles 8-13 Access Directive and 16-19 Universal Service Directive.

[44] Articles 14 to 16 of the Framework Directive and Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ 11.7.2002, C 165/6.

[45] In this paper, I limit myself to markets having a monopoly structure and suggest they are better regulated by sector-specific regulation than merger remedies. I do not deal with markets having a tight oligopoly structure where actors have incentive to tacitly collude. For these markets, there is a case for sector-specific regulation as the natural state of the market is not a competitive one, but less strong than for monopoly markets because structural remedies can be imposed to remove the tight oligopoly (for example, by creating asymmetries between the firms).

[46] This approach is proposed by the Commission in: Draft Recommendation of 17 June 2002 on relevant product and services markets with the electronic communications sector susceptible of ex-ante regulation available at: http://europa.eu.int/information_society/topics/telecoms/regulatory/publiconsult/index_en.htm

[47] Articles 6 and 7 Framework Directive; Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ 30.7.2002 L 2000/38.

[48] As suggested in M. MOTTA, M. POLO, H. VASCONCELOS (2002), *Merger Remedies in the European Union: An Overview,* p. 15. available at: http://www.cerna.ensmp.fr/cerna_regulation/Prog/PastEvents.htm

[49] See Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations 1017/68/EEC, 4056/86/EEC and 3975/87/EC, OJ 19.12.2000 C 365E/284.

We can now check the remedies imposed in the major Commission decisions in the ICT sector against the proportionality principle developed in section 1. Firstly, the Commission should only intervene when dominant position is at stake. It appears that this rule has not been adequately proven due to a lack of attention to the monopolised markets and that some remedies were imposed without necessity. Secondly, the Commission should try every remedy, even behavioural, to clear the merger . This rule appears to have been respected. Thirdly, remedies should minimise its costs. This rule appears to have been respected within the limit of competition law and even when extended to sector-specific obligations due to the current limited availability of these obligations. But in the future, with the new and flexible regulatory framework, this rule would imply less merger remedies.

We can conclude with two principles to be applied by the Commission. Firstly, behavioural remedies dealing with leverage issues are only justified when there is an enduring monopoly (due to economies of scale either on the demand side or on the supply side), no matter how (by leverage or otherwise) the monopoly rent can be reaped. Secondly, intervention in these cases is often more efficiently done by sector-specific regulation than merger remedies, which calls for an enhanced cooperation between the Commission and the NRAs.