European Commission
Directorate-General IV - Competition
Information, Communication, and Multimedia
Telecommunications, Posts,
Information Society Coordination.

IV/ C1/D / 1039 (97)

Report to the European Commission (DG IV) - June 1997

Study on the Scope of the Legal Instruments under EC Competition Law available to the European Commission to implement the results of the on-going review of certain situations in the Telecommunications and Cable-TV sectors

This report was prepared by Coudert, International Lawyers (Brussels Office) in execution of an assignment under Consultancy Frame Contract IV/96/1178/PSE/02 as amended. The views presented in this report are those of the study team and do not represent or commit the European Commission in any way.

Table of Contents

General introduction

The present study is a preparatory and background study for the European Commission on legal questions related to the Commission's review of issues related to the telecommunications and the cable TV sectors as mandated by the Cable TV Directive and the Full Competition Directive.[1]

The Cable TV Directive and the Full Competition Directive mandate the European Commission to carry out, by 1 January 1998, an overall assessment of certain situations in the telecommunications and cable TV sectors, namely: the impact on the aims of the directives of the situation where a single operator provides both telecommunications and cable TV networks and services[2] and the situation with regard to remaining restrictions on the use of public telecommunications networks for the provision of cable television capacity[3].

The purpose of this study is to examine the scope of two legal instruments, which are available to the European Commission under the competition rules set out in the EC Treaty, in order to implement the results of its overall assessments in accordance with the provisions referred to above. On the one hand, it is examined to what extent Article 86 EC as applied to individual undertakings can be used to implement the said results. On the other hand, the same analysis is made for Article 90 EC which imposes obligations on the Member States and provides for specific powers of the European Commission.

The study contains two main parts. In Part I, a general background study is made of the two legal instruments of EC competition law mentioned in the preceding paragraph. Part II of the study builds on the findings and conclusions of Part I and examines the ways in which Articles 86 and 90 EC could be used as legal instruments in the context of the review conducted by the Commission of the telecommunications and cable TV sectors. In Part II, a graduated approach is followed describing the

---

[1] Throughout the study, the following references will be used for the liberalization directives adopted by the Commission pursuant to Article 90(3) EC: Commission Directive 88/723/EEC of 16 May 1988, competition in the markets in telecommunications terminal equipment, O.J. 1988, L 131/73 ("Terminal Equipment Directive"); Commission Directive 90/388/EEC of 28 June 1990, competition in the markets for telecommunications services, O.J. 1990, L 192/10 ("Telecommunications Services Directive"), as amended by Commission Directives 94/46/EC of 13 October 1994, satellite communications, O.J. 1994, L 268/15 ("Satellite Services Directive"), 95/15/EC of 18 October 1995, abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, O.J. 1995, L 256/49 ("Cable TV Directive"), 96/2/EC of 16 January 1996, mobile and personal communications, O.J. 1996, L 20/59 ("Mobile Services Directive") and 96/19/EC, full competition in telecommunications markets, O.J. 1996, L 74/13 ("Full Competition Directive").

[2] See Article 2 of the Cable TV Directive.

[3] See point 9 of the Full Competition Directive.

different degrees of intervention which would be allowed under the said provisions of EC competition law.

The present study examines the scope of legal instruments and does not purport to examine specific issues related to the current and anticipated evolution of the markets concerned or to any other technological or other developments in these markets. In particular, it does not deal at any length with the question of the definition of the relevant markets which is one of the starting points of any competition law analysis. On all of these issues, the study needs to be complemented by and read together with specific economic theory and analysis which the Commission was in the process of conducting at the time of writing of the present study. For this reason, it should be borne in mind when reading or using the present study that it is based on a number of assumptions which are sometimes expressed in an explicit manner in the text but which may also be implicit.

Executive summary

The present study examines the scope of the legal instruments under EC competition law available to the European Commission to implement the results of the ongoing review of certain situations in the telecommunications and cable TV sectors which is mandated by the Cable TV Directive and the Full Competition Directive. More particularly, it examines the scope of Articles 86 and 90 EC as they could be applied by the European Commission (i) to a single operator which provides both telecommunications and cable TV networks and services and (ii) to remaining restrictions on the use of public telecommunications networks for the provision of cable television capacity.

Part I of the study provides, following the existing case law and precedents, a background study of the scope of Articles 86 and 90 EC and the powers of the Commission under the said provisions. In Part II of the study the findings resulting from that background study are applied to the specific situations in the telecommunications and cable TV sectors which are the subject of the Commission's ongoing process of review.

Article 86 EC applies to individual undertakings which hold a dominant position. It applies *a fortiori* to an undertaking which holds a double dominant position over both telecommunications and cable TV infrastructure.

Although it has consistently been held that Article 86 EC does not prohibit market dominance as such but the abuse of such market dominance, the interpretation of the concept of "abuse" has gradually expanded its scope to encompass virtually any behaviour which strengthens the dominance, including not only the "direct" abusive exploitation of suppliers, customers and end-users but also conduct which only indirectly prejudices consumers by impairing the effective competitive structure. The case law of the Court of Justice makes clear that undertakings such as those with a double dominant position have a "special responsibility" not to allow their conduct to impair genuine undistorted competition.

In particular, those undertakings cannot leverage their dominance into secondary markets, impede the emergence of new services, or strengthen their dominance through acquisitions and other types of (cooperative) transactions involving competitors or undertakings active in upstream or downstream markets. In addition, the notion of "abusive conduct" is interpreted in a broad manner as covering positive actions (for example, the granting of fidelity rebates or the implementation of tying practices), negative actions (for example, a refusal to supply or provide access) as well as failures to act (for example, failing to meet market demand or to develop new technologies or to implement technological innovations). The study provides a number of examples of how these principles can be applied by the Commission to the conduct of a dominant undertaking with a double dominant position and how they impose constraints on the

undertaking's pricing, marketing, investment, innovation, expansion and access policies.

It is submitted that the existing case law contains already a number of arguments which could be developed further by the Commission in order to compel undertakings, with the double dominant position described above, to take certain pro-active steps to eliminate anti-competitive (structural) circumstances. In particular, under the case law of the Court on "automatic abuses" (developed so far under a combined application of Articles 90 and 86 EC) and on unlawful extensions of a dominant position (used both under Article 86 EC and under Article 90 in conjunction with Article 86 EC), in combination with the account which is taken under competition law of evolutions in market circumstances and regulatory frameworks, the Commission could envisage qualifying as abusive a number of situations which are discussed in a graduated approach in the study.

These situations include, in particular, the failure of the dominant undertaking to implement adequate separate accounts and appropriate cost allocation systems, which failure would make it impossible both for the undertaking itself and for the Commission to ensure that Article 86 EC is not infringed and would impede an adequate judicial review. In the context of the existing case law and practice, more far reaching structural solutions could also be constructed including an obligation on the dominant undertaking to proceed with a structural separation between the cable TV and telecommunications activities over which it is dominant as well as an obligation on the dominant undertaking to divest certain of those activities. Such a "structural" approach under Article 86 would also be consistent with the evolution which has occurred in the Commission's own administrative practice under Article 85 EC and the Merger Control Regulation, as shown by its tendency towards increased emphasis on structural market solutions to situations which risk foreclosing competition and the need to ensure a sufficient degree of openness of markets. The precedents and technical rules developed in that administrative practice can also be used as practical guidance for the implementation of the structural measures described above.

As far as the scope of the Commission's powers to impose a remedy for infringements of the competition rules is concerned, specific attention is given to the principle of proportionality which should be a principal guideline in any action under the competition rules to be undertaken in implementing the results of the ongoing process of review of situations in the cable TV and telecommunications sectors.

Pursuant to **Article 90(3) EC**, the Commission has the power to adopt directives and decisions requiring Member States to comply with their obligation under Article 90(1) EC not to enact or maintain in force measures contrary to the Treaty, in particular Article 86 EC, in respect of undertakings to which Member States grant special or exclusive rights and public undertakings. These provisions are the principal legal basis for the power of the Commission which it has used to adopt directives aimed at liberalizing competition in the telecommunications sector and decisions aimed

at removing distortions of competition introduced by individual Member States in newly liberalized telecommunications markets. The latter directives imply that there is still scope for further Commission action under Article 90(3) EC, in particular to ensure the effectiveness of the existing directives already adopted by the Commission under this provision and to ensure that Member States do not enact or maintain in force any measure which results in the *de facto* continuation of the special and exclusive rights which have already been abolished.

It is submitted that the Commission would remain within the line of reasoning it has already applied in the existing Article 90(3) EC directives if it adopts a new directive in which it concludes, on the basis of economic and other evidence, that the maintenance in force by some Member States of restrictions preventing the use of telecommunications infrastructure for the provision of cable TV services, in particular through the continuation of special or exclusive rights for the provision of cable TV services, violates Articles 90(1), 3(g) and 86 of the Treaty. Based on the referenced line of reasoning, the Commission could base this conclusion on the "equality of opportunity" principle (recognized by the Court of Justice, in particular, in the context of the Terminal Equipment Directive) and on the doctrine of "the automatic abuse of a dominant position" as applied in the Cable TV and Full Competition Directives and as recognized in the case law. In particular, the Commission could argue that the maintenance of the foregoing rights and restrictions compels or induces the cable TV operator(s) to abuse the dominant position resulting from the special or exclusive rights, *inter alia*, by limiting the emergence of new audio-visual-telecommunications applications and multimedia services and holding back technical progress.

In addition, regarding an undertaking holding double dominant positions in telecommunications and cable TV network infrastructures in a given Member State, it is submitted that the Commission could develop a line of reasoning derived from its reasoning in the existing Article 90(3) directives. Under this reasoning, it can be argued that the elimination of the restrictions on the use of cable TV infrastructure for the provision of telecommunications services, in combination with technological changes leading to the convergence of the telecommunications and media sectors, resulted in the strengthening of the dominant position of the operator concerned in the telecommunications market, by making it more difficult for new entrants to enter this market, and thereby also resulted in the *de facto* continuation of this operator's exclusive rights over telecommunications infrastructures and services. This would be in direct conflict with the objectives pursued by the existing Commission directives.

The Commission could complete this line of reasoning by introducing an argument based on a particular reading of the Court's judgment in *Corbeau*. Under this reasoning, it can be argued that the Member State had a duty, pursuant to Article 90(1) EC and under the principles of "*effet utile*" and equality of opportunity, to respond to the above mentioned regulatory and technological changes by taking steps to prevent the strengthening of the dominant position and the *de facto* continuation of the operator's exclusive rights. Under this reasoning, the requisite "measure" would

consist of the Member State's failure to ensure the effective application of the Cable TV and Full Competition Directives by failing to respond appropriately to the regulatory and technological changes thereby allowing the *de facto* continuation of exclusive rights. In line with the reasoning in the existing Article 90(3) directives, the Commission could conclude, on the basis of economic and other evidence, that the *de facto* continuation of the operator's exclusive rights compels or induces the operator to abuse its double dominant positions by, *inter alia*, limiting the emergence of new audio-visual-telecommunications applications and multimedia services. The reasoning in this respect would be very similar to the one which would need to be followed in order to justify measures such as structural separation and divestiture when Article 86 EC is applied to individual undertakings.

Finally, pursuant to the Commission's powers under Article 90(3), the directive could indicate the specific objective to be achieved in eliminating the situation which is contrary to the Treaty rules, by ordering the Member States to provide for the removal of restrictions on the use of telecommunications infrastructure to provide cable TV services and to take certain measures to address the special problem posed by an operator doubly dominant in both telecommunications and cable TV infrastructures under a graduated approach (including structural separation and divestiture) described in the study.

I. Background study of the regulatory framework set out in the EC Treaty and in secondary legislation

I.A Article 86 - Prohibition of "abuse of a dominant position"

This part of the study focuses on the prohibition of abuse of a dominant position set out in Article 86 EC. It is intended to provide an overview of the existing case law and administrative practice in order to examine in which circumstances the provision applies and could also be applied to structural market situations.

I.A.1 "Traditional" approach under Article 86 EC regarding abuses which have actually been committed: (i) abusive exploitation of suppliers, customers and end-users and (ii) affecting market structures

Article 86 EC provides that "*any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States*". Article 86 also sets out a non-exhaustive list of examples of practices which can be considered as "abusive".[4]

Article 86 has consistently been used and described as having three essential components. First, an undertaking must hold a dominant position in a substantial part of the Common market. Second, there must be an abuse or an abusive exploitation[5] of a dominant position. Third, the abuse must affect trade between Member States. It is the second condition for application of Article 86 EC (i.e., the concept of "abuse/abusive exploitation") which will be developed further below.

By way of introduction, it must also be observed that, in cases dealing with the application of Article 86 EC to individual undertakings, it has consistently been held, both in the case law[6] and in the literature, that Article 86 EC does not prohibit market

---

[4] See, in particular, Case 6/71, Europemballage and Continental Can v. Commission, [1973] ECR 215, in which it is stated at para. 26 that Article 86 "*states a certain number of abusive practices which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty*"; and the constant case law thereafter.

[5] The term "abusive exploitation", as used by several authors, is based on the French version of Article 86 of the Treaty which provides that "*[e]st incompatible avec le marché commun et interdit, dans la mesure où le commerce entre Etats membres est susceptible d'en être affecté, le fait pour une ou plusieurs entreprises d'exploiter de façon abusive une position dominante sur le marché commun ou dans une partie substantielle de celui-ci*" (emphasis added).

[6] See, in particular, Michelin v. Commission, [1983] ECR 3461. See also the recent judgment of 8 October 1996 in Joined Cases T-24/93, T-25/93 and T-28/93, Compagnie Maritime Belge Transports SA and others v. Commission, not yet reported. In that case, the applications submitted in express words to the Court of First Instance that "*Article 86 of the Treaty prohibits the abuse, by one or more*

dominance as such but the abuse of such market dominance.[7] This principle is in fact based on the wording of Article 86 EC. It goes also back to the nature and the orthodoxy of the traditional system of control, as reflected in the case law and in the administrative practice of the European Commission, set out by Article 86 EC which has been conceived and used in the past as a "repressive system" rather than a "preventive system".[8]

Although "abuse/abusive exploitation" is an essential element for the application of Article 86, it results from the case law, as discussed below,[9] that there has been an evolution in the interpretation of the concept of "abuse" that has gradually expanded its scope and that there may still be room for further evolution in future cases. The discussion below does not provide an exhaustive examination of all types of abuses which have already been condemned in the past. It only mentions a first category of abuses which consists of the direct abusive exploitation of end-users, customers, and suppliers and will then focus on those abuses which consist of the affectation of the market structure(s) through exclusionary conduct and other types of conduct aimed at maintaining or strengthening the market power of the dominant undertaking. It is this latter large category of abuses, dealing with "structural market behaviour", "structural abuses" and "structural market circumstances", which must be examined in order to determine whether the current case law is sufficiently broad to cover situations such as the ones which are the specific object of the present study, i.e., situations in which an undertaking holds a dominant position both over telecommunications infrastructure and over cable TV infrastructure.

I.A.1.1 The "direct" abusive exploitation of suppliers, customers and end-users

The abuses listed in Article 86 give already examples of practices and conducts which consist of a direct exploitation of the markets. In particular, it is an

---

undertakings, of a dominant position, but not the fact that one or more undertakings occupy a dominant position, be it individual or collective" (at para. 53). The Court of First Instance replied in evenly clear words that "*whilst it is clear that merely occupying a dominant position cannot constitute an infringement of Article 86 of the Treaty, the argument has no bearing on this case, since the Commission penalized abuses of the dominant position and not the dominant position in itself*" (at para 60; emphasis added).

[7] Notwithstanding this general principle, it may be noted that certain cases which are further discussed below contain language which, at least when read in isolation, could lead to another conclusion. For example, in Continental Can, cited above, the Court observed that "*[i]f it can, irrespective of any fault, be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer's freedom of action in the market, such a case necessarily exists, if practically all competition is eliminated*" (judgment at para. 29).

[8] Compare with the observations made by Advocate-General Darmon in Case C-18/88, GB-INNO-BM, [1991] ECR I-5941, Opinion at para. 44.

[9] See also the discussion in Section I.A.2 below for the concept of "automatic/necessary abuse" as developed in the context of the combined application of Articles 90 and 86 EC.

abuse for a dominant undertaking to impose, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions. Another basic example of a direct abusive exploitation of a dominant position is the charging to customers and consumers of excessively high prices which have no bearing with the costs. Additional examples of direct abusive exploitation of a dominant position which are directly relevant in the context of the present study will be further discussed in Section II.A.1 below.

I.A.1.2 The "indirect" abuse of a dominant position which consists in the affectation of the market structure(s) through exclusionary conduct and other types of conduct aimed at maintaining or strengthening the market power of the dominant undertaking

By way of introduction to this section, it is important to recall the reasons given by the Court in its case law for including in the concept of abuse not only "exploitative abuses" which directly prejudice consumers and which are directly covered by the wording of Article 86 EC but also other abuses which affect the market structure. This "extension" of the concept of abuse is in fact based on the overall objectives of the competition rules as reflected in the EC Treaty as well as on the general objectives of the EC Treaty. In particular, it has been held that "*[t]he prohibitions of Articles 85 and 86 must in fact be interpreted and applied in the light of Article 3(f) of the Treaty, which provides that the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted, and Article 2 of the Treaty, which gives the Community the task of promoting 'throughout the Community harmonious development of economic activities'. By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between Member States, Article 86 covers abuse which may directly prejudice consumers as well as abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(f) of the Treaty*"(emphasis added)[10].

The foregoing language as used by the Court of Justice is very general and broad and could, when read in isolation of the rest of the case law, be interpreted as meaning that the interpretation of the competition rules and, in particular, Article 86 EC can be stretched almost without any limitations so as to serve as a means for the full implementation of one of the basic activities of the Communities which is the establishment of a system of undistorted competition. However, it is necessary to examine the specific cases on abuse which have already been dealt with in the past to

---

[10] See, in particular, Joined Cases 6 and 7/73, Commercial Solvents v. Commission, [1974] ECR 223, at para. 32. Note that the references to Articles 3(f) and 2 of the Treaty are references to the provisions applicable at the time of the judgment before the Treaty on European Union. See also the discussion below and para. 25 of Continental Can, cited above, in which it is stated that "*Articles 85 and 86 seek to achieve the same aim at different levels, namely, the maintenance of effective competition within the common market*".

see what the interpretation is that has so far been given to the concept of abuse in the case law.[11]

A distinction is made below between three classes of abuses: (a) "exclusionary abuses", (b) "abuses based on monopoly leverage or extensions of a dominant position", and (c) "structural abuses through strengthening of a dominant position". Although this distinction may appear to be a bit artificial in certain cases (since, in particular, certain cases could be classified in more than one of the categories used), it is submitted that it allows to understand better the scope of the application of the provisions of Article 86 EC.

(i) "Exclusionary abuses"

The first definition of "abuse" given by the Court of Justice in the context of cases dealing with exclusionary abuses is the following: "*abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*". Although the Court has attempted to clarify this concept further in subsequent cases,[12] there remains substantial doubt as to the precise meaning of the test set out by the Court which can only be clarified, in part, by looking at the specific practices which have been found to infringe Article 86 EC.[13]

---

[11] The fact that there may be certain limits to the application of the competition rules can be illustrated by the recent developments about the Viho/Parker Pen case; Case C-73/95 P, Viho Europe BV v. Commission, judgment of 24 October 1996, not yet reported, in which the Court of Justice confirmed that, according to the "single economic unit theory", agreements between a parent company and its 100% controlled subsidiary lacking any commercial autonomy do not fall within the scope of Article 85(1) even if they are capable of affecting the competitive position of third parties. For a case in which it was submitted that Article 86 EC had certain limits and could not be used to fill in any lacunae in the Treaty or in the secondary legislation, see the Opinion of Advocate-General Warner in BP v. Commission (Case 77/77, [1978] ECR 1513, at p. 1537).

[12] See, in particular, Case 85/76, Hoffmann-La Roche v. Commission, [1979] ECR 461, at para. 91. In Michelin, the Court expressed this test in a slightly different manner by indicated that "*Article 86 covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market*" (Case 322/81, [1983] ECR 3461, at para. 70). In AKZO, the Court used the term "*competition on the merits*" (Case 62/86, [1991] ECR 3359, at para. 70). See also on the vague nature of the test spelled out by the Court of Justice, Valentine Korah, An introductory guide to EC competition law and practice, fifth edition, Sweet & Maxwell, 1994, at 4.3.1.

[13] See the discussion below.

The reasoning of the Court is also based on the concept of "special responsibilities" which need to be respected by undertakings in a dominant position. In particular, Article 86 imposes "*on an undertaking in a dominant position, irrespective of the reasons for which it has such a dominant position,*[14] *a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market, in accordance with the general objective set out in Article 3(f) of the Treaty. Thus Article 86 covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened*".[15] In addition, "*the actual scope of the special responsibility imposed on an undertaking in a dominant position must [...] be considered in the light of the specific circumstances of each case, reflecting a weakened competitive situation*".[16] This has further been developed in cases in which the Court considered that the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen this dominant position and thereby abuse it.[17]

One of the classical examples of cases in which the above reasoning and test have been followed are the cases on rebate schemes implemented by dominant undertakings (in particular, those cases prohibiting the implementation of fidelity rebate schemes).[18]

---

[14] It is submitted that the reference by the Court to the wording "*irrespective of the reasons for which it has such a dominant position*" cannot be interpreted as meaning that the obligations resulting from the application of the competition rules cannot be different for undertakings which obtained their position on the basis of competition on the merits than for undertakings which hold such a position as a result of certain State action as is the case in the telecommunications sector. Rather, it can reasonably be considered that the Court intended to emphasize that undertakings which have been put in a dominant position by State action cannot argue that, for that reason, they are not subject to the provisions of Article 86 EC. See, in this respect, also the judgment in Télémarketing where the Court referred to the fact that for applying Article 86 it did not matter whether the dominant position was acquired on the basis of the merits or on the basis of certain State rights and regulations: "*Article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market, even where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market*" (Télémarketing, cited and discussed below, at para. 18).

[15] See, in particular, Michelin, cited above, at para. 57.

[16] See Tetra Pak II, T-83/91, [1994] ECR II-755, at para 115.

[17] See, in particular, Compagnie Maritime Belge Transports SA and others, cited above, at para. 107; and BPB Industries and British Gypsum v. Commission, Case T-65/89, [1993] ECR II-389, at para. 69.

[18] See the citations in the preceding footnotes.

(ii) Abuses based on monopoly leverage or extensions of a dominant position

The discussion below will focus on those cases in which an undertaking in a dominant position was compelled, through the application of Article 86 EC and thus in order to eliminate the abuse concerned, to provide access to and/or to dispose of certain of its "assets" over which it had property rights. As will be illustrated below, these cases are generally based on the doctrine that an undertaking in a dominant position in one market is not entitled to extend that dominant position to another market and that the undertaking concerned cannot impede, through its conduct, competition or commercial offerings in that secondary market.[19]

- *Refusal to supply*

The well known Commercial Solvents case is still one of the leading cases on refusal to supply under Article 86 EC.[20] The reasoning followed by the Court was that an undertaking in a dominant position, as regards the production of a raw material and therefore able to control the supply to manufacturers of derivatives, could not, just because it decided to start manufacturing the derivatives concerned (in competition with its former customers), act in such a way as to eliminate the competition of those former customers which in the case in question, would have amounted to eliminating one of the principal manufacturers of the derivatives. The Court concluded that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.

The dominant undertaking was thus effectively compelled to continue to supply the raw materials to the customer concerned and could no longer decide independently on the manner in which it would dispose of the property rights which it held over the raw materials. Its conduct, which consisted of the withdrawal of the supplies to the customer concerned, was considered to be abusive under Article 86 EC since it constituted a risk that the customer would have been eliminated from the secondary market for the derivatives.

- *Extension of a dominant position through certain conduct*

Based on the reasoning in Commercial Solvents,[21] the Court concluded in Télémarketing that an abuse within the meaning of Article 86 is committed where,

---

[19] In theory, these cases can be considered as a kind of subcategory of the general category of "exclusionary abuses" discussed in Section (a) above.

[20] Joined Cases 6 and 7/73, Commercial Solvents v. Commission, [1974] ECR 223.

[21] Cited above.

without 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.[22] The conduct that was at issue in the case consisted of the refusal to sell television time on the RTL station for telephone marketing operations using a telephone number other than that of the RTL group so that independent Télémarketing activities outside this group became impossible and all undertakings were excluded from this market.

- *Refusal to license*

It is an established principle that EC competition law does not affect the existence of intellectual property rights but that it may impose limits on the exercise of such exclusive rights. In addition, it is now well established that a refusal to grant a license, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute an abuse of a dominant position.[23] However, it is also clear that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.[24] In particular, the owner of the intellectual property right should not impede the emergence of new services and products and should, at least in certain cases, not engage in monopoly leveraging[25].

- *Refusal to provide access to certain facilities*

The monopoly leveraging argument is also one of the basic arguments underlying the Commission's decisions regarding access to essential facilities in which it ordered undertakings to provide to other parties access to their physical and other property.[26]

---

[22] Centre belge d'études de marché-Télémarketing (CBEM) v. Compagnie luxembourgeoise de télédiffusion and Information publicité Benelux SA, Case 311/84, [1985] ECR 3261, at para. 27.

[23] See, in particular, Case 238/87, Volvo v. Veng, [1988] ECR 6223, at para. 8; and Joined Cases C-241/91 P and C-242/91 P, Magill, [1995] ECR I-743, at para. 49.

[24] Magill, cited above, at para. 50.

[25] See, in particular, the judgment of the Court of Justice in Magill at para. 56 in which the Court referred to Commercial Solvents (discussed above) and indicated that "*the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market [...] since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.*"

[26] For a summary of the doctrine on essential facilities and the Commission's interpretation of its application in the telecommunications sector, see the Draft Notice on access agreements in the telecommunications sector (Communication from the Commission on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles, O.J. 1997, C 76/9). See also John Temple Lang, Fordham Int.L.J., Vol. 18, December 1994, No 2 p. 437.

(iii) Structural abuses - "prohibited strengthening of a dominant position"

In this section the focus is on those cases in which it was held that a dominant undertaking had strengthened its position (in particular, through the acquisition of another undertaking or through the establishment of structural links with a competitor) in a manner contrary to Article 86 EC and in which it was then required to undo that situation (in particular, through the disposal or divestiture of the interests which it had acquired).

The leading case on so-called "structural abuses" is still Continental Can[27] in which the Court held that the Commission has the power to control certain mergers under Article 86 EC. What was challenged by the Commission in Continental Can was not the dominant position of Continental Can as such but the strengthening of that position through the acquisition (under normal circumstances not involving any abusive or abnormal pressure on behalf of the buyer) of a competing undertaking. Although the Court annulled the Commission's decision on the facts of the case, it did confirm the Commission's interpretation of Article 86 EC according to which that provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, as mentioned in Article 3 of the Treaty. The Court therefore concluded that an abuse may occur if an undertaking in a dominant position strengthens the position in such a way that the degree of dominance reached substantially fetters competition (i.e., that only undertakings remain in the market whose behaviour depends on the dominant one).[28]

The judgment in Continental Can is a clear example of the teleological interpretation of the competition rules (in particular, Article 86 EC). Indeed, the Court based its reasoning on the spirit, general scheme and wording of Article 86, as well as on the system and objectives of the Treaty. On the basis of this reasoning, the Court was able to "extend" the powers of the Commission under Article 86 EC.[29] As has already been indicated above, certain wording contained in the judgment could leave scope for further and new developments in the future. In particular, the Court observed that "*the endeavour of the authors of the Treaty to maintain in the market real or*

---

[27] Case 6/71, Europemballage and Continental Can v. Commission, [1973] ECR 215.

[28] Continental Can, cited above, at para. 26. See also the Commission's observations in the Tenth Report on Competition Policy, 1981, at para. 150, where it is indicated that "*[s]trengthening by means of merger is likely to constitute an abuse if any distortion of the resulting market structure interferes with the maintenance of remaining competition (which has already been weakened by the very existence of this dominant position) or its development. Such an effect depends, in particular, on the change in the relative market strength of the participants after the merger, i.e., the position of the new unit in relation to remaining competitors.*".

[29] In this respect, it is interesting to observe that the Court did not follow on this point the Opinion of Advocate-General Roemer who had objected against the Commission's reasoning that Article 86 EC could be used in a Continental Can type of scenario. The Advocate-General followed in fact a more restrictive interpretation of Article 86 EC.

potential competition even in cases in which restraints on competition are permitted was explicitly laid down in Article 85(3)(b) of the Treaty. Article 86 does not contain the same explicit provisions, but this can be explained by the fact that the system fixed there for dominant positions, unlike Article 85(3), does not recognize any exemption from the prohibition. With such a system the obligation to observe the basic objectives of the Treaty, in particular that of Article 3(f), results from the obligatory force of these objectives."[30] This broad wording, referring to the necessity to protect and achieve the objectives of the Treaty, could possibly be used in future cases to "extend" the concept of "abuse" further.[31]

The decision and judgment in Tetra Pak I[32] and the decision in BIC/Gillette[33] are based on reasoning similar to that in the Court's judgment in Continental Can.[34] In both these cases it was not the existing dominant position of the undertakings concerned which was directly challenged under Article 86 EC but certain conduct (i.e., the acquisition of an exclusive license and the establishment of structural links with a competitor, respectively), and the effects of such conduct of the dominant undertakings

---

30 Continental Can, cited above, at para. 25.

31 See also the interpretation which has been given to the judgment in Continental Can by Advocate-General Lenz in his Opinion in Ahmed Saeed (Case 66/86, Ahmed Saeed Flugreisen and Others v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs, [1989] ECR 803). In general terms, the Advocate-General considered that the Court held that the mere fact that competition was substantially fettered on the relevant market by a dominant undertaking or dominant undertakings acting together constituted an abuse, regardless of the means and procedure by which it was achieved (Opinion of the Advocate-General, at para. 35).

32 Case T-51/89, Tetra Pak v. Commission, [1990] ECR II-309. Commission Decision of 26 July 1988, Tetra Pak, O.J. 1988, L 272/27. The Commission (which referred explicitly to Continental Can, see para. 46 of the decision) considered that the acquisition of the exclusive license constituted an abuse of a dominant position since it prevented or at least substantially delayed a new competitor from entering into a market where very little if any competition was found as well as since it strengthened the dominant position of Tetra Pak (in particular, by reinforcing its technical advantages vis-à-vis the minimal competition that remained). It is also worth noting the Commission's observations that the impact of that acquisition was not hypothetical but very real. The effect in the circumstances of that case was to preclude the possibility of any new competition (in particular from Elopak, which was on the verge of trying to enter the market). The Commission also observed that Tetra raised considerably or even insurmountably the barriers to entry and that "*the effect of blocking or delaying the entry of a new competitor is all the more serious in a market such as the present one already dominated by Tetra because a new entrant is virtually the only way at the present time in which Tetra's power over the market could be challenged*".

33 Commission Decision of 10 November 1992, BIC/Gillette and Others, O.J. 1993, L 116/21.

34 See also the Commission's decision in Tetra Pak II in which the Commission considered that the acquisition by Tetra Pak of certain of its competitors could be viewed as part of its predatory strategy to eliminate competitors in violation of Article 86 EC (Commission Decision of 18 March 1992, O.J. 1992, L 72/1). For a summary of the cases which were dealt with, prior to the entry into force of the Merger Control Regulation, by the Commission, without leading to a formal decision, under the Continental Can doctrine, see Hawk & Huser, European Community Merger Control: A Practitioner's Guide, Kluwer Law International, 1996, in particular at chapter XII "Application of Articles 85 and 86 to structural transactions".

in the particular circumstances of the cases concerned which strengthened their dominant market position.[35]

In the three above cases, the remedy required to ensure compliance with the competition rules was the re-establishment of the market structure in its situation as it existed prior to the "abusive structural conduct" of the dominant undertaking concerned. In Continental Can,[36] the Commission gave the dominant undertaking a period of about six months to make proposals to the Commission to put an end to the infringement. The Commission explained that this time period was proper given the nature of the measures which needed to be taken. These measures, although this is not explicitly stated in the decision, should have been the divestiture of the undertaking which Continental Can had acquired. In Tetra Pak I, the Commission considered that the abuse was eliminated at the time that Tetra Pak renounced the exclusivity of the license.[37] Thus, the remedy was not the divestiture of the company which had been acquired by Tetra Pak, and which was the beneficiary of the license, nor was it the full cancellation of the license but rather the elimination of the element of exclusivity which was contained in the license agreement. In Gillette, the Commission obliged Gillette to withdraw, within a given period of time,[38] the structural links which it had established, in contradiction with Article 86 EC, with one of its competitors.

(iv) Conclusions

The overview of the various types of abuses which have already been referred to in the case law and an analysis of the existing cases and decisions leads to the conclusion that in all the cases so far dealt with by the European Commission and the European Courts, involving the application of Article 86 to individual undertakings, the assessment under the competition rules related each time to a specific conduct of the dominant undertaking. The notion of "conduct" has however been interpreted in a broad manner and consisted either of a positive action (for example, the granting of fidelity rebates or the implementation of predatory pricing), a negative action (for

---

35 It may be noted that the issue of strengthening of a dominant position was not directly at issue in the appeal lodged against the Commission decision in Tetra Pak I since the Court considered that the appeal was only based on the point of law as to whether or not the applicability of an exemption to an agreement excludes the applicability of Article 86 EC (see para. 13). The Court of First Instance did however refer to the judgment in Continental Can (see para. 22) and it confirmed that the Commission had been right in considering that in the specific circumstances of the case the acquisition of the exclusive license was incompatible with Article 86 EC: "*The specific context to which the Commission had referred was expressly characterized as being the fact that acquisition of the exclusivity of the license not only strengthened Tetra's very considerable dominance but also had the effect of preventing, or at the very least considerably delaying, the entry of a new competitor into a market where very little if any competition is found*" (see para. 23).

36 Commission Decision of 9 December 1971, Continental Can Company, O.J. 1972, L 7/25.

37 Commission Decision, cited above, at paras. 27 and 45.

38 The specific time period concerned is not specified in the public version of the Commission decision.

example, a refusal to supply, a refusal to license or a refusal to provide access) or a failure to act (for example, not reacting on a given market demand or the failure to develop new technologies and to implement technological innovations[39]). In each of the cases, there was at least a reference or references to actual evidence of the fact that there had been an actual abusive conduct.[40]

It is arguable that the Court of Justice has never been asked directly the question whether there are any circumstances in which there would be no need to bring evidence of an actual abusive conduct in order to impose a remedy to ensure compliance with Article 86 EC. This question is examined, from a theoretical perspective, in the following Section in the light of the case law of the Court of Justice on the combined application of Articles 90 and 86 EC in which it developed and used a concept of "automatic abuse" of a dominant position. This latter concept has been applied by the Commission in its Article 90 directives in the telecommunications sector.[41]

I.A.2 Application of Article 86 EC to "structural" market situations involving Member State legislation

When considering, under the EC competition rules, a situation in which an undertaking holds a double monopoly or a double dominant position, it is necessary to examine the doctrine of the "automatic abuse of a dominant position" established by the Court of Justice in a series of cases involving the combination of Articles 90 and 86 EC (as well as the combination of Article 90 with the Treaty provisions on free movement, as will be discussed further below).[42] It is this doctrine which is also one of the principal legal bases underlying the liberalization directives adopted by the Commission pursuant to Article 90(3) EC in the telecommunications sector.[43]

---

[39] With regard to the latter types of abuses, it may be noted that they have so far mainly be used in the context of cases on the combined application of Articles 90 and 86 EC.

[40] In cases under the procedure for preliminary rulings pursuant to Article 177 EC, the national court was entrusted with the task of verifying whether there had been such actual abusive conduct.

[41] The Commission's assessment of concentrations under the Merger Control Regulation is also forward looking and preventive in nature and also includes assessments of markets which do not yet exist. E.g. Commission Decision of 17 July 1996, Ciba-Geigy/Sandoz, Case No. IV/M.737 (not yet published).

[42] See, in particular, the cases cited below.

[43] See the discussion below in Section I.B below. We just recall here the findings set out in recital 18 to the Cable TV Directive in which it is stated that "*[w]here Member States grant to the same undertaking the right to establish both cable TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for overcharging for use of the cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications networks. [...]*".

The purpose of this background study is clearly not to give a detailed and exhaustive examination of the case law on "automatic abuse" which has already given rise to extensive legal writing.[44] Rather, the discussion below will focus, on the one hand, on the specific results achieved by that case law (in particular, whether or not that case law has resulted in the obligation for undertakings to divest part of their activities and/or assets) as well as, on the other hand, on the question as to whether or not this case law on automatic abuse which was established by the Court through a combined application of Articles 90 and 86 EC can be transposed automatically into Article 86 EC and applied to undertakings as such, independent of any State intervention. Before proceeding in this manner, it is however necessary to give a brief overview of the doctrine itself.

In addition, it is worth noting, in anticipation of the discussion in Section I.A.3, that the case law of the Court of Justice on the combined application of Articles 90 and 86 EC is a typical example of the evolutionary nature of the application of the Treaty rules and, in particular, of those on competition. This case law in fact illustrates well how the Court, through a gradual evolution,[45] has been willing to stretch, albeit not without any limits,[46] the interpretation of the Treaty rules in order to achieve the goals of the Treaty and to allow the full implementation of the instruments set out in the Treaty to achieve those goals. Furthermore, it can be noted that the primary content and effect of this gradually developing case law was precisely in the area of the liberalization of the markets through the challenging of structural barriers to market entry consisting of State regulation.

I.A.2.1 Doctrine of "automatic/necessary abuse" and "unlawful extensions of dominant positions"

As indicated above, the doctrine of "automatic/necessary abuse" has been constructed by the Court of Justice on the combined interpretation and application of Articles 90 and 86 EC. Article 90(1) EC provides that "*[i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary*

---

[44] See, in particular, the reference below in the Section on the Commission's powers under Article 90(3).

[45] See, in particular, the evolution from Sacchi (Case 155/73, [1974] ECR 409, in particular at para. 14), in which the extension of a dominant position through State regulation was considered as not contrary to the Treaty, to GB-INNO-BM (cited and discussed below) where an extension of a dominant position was considered as incompatible with the EC Treaty (in particular, the combined application of Articles 90 and 86 EC). See also the evolution towards the judgment in Corbeau (referred to below) where the Court focused almost immediately on the justifications of the monopoly without going into the detailed analysis of the question as to why the monopoly could be considered as contrary to the Treaty rules in the absence of such a justification (in particular, under Article 90(2) EC).

[46] See, in particular, the judgments in Meng (Case C-2/91, [1993] ECR I-5751), Reiff (Case C-185/91, [1993] ECR I-5801) and Ohra Schadeverzekeringen (Case C-245/91, [1993] ECR I-5851) which relate also to the extended application of Articles 85 and 86 EC to Member State regulations through a combination of these provisions with Articles 3(g) and 5 of the Treaty.

to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94.".[47] In addition, it needs to be observed that several of the cases (and, consequently, the results which they achieve) which are referred to below are not only based on the competition rules but also on the Treaty rules on free movement (in particular, Article 30 on the free movement of goods[48] and Article 59 on the free movement of services[49]). In fact, in several of those judgments it is not entirely clear whether the Court's judgment was based more on the arguments under the competition law provisions of the Treaty or on the rules on free movement of goods and/or services.

The basic rules which have been developed through the case law on the combined application of Articles 90 and 86 EC are the following. Firstly, the Court confirmed that the mere creation of a dominant position by the granting of an exclusive right within the meaning of Article 90(1) EC is not as such incompatible with Article 86 of the Treaty.[50] However, secondly, a Member State will infringe Article 90 in combination with Article 86 EC if it places, through the granting of exclusive rights, an undertaking (namely, the undertakings which fall within the categories of undertakings covered by Article 90(1) EC) in a position so that the undertaking, merely by exercising the exclusive rights granted to it, cannot avoid abusing its

---

[47] Article 90(2) EC provides that "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community*". Article 90(3) EC provides that "*The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*" For a further discussion of Article 90(3) EC, see Section I.B below.

[48] See, in particular, the judgment in *Terminal Equipment Directive* (Case C-202/88, France v. Commission, [1991] ECR I-1223). Furthermore, elements of Article 37 EC, the provision on the adjustment of monopolies of a commercial character, have also been used in the said case law.

[49] See, in particular, the judgment in Telecommunications Services Directive, (Joined Cases C-271/90, C-281/90 and C-289/90, Spain and Others v. Commission, [1992] ECR I-5883) and in ERT (Case C-260/89, Elliniki Radiophonia Tileorassi Anonimi Etairia (ERT AE), [1991] ECR I-2925).

[50] In fact, this principle had already been confirmed by the Court of Justice in its early case law on the interpretation and application of Article 86 EC, including the judgment in Sacchi in which the Court already considered that "*[t]he interpretation of Articles 86 and 90 taken together leads to the conclusion that the fact that an undertaking to which a Member State grants exclusive rights has a monopoly is not as such incompatible with Article 86*" (Case 155/73, Giuseppe Sacchi, [1974] ECR 409, at para. 14). The principle has then been confirmed by the Court in a consistent manner.

dominant position[51], or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses[52].

The precise content of the tests spelled out by the Court for determining whether or not there is an "automatic abuse" is not entirely clear and there remains therefore doubt as to what factors make it possible to distinguish a *situation necessarily leading an undertaking or inducing an undertaking to abuse its dominant position* from a situation, on the other hand, which does not have such an effect. Nor do the judgments referred to above specify whether it is sufficient to find that a given situation is potentially one leading to abuse or on the contrary whether it must be ascertained in every case that a given abuse has actually been committed.[53] The Court of Justice did however specify, on at least one occasion, that the joint application of Articles 90 and 86 EC can only be triggered if the "automatic abuse" is the "*direct consequence*" of the national law concerned.[54] The latter point is further discussed below.

The European Commission has also used the doctrine of "automatic/necessary abuse" as an important basis for the liberalization directives in the telecommunications sector. Several references to the doctrine can be found in the recitals to the said liberalization directives.[55] In particular, recital 11 to the Cable Television Directive summarizes the doctrine by indicating that "*[t]he mere creation of a dominant position within a given market is not, as such, incompatible with Article 86. A Member State is, however, not allowed to maintain a legal monopoly where the relevant undertaking*

---

[51] This test was developed by the Court of Justice in Höfner and Elser (Case C-41/90, Klaus Höfner and Fritz Elser v. Macrotron GmbH, [1991] ECR I-1979, at para. 27) and repeated thereafter by the Court in various other judgments including, in particular, Merci Convenzionali Porto di Genova (Case C-179/90, [1991] ECR I-5889, at para. 17), Société Civile Agricole du Centre d'Insémination de la Crespelle (Case C-323/93, [1994] ECR I-5077, at para. 18) and Banchero (Case C-387/93, [1995] ECR I-4663, at para. 51).

[52] Test developed by the Court of Justice in ERT (cited above, at para. 37) and repeated thereafter in several judgments including Merci Convenzionali Porto di Genova (cited above, at para. 17).

[53] See in this respect the Opinion of Advocate-General Tesauro in Paul Corbeau (Case C-320/91, [1993] ECR I-2533, at para. 11). See also footnote 12 in the said Opinion in which the Advocate-General refers to the different interpretations which have been given to the judgment of the Court of Justice in Porto di Genova, cited above, by the Italian Courts which had to apply the Court's ruling to the specific facts of the cases pending with them. On this question, see also the discussion below on GB-INNO-BM.

[54] See, in particular, Société Civile Agricole du Centre d'Insémination de la Crespelle (cited above, at para. 20). In that case, the Court considered that the alleged abuse (which consisted of the charging of excessively high fees by insemination centres which had been entrusted by State regulation with local legal monopolies) was not a direct consequence of the national law (which merely allowed the insemination centres to require breeders who request the centres to provide them with semen from other production centres to the additional costs entailed by that choice, without compelling them to do so) and that, therefore, the combined application of Articles 86 and 90 EC was not triggered.

[55] See also the discussion in Section I.B below.

is compelled or induced to abuse its dominant position in a way that is liable to affect trade between Member States".[56]

In addition to the doctrine of "automatic/necessary abuse", mention must also be made of the doctrine on the "extension of a dominant position" by way of a State measure. The case law on the illegal "extension of a dominant position" under the combination of Articles 90 and 86 EC has in fact been developed in parallel with and in addition to the case law on "automatic/necessary abuse". The judgment in GB-INNO-BM, which is directly concerned with the telecommunications sector,[57] has a central place in this context and merits a more detailed attention since it contains a number of passages which may shed light on the Court's approach to the application of the competition rules to sectors which are in the process of being liberalized. In addition, GB-INNO-BM is also one of the cases in which a requirement was established to remove certain activities from a dominant undertaking.

GB-INNO-BM related to questions which had been referred to the Court by a national court in order to allow the latter to assess the compatibility with EC law of certain national rules. These rules gave the public undertaking which was responsible, subject to the authority of the Minister, for the establishment and operation of the public telephone network, and which sold telephone equipment, the power to grant type-approval to telephone equipment which it did not supply itself with a view to the connection of that equipment to the telephone network (over which the undertaking held a monopoly).[58] After referring to the judgment in Télémarketing[59], the Court considered that under Article 90, Member States must not put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86. Accordingly, it concluded that where the extension of the dominant position

---

[56] In recitals 12 and 13 to the Cable Television Directive it is then stated that the (abusively) high prices in the Community for the provision of high-capacity infrastructure (in particular, for leased lines) are a "*direct consequence*" of the restrictions imposed by Member States on the use of infrastructures other than those of the telecommunications organizations, and in particular of those of the cable TV operators, for the provision of telecommunications services. This is then used as one of the arguments for justifying the obligation specified in the Directive that the restrictions on the use of cable TV infrastructure should be abolished for the provision of non-reserved services.

[57] Case C-18/88, Régie des Télégraphes et des Téléphones (RTT) and GB-Inno-BM SA, [1991] ECR I-5941. Certain of the issues dealt with in GB-INNO-BM are also identical to questions which were raised in the judgment in Terminal Equipment Directive (cited above).

[58] In fact, the questions referred to the Court of Justice related to the Belgian regulatory framework which put the RTT, the Belgian TO, in a situation of being both "judge and party" in the economic activities concerned.

[59] In Télémarketing, cited above, the Court had held that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position in a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

of a public undertaking, or an undertaking to which the State has granted special or exclusive rights, results from a State measure, such a measure constitutes an infringement of Article 90 in conjunction with Article 86 of the Treaty.

In the judgment, the Court also rejected the argument that the provisions of Articles 90 and 86 could not apply since there was no indication of the fact that an abuse had actually taken place. It also rejected the argument that the mere possibility of discriminatory application of those provisions (by reason of the fact that the RTT was designated as the authority for granting approval and was competing with the undertakings that apply for approval) could not in itself amount to an abuse within the meaning of Article 86.[60] In fact, the Court considered that "*it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension results from a measure adopted by a State. As competition may not be eliminated in that manner, it may not be distorted either. A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors*"[61] (emphasis added).

I.A.2.2 Has the doctrine on "automatic/necessary abuse" and "extension of dominant position" resulted in obligations for dominant undertakings to divest or separate certain of their powers, activities and/or assets?

The answer to the question raised in the above title is clearly positive. However, a close analysis of the case law makes clear that the obligation (on the basis of the application of the competition rules and/or the rules on free movement) to remove certain activities from a dominant undertaking (because otherwise it would automatically abuse of its position or because its dominant position would be unlawfully extended) has so far been applied only in limited circumstances.

The clearest case on this point is GB-INNO-BM in which the Court considered in very clear terms that "*the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or*

---

[60] GB-INNO-BM, at para. 23.

[61] GB-INNO-BM, at para. 18.

services in the telecommunications sector".[62] Thus, the Court made it clear that any "regulatory" powers which had been entrusted to the public undertaking and which could be used to "regulate market entry" had to be taken away from that undertaking, since otherwise a situation would exist infringing Article 90(1) in conjunction with Article 86 EC. In other words, the Court considered that an undertaking cannot possess the power to regulate the competitive process in which it itself participates and that power, at least if it is a power granted by the State, needs to be taken away. It is this principle which has also been applied by the Commission in the Terminal Equipment Directive (creation of an independent regulator)[63], the Telecommunications Services Directive (creation of an independent regulator)[64] and the Full Competition Directive (allocation of numbers)[65].[66]

In the other cases involving the combined application of Articles 90 and 86 EC to "automatic/necessary abuses" and "extensions of dominant positions", the end-result of the application of the Treaty rules (in particular, those on competition) was not the divestiture or removal of any activities and/or assets by the dominant undertaking. Rather, these cases resulted in the condemnation of the State regulations which provided for a legal monopoly and, therefore, created, strengthened or extended a dominant position contrary to the competition rules. Those legal monopolies needed to be abolished since they created a fundamental (artificial) obstacle to the freedom of competition and market development and growth. In addition, in each case it was each time verified whether or not there was an objective justification for the situation concerned which could have put the competition rules out of play on the basis of

---

62 Judgment at para. 26 in which the Court also referred to its judgment in Telecommunications Equipment Directive (cited above, reference in particular to para. 52). See also Case C-91/94, Tranchant, [1995] ECR I-3911, in which the Court of Justice stated, at para. 19, that this requirement of independence "*seeks to eliminate any risk of a conflict of interests between, on the one hand, the regulatory authority responsible for drawing up the technical specifications, monitoring their application and granting type-approval and, on the other hand, undertakings offering goods or services in the telecommunications sector.*"

63 See Article 6 and recital 17 of the Terminal Equipment Directive.

64 See Article 7 and recital 29 of the Telecommunications Services Directive.

65 See recital 11 to the Full Competition Directive where it is indicated that "*[n]ewly authorized voice telephony providers will be able to compete effectively with the current telecommunications organizations only if they are granted adequate numbers to allocate to their customers. Moreover, where numbers are allocated by the current telecommunications organizations, the latter will be induced to reserve the best numbers for themselves and to give their competitors insufficient numbers or numbers which are commercially less attractive, for example, because of their length. By maintaining such power in the hands of their telecommunications organizations Member States would therefore induce the former to abuse their power on the market for voice telephony and infringe Article 90 of the Treaty, in conjunction with Article 86.*" See also point 3.4 of the Full Competition Directive.

66 For a further discussion of these directives and the way in which they have made use of the combined application of Articles 90 and 86 EC, see Section I.B below.

Article 90(2) EC.[67] Also, in certain other cases, the State measures which were in violation of Article 90 in conjunction with Article 86 needed to be withdrawn, amended or eliminated so that the illegal situation would be eliminated.[68]

The above principles may be illustrated by a number of Court judgments as well as by the Commission's telecommunications liberalization directives:

- In Höfner,[69] it was concluded that the undertaking entrusted with a legal monopoly for the carrying out of recruitment activities could not exercise its exclusive rights and could not prevent other undertakings from engaging in executive recruitment activities since the undertaking in the dominant position was manifestly not (owing to the lack of resources which the State had provided to it) in a position to satisfy the demand prevailing on the market for activities of that kind. Thus, the recruitment office was not compelled to leave the market for executive recruitment activities, it was merely precluded from using its exclusive rights against other undertakings which became active on that market and, consequently, the application of the Treaty rules resulted in the condemnation of the State measures which had created an illegal situation of monopoly.[70]

---

67 See, in particular, the judgment in Paul Corbeau (cited above) in which the Court provided guidance as to the circumstances in which the extension of the dominant position of the postal services undertaking could be extended from the basic postal services into other activities of value-added postal services.

68 See, in this respect, the Court judgment in Corsica Ferries (Case C-18/93, Corsica Ferries Italia srl v. Corpo dei Piloti del Porto di Genova, [1994] ECR I-1783) in which the Court held that the approval by State authorities of discriminatory tariffs for piloting services carried out by a legal monopoly infringed Article 90 in conjunction with Article 86. In particular, the Court had considered in this case that a Member State infringes the prohibitions in Articles 90 and 86 EC "*if, by approving the tariffs adopted by the undertaking, it induces it to abuse its dominant position inter alia by applying dissimilar conditions to equivalent transactions with its trading partners, within the meaning of Article 86(c) of the Treaty*".

For another illustration, see also the Commission decisions regarding the license fees applied to the second GSM operators in Italy and Spain: Commission Decision of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy, O.J. 1995, L 280/49; and Commission Decision of 18 December 1996 concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain, O.J. 1997, L 76/19.

69 Cited above.

70 It may be questioned whether the Court's judgment in Höfner did not in fact leave room to the Member State concerned for ensuring that the dominant undertaking was given sufficient means to meet the market demand. On the basis of the reasoning and test followed by the Court in the case concerned, there should have indeed not been an infringement of Articles 90 and 86 if the dominant undertaking held the necessary means to meet all market demand in a satisfactory manner.

- The judgment in ERT[71] is most illustrative of the principles outlined above. The case concerned a Greek radio and television undertaking which was granted an exclusive franchise comprising both the right to broadcast its own programmes ("broadcast") and the right to receive and retransmit programmes from other Member States ("retransmission"). Although the Court referred the practical application of the Treaty rules as interpreted by the Court to the national court which had referred the questions to the Community Court, it did observe that the concentration of the monopolies to broadcast and retransmit in the hands of a single undertaking may lead that undertaking to favour its own programmes to the detriment of foreign programmes and would lead to a situation in which the equality of opportunities for the undertakings would not be guaranteed.[72] Under the test of "automatic abuse", this was then expressed as meaning that Article 90(1) of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own rights.[73]

  The Court did not indicate that if there would indeed be such a situation of fact, the undertaking concerned should be compelled to stop its activity of retransmission. Rather, it was implied that the exclusive right for retransmission could no longer be entrusted to the dominant undertaking holding the broadcasting rights. Thus, the exclusive right could no longer be invoked and enforced against another undertaking which had already started activities of retransmission in violation of the State regulation providing for the exclusive transmission right.[74]

- It is also this reasoning which has been followed by the Commission in the liberalization directives in the telecommunications services sector.[75] On the one hand, as indicated above, these directives obliged the

---

[71] Cited above.

[72] The Court's reasoning was based both on the Treaty rules on the free movement of services and on the EC competition rules.

[73] ERT, at para. 37.

[74] In his Opinion in ERT, Advocate-General Lenz touched very briefly upon the question of the "structural separation" of the two activities of broadcasting and retransmission. In fact in a puzzling statement, he indicated that it may be "*accepted that the best means to ensure that there is no such danger [of discrimination against foreign broadcasts] is to separate the areas covered by the monopoly, that is to say, to abolish the retransmission monopoly.*" (Opinion of the Advocate-General, at para. 17).

[75] For a more detailed discussion of the Article 90(3) directives adopted by the Commission in the telecommunications sector, see Section I.B below.

> Member States to take away from the monopolistic and dominant operators certain regulatory powers which they exercised. On the other hand, the directives considered that the extension of the exclusive rights for and the dominant positions over basic (voice) telephony services to other activities including non-reserved services was contrary to Article 90 in conjunction with Article 86 EC. The remedy imposed to ensure that this illegal situation would be eliminated was not to make the dominant undertakings leave the market for non-reserved services but rather to abolish the existing special and exclusive rights for the provision of such non-reserved services.

The results achieved by the case law on the combined application of Articles 90 and 86 EC show clearly some similarities with the case law on exclusionary abuses and extensions of dominant positions under Article 86 EC. In particular, in cases such as Télémarketing and Commercial Solvents,[76] the undertakings which were considered to be dominant in one market (namely, in a market for upstream services such as the television advertisement in Télémarketing or the upstream supply for raw materials such as in Commercial Solvents) were not prevented, on the basis of the competition rules, from entering into or being active in a downstream or in a neighbouring market. Rather, the abuses which needed to be eliminated in those cases consisted of the fact that the undertakings abused their dominant position in the first market by not confining themselves to participating in the second market but simultaneously attempting (by means of their conduct which consisted of refusals to supply in the first market) to eliminate the competition of those active in the second market. Therefore, the conduct which excluded competition in the second markets had to be eliminated. This is comparable to the situation in the cases on the combined application of Articles 90 and 86 in which the legal barrier to entry into secondary or neigbouring markets, which excluded competition in such secondary markets and for which there was no objective justification, had to be abolished in order to ensure equality of opportunities.

It may also be observed that in all the cases which have so far been dealt with in the case law on the combined application of Articles 90 and 86 EC there was little or no doubt about the fact that the abolition of the monopoly rights was sufficient to introduce a certain degree of competition into the market. The facts of the cases concerned in fact demonstrate that most of the judgments of the court concerned situations in which certain undertakings had already started to carry out certain activities in competition with the dominant undertaking notwithstanding the fact that there was still a State measure which precluded them, as a matter of national law, to do so. Thus, the Court only had to deal with the question as to whether or not the national law could be enforced against the competitor concerned taking into account its possible violation of EC law. The answer given by the Court, namely that the national monopoly/exclusive rights were prohibited by EC law in the circumstances

---

[76] Both cited and discussed above.

concerned, provided in this context a sufficient answer to the questions which had been raised with the Court.

I.A.2.3 Transposing the doctrine of "automatic/necessary abuse" into Article 86 EC and its application to "dominant undertakings"

As has been indicated above, the doctrine on "*extension of dominant position*" has been applied at several instances in pure Article 86 cases. Therefore, there is no doubt as to the fact that there is indeed a possibility of applying Article 86 to undertakings in a situation in which, through their conduct, they extend (or strengthen) their dominant position in an unlawful manner. As also indicated above, there remains some doubt as to what needs to be understood by the terms "unlawful manner" used in the previous sentence and as to the precise circumstances in which this test will be met.

Furthermore, the parallel between the doctrine on "extension of dominant position" under Article 86 EC, as applied to individual undertakings, and under the combined application of Articles 90 and 86 EC is also illustrated by the Court's reasoning in GB-INNO-BM in which the Court considered that "*Member States must not [...] put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86*" (emphasis added)[77].

The question as to whether or not the doctrine on "*automatic/necessary abuse of a dominant position*" can be automatically transposed into Article 86 EC is much more complex and it is submitted that the case law does not provide direct and full guidance on this point and could leave room for further action by the Commission.

First, it should be considered that, as a general principle, Article 90(1) of the Treaty is only a reference rule ("norme de renvoi") which, in itself, does not contain additional obligations of substance other than those which are set out in the other Treaty provisions. On the other hand, there is at least one important difference between the application of Article 86 as a stand-alone provision and the application of Article 86 in conjunction with Article 90 EC. Namely, Article 86 is applicable to individual undertakings whereas the combined application of Articles 90 and 86 is applicable to the Member States. This is borne out by the wording of Article 90(1) EC which prohibits *Member States* to enact or to maintain in force measures which are contrary to the Treaty rules in respect of public undertakings and undertakings which are entrusted with special or exclusive rights.

Second, there remains some doubt as to the precise conditions in which the doctrine of "automatic/necessary abuse" applies under Article 90 in conjunction with Article 86. In particular, it remains unclear whether the doctrine can be applied on the

---

[77] GB-INNO-BM, cited above, at para. 20.

basis of assumptions that there will be an abuse or whether it applies only where an abuse has actually been committed.[78] In this respect, the judgment in Centre d'Insémination de la Crespelle[79] appears to indicate that the doctrine only applies in cases where the abuse is a "*direct consequence*" of the State measure concerned. The introduction of this rule in the case law may be a consequence of the observations of Advocate-General Gulman in that case since in his Opinion he had indicated that the risk of an abuse is not sufficient to trigger the application of Articles 90 and 86 EC.[80] If this interpretation is correct, this could mean that the doctrine only applies if the State measure concerned does not leave the (dominant) undertaking concerned any discretionary margin for ensuring that its conduct will be in compliance with the competition rules but that whatever it may do it will necessarily abuse its dominant position. The above considerations may also be one of the reasons why the Court did not use in GB-INNO-BM the doctrine of the "automatic abuse" (based on the premise that the State measures would put the undertaking in a situation in which the latter would be induced to abuse its dominant position) but the doctrine of the "extension of a dominant position" since entrusting an undertaking with certain regulatory powers does not directly and necessarily mean that the undertaking will abuse such powers.[81]

Notwithstanding the above, it can be argued that the doctrine on "automatic/necessary abuse" should not be interpreted too narrowly (in particular, by giving too much weight to the criterion of "direct consequence" used in part of the case law). In particular, if the above reasoning is followed, this would mean that the application of the doctrine of "automatic/necessary abuse" is now limited to one of the two tests which had been developed by the Court of Justice. The doctrine would then in fact be limited to the test developed in Höfner in which the undertaking cannot avoid abusing its dominant position (by merely exercising its exclusive rights),[82] and the less severe test of Merci Convenzionali Porto di Genova when the exclusive rights are liable to create a situation in which the undertaking is (only) induced (but not "compelled") to commit such abuses would have been implicitly overruled and

---

78 See the discussion above.

79 Cited above.

80 Centre d'Insémination de la Crespelle, cited above, Opinion of Advocate-General Gulman, at para. 43.

81 In GB-INNO-BM, this point was also partly addressed by the RTT which had emphasized that the order for reference which had been made by the national court did not state that any abuse had actually been committed and that the mere possibility of discriminatory conduct by reason of the fact that the RTT was designated as the authority for granting type approval and was competing with the undertakings that applied for such approval could not in itself amount to an abuse within the meaning of Article 86 of the EEC Treaty; GB-INNO-BM, cited above, at para. 23.

82 Such a test would be difficult to apply to an individual undertaking since it is virtually impossible to think of any circumstances in which such undertaking would not be in a position to adjust its conduct so that it does not act in a manner which is contrary to Article 86 EC.

repealed by the Court.[83] There is no direct and explicit support in the case law for the latter conclusion and the Court did refer to the two alternative tests on several occasions.[84]

If the test of Merci Convenzionali Porto di Genova was deliberately overruled in Centre d'Insémination de la Crespelle, then it could be thought (see also the discussion above) that this had already been prepared in GB-INNO-BM in which the Court did not follow the doctrine of "inducement to abuse" but the doctrine of "extension of a dominant position". This seems however difficult to accept since there were only three days between the judgment in Merci Convenzionali Porto di Genova and that in GB-INNO-BM.[85] In addition, it can also be argued that, in fact, in GB-INNO-BM the Court applied itself the test of the automatic abuse in a situation in which the undertaking was clearly not "compelled to abuse its dominant position" and in a situation where there was arguably freedom for the undertaking to behave in a manner compatible with Article 86 (for example, by exercising its regulatory powers in an entirely objective, fair and non-discriminatory manner). The Court in fact did not invite the national court concerned to verify whether or not there had actually been an abuse or whether or not there had been, on the facts of the case, an extension of a dominant position. Rather, it declared the situation of fact as reported by the national court to be contrary to Articles 3(f), 90 and 86 of the Treaty.[86] Thus, the Court must have assumed that there would have been an extension of the dominant position as a likely, and possibly direct, consequence of the fact that the undertaking concerned had been entrusted with a regulatory power regarding its own activities and those of its competitors on the equipment market.[87]

---

[83] Both cases cited above.

[84] Admittedly, in the more recent judgments the Court referred to only one test which is the test based on Höfner in which the undertaking cannot avoid abusing its dominant position (see, in particular, Case C-387/93, Banchero, [1995] ECR I-4663, at para. 51). However, see also Corsica Ferries in which the Court referred to the test on "inducement to abuse a dominant position" in a situation in which a Member State had "cooperated" with an abuse of a dominant position by approving a discriminatory tariff scheme (cited above, at para. 43).

[85] The judgment in Merci Convenzionali Porto di Genova was given on 10 December 1991 (Court composed of 11 judges) and that in GB-INNO-BM on 13 December 1991 (Court composed of 5 judges).

[86] In the holding of the judgment, the Court indeed ruled that "*Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment*".

[87] Admittedly, importance may need to be given to the fact that the Court's judgment in GB-INNO-BM is not exclusively based on the doctrine of "extension of a dominant position". In fact, after having referred to the doctrine on extension of a dominant position both under Article 86 and under the combined application of Articles 90 and 86, the Court went on to state that as competition may not be eliminated through such an extension of a dominant position, it may also not be distorted either. Thereafter, it repeated the language which it had used in its judgment in Terminal Equipment Directive: "*A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of*

A parallel may also be made with another line of case law which is based on the combination of Articles 3(g), 5 and 85 and/or 86 EC and which is based on the same principles as the case law on the combined application of Articles 90 and 86 EC. The Court has consistently held that the Member States could not deprive the competition rules of their practical effect and effectiveness since otherwise they would be infringing the aforementioned Treaty rules.[88] In this line of cases, the Court has consistently held that such a situation would not only occur where a Member State has required an undertaking or undertakings to act in a manner contrary to the competition rules but also where a Member State has favoured or encouraged behaviour in restraint of competition and incompatible with the competition rules. This reasoning arguably confirms that the rules developed by the Court can apply not only where the conduct of the undertaking is the direct consequence of the State action but also in certain circumstances in which the undertaking concerned still has some possibility to "adjust" its market behaviour in order to ensure that it is in compliance with the constraints imposed by the competition rules.

The above leads us to conclude that it is not excluded by the existing case law for the Commission to apply to individual undertakings the doctrine on "automatic/necessary abuse" under Article 86 EC. However, doing so would clearly constitute a novel development in EC competition law. In addition, it is submitted that such a case should be constructed in a careful manner in order to attempt avoiding that it would be qualified as incompatible with the basic principle underlying Article 86 that what is prohibited is not the dominant position but the abuse of such a position. We revert to this question in the Sections below.

---

opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors. [...] In those circumstances, the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or services in the telecommunications sector." (GB-INNO-BM, cited above, at paras. 25-26). It cannot be excluded that the latter was the principal reason why the Court considered that the situation of fact which had been created by the Member State was incompatible with the Treaty rules on competition and that the reference to the "extension of a dominant position" was only a first step in the reasoning followed by the Court but that the Court did not conclude that this condition was met in the specific circumstances of the case. The latter observation could find support in the reasoning of the Court in Lagauche (Joined Cases C-46/90 and C-93/91, [1993] ECR I-5267) which was based on the "equality of opportunities" argument and not on the "extension of the dominant position" argument.

[88] See, in particular, Case 13/77, INNO v. Atab, [1977] ECR 2115; and Case 82/77, Openbaar Ministerie v. van Tiggele, [1977] ECR 25. See also Meng, Reiff and Ohra Schadeverzekeringen, cited above.

I.A.3 Evolutionary nature of the application of the competition rules

Both competition law itself and its application have almost by definition an evolutionary nature and are very often developed on a case-by-case basis. Within the European Community, this is illustrated by the very notable evolutions and developments which have taken place throughout the years after the entry into force of the EC Treaty both in the content and the scope of the law as well as in its interpretation and application.

Below, the focus is on a number of elements of EC law which are particularly relevant to the present study. In addition, in the Sections above, a number of other relevant evolutions in the case law have already been highlighted in an implicit manner. In particular, the evolution which has taken place in the interpretation and the application of the concept of "abuse" and in the combined application of Articles 90 and 86 EC are already good practical examples of the ways in which competition law is apt to be adjusted in a flexible manner to new market circumstances and new legal and policy questions in which the Commission plays a major role. As a general rule, it may be stated that, under the ultimate control and authority of the Court of Justice, the interpretation and application of the EC competition rules has gradually been extended in order to cover new types of agreements, practices and market circumstances. References have already been made above to the teleological interpretation of the Treaty rules which has been used by the Court of Justice in the application and the interpretation of the competition rules in order to ensure that competition in the internal market is not distorted.[89]

I.A.3.1 Impact of technological changes and other market developments on the assessment under EC competition law

In each case applying the competition rules to specific facts, it is essential to take due account of the legal and economic context in which the agreement or practice concerned takes place. This automatically implies that changes in market circumstances, such as technological or other developments, have a direct impact on the analysis under competition law.

This basic principle may be illustrated by the mechanism of exemptions and negative clearances under EC competition law. In particular, exemptions granted under Article 85(3) EC are always limited in time and a renewal of an exemption should only be granted if the requirements of Article 85(3) continue to be satisfied.[90] In addition, an exemption may be revoked where there has been a change in any of the facts which were fundamental in the making of the exemption decision.[91] A similar rule applies

---

[89] See Article 3(g) of the EC Treaty.

[90] See Article 8(1) and (2) of Regulation No 17/62, O.J. 1959-1962, Spec. Ed.

[91] See Article 8(3) of Regulation No 17/62.

to negative clearances under Article 85(1) and Article 86 EC. Such negative clearance decisions are limited to the facts in the possession of the Commission and do not prejudice the impact which any future market or technological developments may have on the assessment made in the negative clearance decision concerned. This confirms that in certain market situations certain agreements or practices may be allowed and in other market circumstances (for example, after a technological development leading to a change in the market structure) are prohibited.[92] Thus, for example, if the conditions for exemption are no longer met, undertakings may be required to change their market behaviour and to modify their commercial conduct or existing agreements on the market. This may also result in certain types of divestitures, for example, where the exemption concerned relates to a structural cooperation agreement such as a joint venture.[93]

Looking more specifically at the impact of technological developments on the assessment under EC competition law and, in particular, under Article 86 EC, it can be considered that such developments can affect the undertaking's position in at least two different manners:

- First, a technological development (for example, obtaining a patent which protects a production process which is far more efficient than existing production processes) may directly influence the position of economic strength of an undertaking and may, if the conditions therefore are met, put it directly or after a short period of time in a dominant position. If this happens, the undertaking may have to change its commercial conduct and practices since the special responsibility which it will have as a dominant undertaking may imply that practices which would be tolerated when the firm is not dominant could become prohibited for the newly dominant undertaking.

- Second, technological developments may have an indirect impact on the market position of undertakings through their influence on market definition. In particular, technological developments may result in the emergence of new markets or in re-defining the scope of existing markets which are converging

---

[92] For a practical application, see for example the Commission's assessment of strategic alliances in the telecommunications sector where it has been clearly indicated by the Commission that the situation needs to be re-examined at regular occasions. For a recent decision in which the Commission made also a specific reservation for a possible review of one aspect of the decision see Iridium (Commission Decision of 18 December 1996, O.J. 1997, L 16/87) in which the Commission indicated that the exclusive rights granted to gateway operator investors could be revisited should the particular circumstances of the case change in a substantial manner. The Commission indicated that such a change would happen, in particular, should Iridium acquire a dominant position in respect of the actual provision of S-PCS services.

[93] A recent illustrative example for the non-renewal of an exemption and the order of divestiture resulting thereof is UIP Pay TV, the joint sales venture between Paramount, MCA and MGM. UIP was granted an exemption in 1989 (O.J. 1989, L 226/25); in March 1997, the Commission decided not to renew the exemption and requested the parents to dissolve UIP after a period of 18 months following the decision (European Commission Press Release of 17 March 1997).

or expanding. In each of these cases, it will be necessary for the undertakings concerned to re-assess their market position on the newly defined markets and, where necessary, to modify their business practices in order to ensure their compliance with the constraints imposed by EC competition law.

The assessment of business practices and regulations under the EC rules and, in particular, those on competition may also be influenced by more general developments in the economy and society. This may, for example, be illustrated by the gradual process of implementation of the liberalization in the telecommunications sector which meant that, in a gradual manner, the possibility of having recourse to the exception of the application of the Treaty rules set out in Article 90(2) (in particular, to justify exclusive rights) was eliminated. In GB-INNO-BM, the Court referred to these developments in a general manner by stating that "*[a]t the present stage of development of the Community, [the monopoly for the establishment and operation of the public telecommunications network ...] constitutes a service of general economic interest within the meaning of Article 90(2) of the Treaty*" (emphasis added)[94]. This wording clearly illustrates the evolutionary nature of the application of the Treaty competition rules as is further confirmed by the directives adopted by the Commission in the telecommunications sector which have implemented, based on the interpretation, specification and application of the Treaty rules (including those on competition) the liberalization process in a gradual manner moving to the full liberalization of the markets. The liberalization directives have each time specified the scope, content and meaning of the Treaty rules taking into account technological, market, societal and political developments.[95]

Technological and market developments may also result in sector specific applications of the competition rules and may require the adoption of specific instruments and the implementation of measures which are necessary to ensure the creation and maintenance of an environment where competition is undistorted and where there are equal opportunities for the undertakings concerned. The adoption of the Competition Guidelines in the Telecommunications Sector[96] and of the recent Draft Notice on access agreements in the telecommunications sector[97] are good illustrations of this principle. The adoption of these non-binding measures was necessary to clarify the scope of the competition rules as a necessary instrument for ensuring a level playing field in the liberalized telecommunications sector in Europe.

---

[94] GB-INNO-BM, cited above, at para. 16.

[95] For a further discussion of the liberalisation directives in the telecommunications sector, see Section I.B below.

[96] Commission Notice of 6 September 1991, Guidelines on the application of EEC competition rules in the telecommunications sector, O.J. 1991, C 233/2.

[97] Communication from the Commission on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles, O.J. 1997, C 76/9.

Furthermore, Article 87 EC implicitly acknowledges that there may be sector specific differences in the application of the EC competition rules.[98]

In Part II of this study, we will examine to what extent the above general principles can be applied in practice, in the context of Articles 86 and 90, to the specific situation which is the subject of this study.

I.A.3.2 Impact of the changes in the regulatory environment on the assessment under EC competition law

As has been indicated above, the analysis under EC competition law must always be made in the legal and economic context in which the agreement, practice or other situation which is the subject of the analysis takes place. This basic principle of EC competition law already confirms that changes in the regulatory framework have an impact on the assessment of agreements, practices and situations under EC competition law. The above mentioned Competition Guidelines in the Telecommunications Sector and the Draft Notice on access agreements in the telecommunications sector are typical examples of instruments which have been adopted to adjust the interpretation and application of the competition rules to the new market situations and structures resulting from changes in the regulatory framework which have been brought about by the liberalization programme in the telecommunications sector.

Apart from the general impact which regulatory changes may have on the assessment under the competition rules, changes in the regulatory framework may also have a more direct impact on the analysis of business practices and conduct under Articles 85 and 86 EC. In particular, the Court has recognised that obligations and rules set out in EC secondary legislation can be used as interpretative criteria for the assessment as to whether or not a certain practice is prohibited under the competition rules.[99] Furthermore, the said case law confirms that this rule applies even if the rules contained in the secondary legislation are not directly addressed to the individual undertakings but to other entities (in particular, the Member States). The above principle should also imply that when there are changes in the regulatory framework

---

[98] Article 87 EC provides that the Council may adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86 and that such measures shall be designed, in particular, "*to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86*" (emphasis added).

[99] See, in particular the judgment in Ahmed Saeed, in which the Court considered that "*certain interpretative criteria for assessing [under Article 86 EC] whether the rate employed is excessive may be inferred from Directive 87/601/EEC, which lays down the criteria to be followed by the aeronautical authorities for approving tariffs. It appears in particular from Article 3 of the directive that tariffs must be reasonably related to the long-term fully allocated costs of the air carrier, while taking into account the needs of consumers, the need for a satisfactory return on capital, the competitive market situation, including the fares of the other air carriers operating on the route, and the need to prevent dumping*" (cited above, at para. 43). See also the reference to this rule and principle in the Draft Notice on access agreements in the telecommunications sector, cited above, at para. 56 and footnote 49.

or in the secondary legislation, this will also change the interpretative criteria which can be inferred from it for the application of the competition rules. This may then mean that a change in the regulatory framework and in secondary legislation can have as a direct consequence that a certain practice, agreement or situation which used to be permissible becomes prohibited after the entry force of the modification to the regulatory framework.

It is the above case law which may be used as one of the arguments to consider that the entry into force of the liberalization directives in the telecommunications sector, as well as the entry into force of the harmonisation legislation (in particular, the ONP legislation), may have resulted or may result in the appearance of new types of abuses. In particular, the liberalization directives contain a number of obligations which need to be imposed on certain categories of undertakings active in the telecommunications sector through the implementation of the directives in the national legal orders of the Member States. Those obligations not only cover practices which in a traditional application of the competition rules would be qualified as abusive practices (including, for example, a refusal to grant interconnection or the application of excessively high or discriminatory interconnection rates) but also contain a number of accompanying measures necessary to implement the liberalization in an effective manner (including, for example, the necessary implementation of systems of accounting separation and cost allocation systems or the compliance with certain transparency principles). It could be argued, on the basis of the above mentioned case law, that non-compliance by undertakings with the latter category of obligations could in itself be considered as an abuse of a dominant position. In addition, such practices could be qualified as abusive in an indirect manner by considering that an undertaking which does not implement the said obligations (for example, the requirement to implement an appropriate cost-allocation system) will not be able to demonstrate that its business practices are in compliance with the regulatory framework and, therefore, with the competition rules and will result in a situation where it is impossible to verify whether the undertaking concerned is complying with the regulatory constraints which are applicable to it.

The impact of regulatory changes on the assessment under the competition rules may also be illustrated by the initial versions of the Telecommunications Services Directive and the Terminal Equipment Directive. Both these directives contained certain provisions which related to changes which were required to be made to agreements entered into by telecommunications organizations.[100] In particular, the said provisions required the introduction of short notice periods in (long-term) customer agreements in order to avoid that the existence of such agreements, entered into prior to the liberalization of the markets, would have prevented the introduction

[100] See Article 7 of the Terminal Equipment Directive and Article 8 of the Telecommunications Services Directive.

of free competition from having a practical effect within a reasonable period.[101] Notwithstanding the fact that those provisions of the two directives have been annulled by the Court of Justice on specific grounds related to the scope of the Commission's powers under Article 90(3),[102] it is clearly arguable that the principle for which they stood was correct: namely that prior to the entry into force of the liberalization directives, long-term supply agreements did not raise specific issues under the competition rules since there was simply no significant competition which could be restricted in the markets concerned which were reserved to one undertaking; but that after the entry into force of the liberalization those agreements needed to be examined in a new context and could raise specific concerns under the competition rules through their foreclosure effects on new market entrants.

The fact that competition law and policy develops gradually, and may over time result in different and new results, is also acknowledged in the case law of the Court. For example, in Leclerc/Au Blé Vert, the Court considered that it was apparent "*that the purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply by virtue of their duty to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. It follows that, as Community law stands, Member States' obligations under Article 5 of the EEC Treaty, in conjunction with Articles 3(f) and 85, are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books, provided that such legislation is consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods*" (emphasis added).[103] The observations made by the Court in that case confirm that developments in individual competition cases may influence the general scope of the competition rules and the obligations imposed on individual undertakings and Member States.

I.A.3.3 Evolution in the administrative practice from behavioural solutions to structural solutions

In this Section of the background study, a short summary is made of an evolution which may be noted in the administrative practice of the Commission in the assessment of cases under the competition rules and, in particular, in the types of

---

[101] See recital 18 to the Terminal Equipment Directive and recital 31 to the Telecommunications Services Directive.

[102] See the judgments in Terminal Equipment Directive and Telecommunications Services Directive, both cited above. In both cases, the Court considered that the Commission had not provided sufficient reasons indicating that the holders of the special or exclusive rights had been compelled or encouraged by State regulations to conclude long-term contracts. Therefore, the Court considered that the questions could not be dealt with in a directive adopted on the basis of Article 90(3) but that the obstacles which were purportedly created by the long-term contracts could only be examined through individual decisions adopted under Articles 85 and 86 of the Treaty.

[103] Case 229/83, [1985] ECR 1, at para. 18.

remedies which have been developed in order to eliminate anti-competitive situations. The basic finding and starting point in this respect is that there is a tendency in the application of the competition rules towards increased emphasis on structural market situations and the need to ensure a sufficient degree of openness of markets.[104] The purpose of this Section is to provide a background as well as a frame of reference for the practical application of these principles in the Part II of the study.

The increased attention and emphasis on the structural market situations is accompanied by an increased use of structural solutions and remedies instead of behavioural solutions which have more traditionally been used to eliminate concerns under and infringements of the competition rules. The reasons for this shift in emphasis may be multiple. From an economic perspective, the orientation taken is certainly influenced by market developments and integration which provide for increased opportunities for undertakings to enter into important international and global alliances and other types of structural cooperation agreements as well as an incentive for extending market power through mergers and acquisitions (with a horizontal, vertical and/or conglomerate nature). One of the main concerns in examining these structural developments, in addition to the inherent restrictions on competition to which they may give rise, is their foreclosure effects on market access by third parties. From a legal perspective, the shift in emphasis may also be explained by the entry into force of the EC Merger Control Regulation which is specifically aimed at scrutinizing and controlling structural market operations and which may also have affected the approach followed in examining transactions under Article 85 EC.

As already indicated in the preceding Sections, structural measures have only rarely been used in cases on the application of Article 86 EC to individual undertakings. The emphasis has traditionally been on behavioural obligations and commitments devised to eliminate the specific abuse concerned.[105] So far, pure structural measures have been reserved to those cases under Article 86 EC in which the abuse which needed to be eliminated consisted specifically of a structural behaviour (including, for example, the acquisition of a competitor).[106]

---

[104] For a more detailed discussion and illustrations of these principles, see also Art & Van Liedekerke, "Developments in EC competition law in 1995: An overview", CMLRev 719-775 (1996).

[105] See, for example, Hilti (Commission Decision of 22 December 1987, O.J. 1988, L 65/19) in which an undertaking was obliged to abrogate commercial practices that tied the sale of nails to the supply of powered tools for inserting them rapidly, a market over which the Commission found that Hilti was dominant. As indicated in the Sections above, in cases on refusal to supply or refusal to provide access, undertakings were effectively compelled to continue supplies which had been withdrawn or to commence supplies. The cases on essential facilities could be used to illustrate that there may also be some structural aspects involved in remedying situations of abuse of a dominant position since in those cases the Commission referred to a test comparing the behavior of a dominant undertaking with that of an independent authority whose decisions are not influenced by a "conflict of interest".

[106] See the discussion in Section I.A.1.

Therefore, the emphasis below is on developments under Article 85 EC and the EC Merger Control Regulation which have led to the imposition of structural remedies and/or undertakings. In particular, attention will be given to the exemption decision in Atlas in which the Commission, after an in-depth assessment of the competitive impact of the operation, imposed the divestiture of one of the subsidiaries of France Telecom.[107] This aspect of the decision in Atlas is a good illustration of the evolution towards more structural solutions for remedying, through the application of the conditions for exemption in Article 85(3) EC,[108] anti-competitive concerns.

(i) Cases under Article 85 and the Merger Control Regulation involving structural solutions

In the cases examined below, the Commission considered that the only possible remedy to restore effective competition was to impose a structural measure or measures on the parties involved. Since every case generally presented different market circumstances and different reasons for the divestiture, the Commission each time needed to develop a package of measures tailored to those specific circumstances.

In imposing a divestiture the Commission generally required the parties concerned to sell off a company belonging to their economic or financial group or to sell a part of the company which did not form itself an autonomous legal entity (i.e. production facilities or units).

The Commission usually attached additional obligations, of a more behavioural nature, to the order to divest. These obligations can have different functions, such as: to maintain the value of the company to be disposed of during the period of time necessary for the sale; to guarantee that after the completion of the sale new anti-competitive effects will not arise such as economic coordination between purchaser and former owner; or to ensure that the purchaser would be able to compete with the former owner from the start, which often involves an obligation of assistance to and cooperation, on the part of the seller, with the purchaser. These additional obligations are also discussed below.

- *Article 85(3)*

The legal basis for structural remedies under Article 85(3) lies in Article 8(1) of Regulation 17/62, which provides that a "*decision in application of Article 85(3) of the Treaty shall be issued for a specific period and conditions and obligations may be attached thereto.*" That provision does not specify the nature which these conditions can have but the practice has made it clear that they can be behavioural and/or

---

[107] Commission Decision of 17 July 1996, Atlas, O.J. 1996, L 239/23.

[108] See, in particular, the last condition for exemption under Article 85(3) according to which exemption can only be granted if the agreement "*does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*"

structural in nature, depending on what the Commission considers necessary in order to be able to exempt the agreement. The condition for exemption under which such measures are introduced is mainly the last condition in Article 85(3)(d) which provides that the agreement must "*not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*"[109]

The Atlas decision[110] provides the precedent for a case in the telecommunications sector in which exemption under Article 85(3) was granted subject to structural (as well as behavioural) conditions. The decision involved the grant of an exemption under Article 85(3) for Atlas, a joint venture between France Telecom (FT) and Deutsche Telekom (DT). The Commission made its grant of an exemption subject to two structural conditions.

The first such condition was that the French and German public packet-switched data networks could not be integrated into Atlas before full and effective liberalization of the French and German telecommunications infrastructure and services markets. The Commission considered that no adequate competitive alternative would exist in Germany and France for customers using the public packet-switched data networks before at least two competing nationwide carriers were licensed in each of Germany and France to provide public telecommunications services. Pending full liberalization, the integration of the networks of FT and DT would reinforce their existing dominant positions in the French and German markets respectively for national packet-switched data communications services (each had a market share of more than 70% in its respective national market). The parties therefore undertook that Atlas would not acquire legal ownership or control (within the meaning of the Merger Control Regulation) of the foregoing networks before the full liberalization scheduled for 1 January 1998.

The second structural condition was that France Telecom (FT) had to sell, before a certain date, its shares of a German subsidiary, Info AG, which provided packet-switched data communications services in Germany in competition with Deutsche Telekom (DT). The market circumstance which led to this divestiture was that DT owned the only existing nationwide, packet-switched data communications network in Germany. The divestiture was considered necessary to ensure that actual competition in the above market would not be eliminated. Info AG was DT's second largest and most important competitor and all remaining competitors were relatively small. The decision (at paragraph 68) implies that in the absence of the divestiture all actual competition in the market would have been eliminated.

---

[109] As a matter of law, certain conditions and obligations (including an obligation to take structural measures) could also be imposed in an exemption decision, on the ground that otherwise the "indispensability test" under Article 85(3) would not be met.

[110] Cited above.

As to the scope of the divestiture requirement, FT undertook to the Commission irrevocably to make Info AG available for sale, as a going business, or to execute alternative remedies if such sale should not occur. FT agreed to divest all assets and contracts of Info AG, and to transfer to Atlas multinational clients outside Germany to whom Info AG at that time provided advanced network services, to the extent to which the Commission would be satisfied that such services were separable from the German activities of Info AG without significantly lessening the value of those activities. FT undertook that, if no purchaser could be found for Info AG as a whole, the two parts of the business into which it was divided internally would be sold separately.

- *Merger Control Regulation*

For decisions adopted pursuant to the EC Merger Control Regulation, the powers of the Commission to impose certain conditions and obligations are set out, in particular, in Article 8(2) of the Merger Control Regulation which provides that the Commission "*may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to modifying the original concentration plan*". Where a concentration has already been implemented Article 8(4) of the Merger Control Regulation provides that "*the Commission may, [...] by decision require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.*"

The substantive test under which structural measures are imposed is the general test for the appraisal of concentrations set out in Article 2 of the Merger Control Regulation in which it is provided, in particular, that a "*concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market*". Where structural measures (in particular, the divestiture of certain business units or subsidiaries) are imposed, this means that without such changes the concentration concerned would not be able to meet the standard for permissibility under the said Article 2.

The discussion of individual cases below will clearly not be exhaustive but is simply aimed at providing a number of references to cases in which the Commission considered that the foreclosure effects raised by transactions were so substantial that it could not clear the transaction without structural modifications to the original plans of the parties concerned (and where behavioural commitments or obligations were implicitly considered as unworkable or not sufficient to remedy the situation at issue).

In transactions dealt with under the Merger Control Regulation, structural measures have become more and more frequent. The Commission has requested structural undertakings, because behavioural remedies could not, alone, eliminate the

anti-competitive effects of the concentration.[111] Recently, the Commission has made use of them mostly in the form of the acceptance of commitments by the parties to divest a company or part of a company (production facility). The conditions in which a divestiture has been considered the appropriate remedy have included a variety of different economic and market circumstances in the context of which the concentration created or strengthened a dominant position impeding effective competition.

The main circumstances, the usual scope of a divestiture package and the reasons justifying divestiture are illustrated by the examples of cases briefly referred to below in which the Commission imposed structural measures.

1. In Nestlé/Perrier,[112] in which Nestlé planned to acquire 100% of the shares of its competitor Source Perrier SA, the Commission concluded that the acquisition would result in the French bottled water market having two producers who together would occupy a position of duopolistic dominance significantly impeding competition in the market concerned. The particular market circumstances which gave rise to the duopolistic dominance were mainly the high market shares of the two remaining market operators, the insufficient competitive counterweight provided by local mineral and spring waters, the increased dependency of wholesalers and retailers of bottled waters on the portfolio of brands of Nestlé and the other operator, and the absence of effective price-constraining potential competition from new entrants.

To address the Commission's concerns and avoid the creation of a duopolistic dominant position, Nestlé undertook, *inter alia*, to divest to a single third party a bundle of brands and to supply to the prospective purchaser of these brands not less than 3000 million liters of water capacity per annum. The Commission considered that these undertakings addressed its concerns, because the combined effect of divesting the bundle of brands in addition to the water capacity would create effective competition

---

[111] For examples of cases indicating the reasons behavioural commitments are generally considered insufficient to remedy the creation or strengthening of a dominant position, see the following: In Commission Decision of 24 April 1996, Gencor/Lonrho, O.J. 1997, L 11/30, in an attempt to address the Commission's concerns, the parties proposed a draft commitment to develop additional capacity, maintain output at existing levels and create a new supplier. The Commission considered that the commitment offered was behavioral in nature and could not therefore be accepted under the Merger Control Regulation. Nor did the proposed undertaking address the principal concern, which was that the proposed concentration created a dominant duopoly position in the relevant market. In Commission Decision of 9 November 1994, MSG Media Service, O.J. 1994, L 364/1, at para. 99, the Commission declared the proposed joint venture incompatible with the common market and rejected the undertakings offered by the parties, on the grounds that they were mere pledges of conduct which have no structural dimension and whose fulfillment cannot in any case be checked and, therefore, were, as a matter of principle, inappropriate to solve the structural problem resulting from the fact that the joint venture created or strengthened a dominant position in the affected market. In Commission Decision of 19 July 1995, Nordic Satellite Distribution, O.J. 1996, L 53/20, at para. 159, the Commission found that undertakings proposed by the parties were not sufficient to solve the competition problems identified by the Commission, because they were too limited in scope, mostly behavioral and would be very difficult to control and enforce.

[112] Commission Decision of 22 July 1992, Nestlé/Perrier, O.J. 1992, L 356/1.

to counteract the duopolistic dominance which would have otherwise resulted from the proposed concentration. Moreover, the buyer would be put in a position to acquire a foothold in major retail stores, access to which was necessary to enable any new entrant to promote other lesser-known brands and to introduce new brands.

2. In Kimberly-Clark/Scott,[113] Kimberly-Clark Corporation ("KC") notified the Commission of its intention to merge its worldwide activities with the Scott Paper Company. In its detailed competitive assessment of the planned concentration, the Commission reached the conclusion that the merger would create or strengthen a dominant position impeding effective competition. The principal factors which led to this conclusion were the fact that the merged entity would be the largest operator in terms of production capacity in the UK and Ireland in consumer markets for toilet-tissue and facial tissues/handkerchiefs; the merged entity would be significantly stronger than the next largest competitor; and existing competitors lacked the power to constrain the dominance of the merged entity.

The Commission found that potential entrants would also not be able to constrain this dominance, because of the high barriers to entry including a high degree of brand loyalty, the high level of advertising sunk costs for the establishment of a new brand, and the need to obtain access to shelf space in sales outlets. Moreover, it found that the high degree of brand loyalty, combined with the need for retailers to stock the essential brands of KC and Scott, would enable the merged entity to pursue a tied branded product policy.

To address the Commission's concerns, the parties undertook to divest four toilet-tissue brands and businesses in the UK and the Republic of Ireland, together with the copyright in the packaging, advertising and promotional materials used in relation to the products sold under these brands. The parties also agreed to enter into a fifteen-year agreement with the purchaser containing provisions for an initial three-year royalty-free exclusive license for the purchaser to use the Kleenex trade mark in the UK and Ireland, an option for the purchaser to renew the license for seven more years on a royalty basis, and finally, an agreement by the parties not to use the Kleenex trade mark in the relevant market for a certain period of time.

The Commission considered that the foregoing remedy was adequate to facilitate the entry into the market of an effective competitor and the avoidance of the creation of a dominant position. Four major reasons were given for justifying that the above divestiture was the proper remedy.[114] First, the divestiture would permit the post-merger combined market share of the new entity not to exceed the greater of either party's pre-merger market share. Second, the sale of business, plant and brands to be

---

[113] Commission Decision of 16 January 1996, Kimberly-Clark/Scott, O.J. 1996, L 183/1.

[114] At paras. 235 and following.

divested would allow the entry into the market of a new effective competitor,[115] who would be able to compete immediately due to the possibility to use the well known brands which were also the object of the divestiture measures. Third, the package of assets to be divested was "highly profitable", so that the degree of risk connected to the necessary operation of rebranding would not be too high to prevent a third party to consider investing. Finally, as part of the package the parties divested a significant amount of primary production capacity in the UK and Ireland with the consequence that their market share fell from 50-60% to 30-40% in the market concerned.

3. In Accor/Wagon-Lits,[116] the concentration involved the proposed acquisition by Accor SA, through the intermediary of the holding company Cobefin, of all the shares still in circulation of the Compagnie Internationale des Wagons-lits et du Tourisme. This transaction was found to create or strengthen a dominant position impeding effective competition in the market for motorway catering activities, in view of the very high market share (89%) of the post-acquisition enterprise, the expectation that this market share would not be eroded in the foreseeable future, the fact that this market share was 18 times larger than that of the next largest competitor, and the circumstance that the financial strength of the post-acquisition enterprise would have been "*out of all proportion to that of its competitors*". Moreover, due to legal and regulatory constraints, motorways were limited in number and the future development of networks was uncertain. Finally, foreign firms would experience difficulty to penetrate the market since barriers to entry were very high.

The parties contended that the acquisition would not limit competition because the Accor and Wagon-Lit networks would continue to be operated separately, given that the operations were conducted in partnerships with local caterers each holding a minority stake in the capital of the companies. The Commission responded that "*internal competition between establishments belonging to one and the same group is not a sufficient argument for accepting a dominant position on the part of the group concerned.*"

To address the Commission's concerns, the parties agreed to sell off the motorway catering activities.

4. Another example is Crown Cork & Seal[117], concerning the notification by Crown Cork & Seal Company Inc. of its intention to acquire sole control of CarnaudMetalbox SA. The proposed concentration was found to create or strengthen a dominant position impeding effective competition, based on the following principal

---

[115] In fact, the new competitor would have been able to acquire a modern plant and thus maintain the high quality of the Kleenex toilet-tissue.

[116] Commission Decision of 28 April 1992, Accor/Wagon-Lits, O.J. 1992, L 204/1.

[117] Crown Cork & Seal/CarnaudMetalbox, Commission Decision of 14 November 1995, O.J. 1996, L 75/38.

factors: First, after the acquisition the combined market share of the parties would have been more than three times larger than its next closest competitor, while before the transaction the three largest players were of approximately the same size. Second, the operation would result in the concentration of the two market leaders with respect to know-how, R&D and technology in a market that was experiencing a fast-moving and costly evolution in technology and know-how, in which possession and updating of state-of-the-art know-how was a primary factor driving competition in the market. Third, the concentration would have eliminated one of the only two suppliers able to offer full geographic coverage. Fourth, neither customers,[118] nor existing competitors[119] nor potential competitors[120] would have been able to constrain the market power of the new entity.

To address the Commission's concerns, the parties agreed to divest five businesses located within five different Member States in order to facilitate the entry of a credible competitor with adequate resources into the concerned market. The divestiture package included plant facilities, equipment, machinery, all rights to contracts entered into in the regular course of business, plus all other assets related to aerosol can production, rights to any aerosol can trade-marks, patents, inventions, trade secrets and know-how. The Commission emphasized the following fundamental pro-competitive changes resulting from the divestiture. First, it prevented the parties from acquiring a dominant position, given the fact that the plants were widely spread from a geographical point of view which (together with the fact that the divestiture package included state-of-the-art machinery) granted to the prospective purchaser the possibility to compete immediately and effectively with the merged group. Second, the market share of the new group after the divestiture would have remained the same as that of only one of the parties prior to the acquisition. Finally, the Commission considered as important the fact that the divestiture package comprised a stand-alone ongoing business representing an overall market share of 22%.

5. In DuPont/ICI,[121] DuPont de Nemours notified its proposed acquisition of the worldwide nylon operations of ICI. In order to eliminate the creation or strengthening of a dominant position, the parties agreed to both behavioural and structural remedies to address the Commission's concerns. The behavioural remedies,

---

[118] The Commission established that smaller competitors did not constitute a viable alternative to meet customer requirements, since they usually purchased a number of different sizes of aerosol can in large quantities that were manufactured in long production runs.

[119] Mainly because technological innovation which was under the control of the parties to the concentration.

[120] The market was characterized by high barriers to entry resulting from the need to have particular know-how and the fact that the new entity alone would have had enough capacity to supply the entire market (with the consequence that new entrants would not undertake the risk of an investment to attempt penetrating the market).

[121] Commission Decision of 30 September 1992, DuPont/ICI, O.J. 1992, L 7/13.

however, were of a particularly heavy character and, in effect, were comparable to structural remedies.

First, DuPont agreed to reserve capacity to produce up to 12000 tons per annum of nylon staple fibre (representing a cross-section of ICI's production range) for the benefit of an independent third party. Second, DuPont agreed to manufacture up to 12000 tons of such nylon as specified by the third party for a period of five years, renewable. The third condition was purely structural and consisted of a requirement for DuPont to transfer to the designated third party a free-standing, high quality carpet research and development facility appropriate to the business transferred.

Given the undertakings, the Commission considered that the third party would be able immediately to replace ICI as a supplier of high quality fibers. This third party would be able to maintain and build on the acquired position in the segment of the market which was closest to that of DuPont in terms of quality, through its use of the research and development facility and the development and support expertise which were also to be transferred. This would significantly improve the competitiveness of the third party, in particular as regards its product range and future product development. The Commission concluded that the undertakings imposed would therefore substantially reduce the likelihood that DuPont could be able to determine the degree of product development and innovation in the market.[122]

6. Finally, in Magneti Marelli/CEAC,[123] the market share of a subsidiary of the Fiat group in the French battery market for the automotive aftermarket would have increased from roughly 20% to around 60% as a result of the notified acquisition. This was found by the Commission to create a dominant position significantly impeding effective competition because of the gap with the next largest competitor (of the order of 40%), the financial strength of the new entity and that of its parent companies, its greater access to the lead market, the fact that competitors in other markets would not try to enter the French market through price competition[124] and customers lacked the purchasing strength to counterbalance the power of the new entity.

To address these concerns, Fiat undertook, within an agreed period, to reduce its majority holding in the capital of the above mentioned subsidiary to 10% and to reduce to one member its representation on the administrative or supervisory bodies of the subsidiary. This remedy may illustrate a possible alternative to full divestiture.

---

[122] At para. 48.

[123] Commission Decision of 29 May 1991, O.J. 1991, L 222/38.

[124] Because price competition was considered unreasonable on a mature market on which little production capacity is available.

(ii) **Administrative practice regarding structural separation as a temporary condition before divestiture**

A number of the precedents mentioned above, as well as certain other cases, also contain useful guidance as to the practical measures used by the Commission when it imposes a structural separation or a divestiture on a specific undertaking in a direct or indirect manner.[125] In fact, these precedents could be used as a starting point for developing a framework of accompanying rules to be used if such measures were to be adopted in order to ensure the effectiveness of the remedy imposed.

In particular, in cases where divestiture was a condition for clearance of a transaction, the Commission required the undertakings concerned to take a number of measures in respect of the company or entity which needed to be divested during the time necessary to carry out the sale. One of these measures includes a type of structural separation, of a temporary nature, to be implemented prior to the effective divestiture of the business concerned. These measures are generally aimed at: (i) maintaining the viability, marketability and competitiveness of the company to be divested and (ii) providing sufficient management and other resources for this purpose. Because they may be relevant in the Commission's further dealing with the subject of this study, a number of practical examples taken from existing precedents are briefly summarized.

First, the Commission has imposed a number of "preparatory" measures which were necessary to make the entity concerned "transferable". In particular, in Procter & Gamble the Commission required the parties to render "*the [...] plant capable of being transferred to an independent third party and most particularly, that the plant [had to be made] capable of being managed separately from P&G*".[126] Similarly, in Crown Cork & Seal the Commission required the parties, as a first obligation, to "*remove from [the facilities to be divested] the elements of Crown's metal-crown business at such location so that such operations become a stand alone and ongoing aerosol business. Such removal [had to] be conducted so as not to impair the aerosol business as [...] conducted.*"[127] Other types of preparatory measures related to the staffing of the entity to be divested. Thus, for example, in DuPont/ICI the parties agreed that the facility to be transferred had to be "*staffed with competent technical personnel at least half of whom should have been from [the German facilities] of ICI.*"[128] Also, in several other decisions the parties undertook to use their best efforts to encourage its personnel to take up employment with the purchaser.

---

[125] As has been indicated above, the existing precedents under Article 86 in which structural remedies were imposed (in particular, Continental Can, examined above) provide very little or no guidance in this respect.

[126] Commission Decision of 21 June 1994, Procter & Gamble/Schickedanz, O.J. 1994, L 354/32, at para. 182.

[127] Crown Cork & Seal, cited above, at para. 115.

[128] DuPont/ICI, cited above, at para. 48.

Second, certain other obligations related to the viability and the competitiveness of the entity which would be divested. Such obligations concerned, for example, the assignment of existing contracts with both the supply and the retail side, support of the divestiture with the necessary financial means and finally all other reasonable steps necessary to make the entity sold fully competitive from the start. In Crown Cork & Seal, for example, the Commission required Crown to "*ensure that the businesses in the divestiture package are legally held separate and are maintained as distinct and saleable businesses and to ensure that production capacity and selling activities are maintained, pursuant to good business practices, at their current level, and that all contracts necessary to preserve the businesses are entered into or continue in accordance with their terms, consistent with past practice.*" Regarding the management of the business to be divested, the Commission considered it necessary to require Crown to undertake "*to maintain all administrative and management functions relating to the divestiture package which have been carried out at all appropriate headquarters levels in Crown [...]*".[129] In Procter & Gamble the Commission also requested P&G to provide sufficient financial resources to the end of administrating and managing the divestiture, in the ordinary course of business."[130]

Third, in the event of temporary structural separation prior to divestiture, the Commission required, on the one hand, that the entity concerned be put under clearly separate management and, on the other hand, gave specific attention to the possible exchange of confidential information between the entities to be separated:

- For the separation of the management, the Commission made use of the appointment of a trustee with authority to take care of the sale of the entity to be divested as well as to manage that entity on a temporary basis.[131] In Crown Cork & Seal the trustee had to "*determine the best management structure to ensure the viability, marketability and competitiveness of the divestiture*

---

[129] Crown Cork & Seal, cited above, at para. 115.

[130] Procter & Gamble, cited above, at para. 182. In this respect, see also Kimberly-Clark/Scott, cited above, at para. 233, where the Commission included in the divestiture package extra obligations relating to the business to be divested in order to enhance its commercial viability. In particular, the list of obligations included: "*transfer of sales staff [at the time] engaged in the UK consumer tissue categories; transfer of production and administrative personnel currently dedicated to the facility [to be divested]; provision of manufacturing technical assistance at the facility, for a period of not more than 12 months from the date of sale; assignment of existing pulp and other input supply contracts and services; finally the parties best efforts to procure the assignment to the purchaser of existing contracts or business with retailers for the supply of an agreed amount of store brand tissue products to the extent related to the facility.*"

[131] See, for example, Atlas, cited above, at para. 26, where the trustee had indeed twofold obligations: manage the business during the separate holding period and manage the sale of the business. As to the managing of the sale, the trustee had to: conduct good faith negotiations with interested third parties with a view to selling the entity; provide a written report before a binding contract was signed or in any event every month. Regarding the management of the entity, the trustee had to provide the Commission with a written report every two months concerning the monitoring of the operations and management of the entity.

package"[132]. In Procter & Gamble "*P&G under[took] that the Business ha[d] its own management composed of ex-VP or other currently non-P&G personnel that shall, under the guidance and control of the Trustee be under instructions to manage it on an independent basis [...]*".[133]

- As far as the exchange and the utilization of information between the parties and the entity to be divested is concerned, in Nestlé/Perrier the Commission required Nestlé to undertake "*not to permit the Perrier management to transfer any business secrets, know-how, commercial information or any other industrial information or property rights of a confidential or proprietary nature that it obtains from [the businesses to be divested] to any other commercial entity within the Nestlé group and not to use any such information within the Nestlé group other than for the purposes of selling the assets which [were] the subjects of this commitment*"[134]. In Procter & Gamble P&G undertook "*not [to] obtain from the Business management [to be divested] any business secrets, know-how, [or similar confidential information] relating to the business.*"[135]

The two above points illustrate the kinds of minimum measures to be implemented by an undertaking to implement an internal structural separation as a remedy under the Merger Control Regulation. If such separation is to have a more permanent nature, it would of course not be possible to work with a trustee but the undertaking would need to put in place an own adequate and separate management. In any case of structural separation, it is clear that one of the essential points would be the exchange and use of confidential and other commercially sensitive information. Therefore, impermeable Chinese walls would need to be built between the different entities so that the separation and the elimination of the anti-competitive concerns can be carried out in an effective manner.

Fourth, in some recent cases, it is provided that the trustee will present the names of potential purchasers to the Commission which then has a certain period of time in which to take a position on whether any of the potential purchasers would be considered unsatisfactory.[136]

---

[132] Crown Cork & Seal, cited above, at para. 115. In addition, in order to ensure that the divestiture would not have altered the marketability of the business, the trustee was also given access to the personnel and facilities as well as the documents, books and records of Crown's aerosol business, including those which did not form part of the divestiture package.

[133] Procter & Gamble, cited above, at para. 182.

[134] Nestlé/Perrier, cited above, at para. 136.

[135] Procter & Gamble, cited above, at para. 186.

[136] Procter & Gamble, cited above, at para. 186.

Fifth, it may be noted that in the conditions set by the Commission ordering a divestiture, provision is often also made for the case that no purchaser can be found. The general remedy imposed in the event that the sale cannot be completed within the time limit defined in the definition is that the Commission reserves itself the right, pursuant to Article 8(5) of the Merger Control Regulation, to revoke its decision (which would then have the effect to re-separate the companies involved in the operation with the view to restore the degree of competition existing prior to the merger or acquisition).[137] In two other decisions, however, different solutions were envisaged. In Crown Cork & Seal, the Commission stated that in "*the event that the trustee at any time prior to the target date determines in conjunction with the Commission that it is not possible to identify an acceptable purchaser for the divestiture package 'en bloc', the trustee, Crown and the Commission will discuss appropriate alternatives to the divestiture 'en bloc'*".[138] In Atlas, the Commission required that if "*the sale of [the] business does not seem likely to occur by the [target] date France Telecom shall, at least two months before that date, submit alternative remedies sufficiently satisfactory to safeguard actual competition in the German market.*" In case of a final absolute impossibility to find an acceptable purchaser for the business as a whole, the business needed to be divided in two entities and sold separately.[139]

Finally, the Commission usually attaches, as an "after-sale" condition, a prohibition to re-acquire the divested business for a certain period of time as well as a prohibition to use confidential information regarding the divested business.[140]

I.A.4 Powers of the Commission to impose remedies for the infringement of the competition rules

The cases discussed in Section I.A.1 above provide already a good illustration of the powers which the Commission has to remedy situations in which an infringement of the EC competition rules is found.[141] However, in preparation of the discussion in Part II, it is useful to recall briefly the legal basis of the powers of the Commission as well as the interpretation which has been given to these powers by the European Courts.

---

[137] See, in particular, KNP/BT/VRG, Commission Decision of 4 May 1993, O.J. 1993, L 217/35, at para. 71.

[138] Crown Cork & Seal, cited above, at para. 115.

[139] Atlas, cited above, at para. 26.

[140] See, for example, Kimberly-Clark/Scott, at para. 234, regarding the prohibition to use confidential information and Nestlé/Perrier, at para. 136, for the prohibition not to re-acquire.

[141] The power of the Commission to impose fines, as set out in Article 15(2)(a) of Regulation 17, is not the subject of a specific discussion in the context of this study.

The legal basis of the Commission's powers can be found in Article 3(1) of Regulation 17/62[142] which provides in broad terms that "*[w]here the Commission [...] finds that there is infringement of article 85 and article 86 of the Treaty, it may by decision require the undertakings [...] concerned to bring such infringement to an end.*" In order to be able to enforce the competition rules in an effective manner, the Commission has had to interpret the wording of Article 3 and has, in fact, gradually "extended" its powers to impose remedies which were adequate in the circumstances at issue. The Courts have, in the great majority of the cases referred to them, upheld the Commission's interpretation of Article 3.[143]

It is clear that the Commission's powers pursuant to Article 3 of Regulation 17 cover not only negative prohibitions (so-called cease or desist orders) but also positive orders to act. Furthermore, the Commission also has the power, where justified, to order the parties to refrain from future conducts.[144] Prohibitions are generally used in cases under Article 86 EC where no other more intrusive measure is warranted by the circumstances to stop the infringement. In other words, where the simple elimination of the anti-competitive practice is sufficient in and by itself to restore effective competition.

As mentioned above, the Commission also has the power to require a positive action from the addressee of a decision finding an abuse of a dominant position. The type of action or conduct which can be imposed depends on the circumstances of the case at hand and, in particular, on the type of infringement. In Commercial Solvents v. Commission,[145] for example, the undertaking challenged the Commission's power to order certain quantities of raw material to be supplied to make good the refusal of

---

[142] Council Regulation 17/62, O.J. Spec. Ed. 1959-1962, 87.

[143] For a case in which the Court considered that the Commission's interpretation of Article 3 could not be followed, see Case T-7/93, Langnese-Iglo GmbH, [1995] ECR II-1539. In that case, the Court of First Instance considered that the Commission did not have the power to prohibit the undertaking concerned to conclude exclusive purchasing contracts in the future, because the Commission was not empowered, by means of an individual decision, to restrict or limit the legal effects of a legislative measure such as block exemption Regulation No 1984/83, unless the latter expressly provides a legal basis for that purpose. See also Automec II where the Court of First Instance said that "*the Commission cannot in principle be considered to have, among the powers to issue orders which are available to it for the purpose of bringing to an end infringements of Article 85(1), the power to order a party to enter into contractual relations, since in general the Commission has suitable remedies at its disposal for the purpose of requiring an undertaking to terminate an infringement.*" Case T-24/90, Automec v. Commission (II), [1992] ECR II 2223, at para. 51. The content of the latter ruling may be difficult to reconcile with the position taken by the Court of Justice in cases as Commercial Solvents and Magill (both discussed above).

[144] For example, in Hilti (Case T-30/89, Hilti AG v. Commission, [1991] ECR II-1439) the undertaking was required to "*refrain from repeating or continuing any of the acts or behavior specified in Article 1 [of the decision] and [to] refrain from adopting any measures having an equivalent effect*" to those found to have been abusive. On appeal, the Commission Decision was upheld.

[145] Joined Cases 6-7/73, Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission, [1974] ECR 223.

supplies as well as the power to order that proposals to prevent a repetition of the conduct complained of be put forward on the basis of Article 3 of Regulation 17/62. The Court confirmed, however, that the said Article 3 "*must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain actions, practices or situations which are contrary to the Treaty.*"

Equally, in Magill[146], the Court of First Instance, following the Commercial Solvents interpretation, upheld the Commission's decision ordering the BBC and other broadcasting companies to make the information, covered by copyright, available to competitors, and to each other, by requiring it to grant licenses in one of two ways at the choice of the parties.[147] On appeal, the Court of First Instance rejected the applicants' arguments that the Commission had exceeded its powers under Article 3 of Regulation 17/62; it considered that "*the Commission has the power under Article 3 of Reg. 17 to require the undertakings to take or refrain from taking certain action with a view to bringing the infringement to an end. In that light the obligations imposed upon the undertakings must be defined with regard to requirements related to re-establishing compliance with the law, taking into account the details of each individual case.*" The Court then cited the language of Commercial Solvents, mentioned above, and referred, in addition, to the Camera Care[148] judgment where "*the Court of Justice ha[d] expressly acknowledged [...] that the Commission must be able to exercise the right to take decisions conferred upon it 'in the most efficacious manner best suited to the circumstances of each given situation.*'" Lastly, the Court held that the type of remedy mandated by the Commission was acceptable under the circumstances since it was the only means of bringing that infringement to an end.

The Court's judgment in Camera Care also contributes to an understanding of the reasoning followed by the Court in assessing the powers held by the Commission. In that judgment, the Court confirmed the Commission's powers to impose interim measures on the basis of Article 3 of Regulation 17/62, a power which is not covered in an explicit manner in that provision. The Court held in that case that "*[a]s regards the right to take decisions conferred upon the Commission by Article 3(1), it is essential that it should be exercised in the most efficacious manner best suited to the circumstances of each given situation. To this end the possibility cannot be excluded that the exercise of that right should comprise successive stages so that a decision finding that there is an infringement may be preceded by any preliminary measures which may appear necessary at any given moment.[...] The powers which the*

---

[146] Case T-69/89, Radio Telefis Eireann v. Commission, [1991] ECR II-535.

[147] The first way was through the supply to third parties on request and on a non-discriminatory basis of the listings concerned with a view to their publication. The alternative was the grant of licenses on conditions which took account of the parties' legitimate preoccupations.

[148] Case 792/79 R, Camera Care Limited v. Commission, [1980] ECR 119.

Commission holds under Article 3(1) of Regulation No 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist."

On the basis of the above, it may be concluded that the exercise by the Commission of its powers under Article 3 of Regulation 17/62 is subject to a test similar to that of proportionality. The Commission is entitled to exercise its remedy powers in the most efficacious manner best suited to the circumstances of each individual situation but if various options are open to achieve the same goal, it has to select that remedy which interferes the least with the commercial freedom of the undertaking(s) concerned.[149]

I.B Article 90(3) - Commission powers to adopt directives and decisions

This part of the study focuses on the Commission's power to adopt directives under Article 90(3) EC. It is intended to provide an overview of the existing case law and administrative practice in order to establish the circumstances under which this provision could be used as the basis to address structural market situations brought about by Member State measures.

I.B.1 The Commission's powers under Article 90(3) as confirmed by the Court of Justice

I.B.1.1 Power to supervise and prohibit Member State measures

Article 90(3) empowers the Commission to ensure the application of the provisions of Articles 90(1) and (2) and, where necessary, to address appropriate directives or decisions to Member States. In particular, this provision imposes on the Commission both a power and a duty of supervision[150] to ensure that measures adopted by the Member States in relation to public undertakings[151] and undertakings to which Member States grant special or exclusive rights[152] comply with Article 90(1)

---

[149] See C.S. Kerse, E.C. Antitrust Procedure, (3d ed., 1994), 314: *"The principle of proportionality and of minimum intervention are not the same thing but are not mutually exclusive. Thus, where several means are available, each being justifiable to the end sought (proportionality), the least stringent which will be effective must be employed (minimum intervention)."* Kerse cites Advocate-General Roemer in Case 31/59 Acciaieria e Tubificio di Brescia v. High Authority, [1960] ECR 71.

[150] Case C-202/88, France v. Commission, [1991] ECR I-1223, at paras. 21 and 24.

[151] See the discussion of the concept of "public undertakings" further below.

[152] For the definition of "special" and "exclusive" rights as set out in the liberalization directives, see Article 1(1) of the Telecommunications Services Directive, as amended by the Satellite Services Directive; discussed further below.

of the Treaty. Article 90(3) also confers on the Commission a power of prohibition, in that it is entitled to prohibit individual Member States from adopting or maintaining measures in breach of Article 90(1).

Pursuant to Article 90(1), the Member States are prohibited from enacting or maintaining in force any measure[153] contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94. According to the Court of Justice, the supervisory power conferred on the Commission, pursuant to Article 90(3), depends on the scope of the particular Treaty rules with which compliance is to be ensured,[154] i.e., for purposes of the present study the competition rules, and particularly Article 86.

Article 90(2) permits a derogation where compliance with such rules would obstruct the performance of particular tasks of undertakings entrusted with the operation of services of general economic interest.[155] This "general economic interest" exception is strictly construed,[156] and is closely related in the telecommunications sector to the concept of "universal service".[157] This concept will not be discussed in greater detail

---

[153] See the discussion in Section II.B below.

[154] France v. Commission, cited above, at para. 21.

[155] Article 90(2) provides that: "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.*" Article 90(2) "*thus permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights.*" Case C-320/91, Corbeau, [1993] ECR I-2533, at para. 2, third indent. According to the Court of Justice, in allowing derogations to be made from the general rules of the Treaty on certain conditions, Article 90(2) seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules of competition and the preservation of the unity of the Common Market (France v. Commission, cited above, at para. 12).

[156] E.g. Case 127/73, BRT v. SABAM, [1974] ECR 313, at para. 19; Case 66/86, Ahmed Saeed Flugreisen and Others v. Zentrale zur Bekämpfung unlauteren Wettbewerbs, [1989] ECR 803, at para. 58.

[157] According to the Commission, the provision of telecommunication systems in a given country is a service of general economic interest. Commission Decision of 10 December 1982, British Telecommunications, O.J. 1982, L 360/36, at para. 41, on appeal in Case 41/83, Italy v. Commission, [1985] ECR 873; RTT v. GB-Inno-BM, cited above, at para. 16. The concept of services of general economic interest and the general interest "universal service" requirements are discussed in the Commission's communication Services of General Interest in Europe, O.J. 1996, C 281/3. See also the Commission's 1996 communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Universal Service for Telecommunications in the Perspective of a Fully Liberalised Environment, COM(96) 73 final.

here because it is not central to the analysis of one undertaking holding dominant positions over telecoms and cable TV infrastructures (and/or both services) or to the elimination of restrictions on the use of telecoms infrastructure for the provision of cable TV services.

I.B.1.2 Article 90(3) directives

In making it possible for the Commission to adopt directives to ensure the application of Articles 90(1) and (2), Article 90(3) of the Treaty empowers the Commission to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States as regards the undertakings referred to in those provisions.[158] The Commission's power is not, therefore, limited to mere surveillance to ensure application of the existing Commission rules.[159]

The Commission has described the scope of its powers to adopt Article 90(3) directives in its XXIVth and XXVth Reports on Competition Policy. The Commission indicates that its powers under Article 90(3) are neither legislative nor "quasi-legislative" and that it does not have the power under this provision to create new substantive obligations for either the Member States or State undertakings. Instead, the Commission is entitled to specify the implications of existing Treaty rules, and set up procedures for making sure that existing obligations on Member States are complied with.[160]

In addition to empowering the Commission to establish general rules defining the obligations already imposed on Member States by the Treaty, the Commission considers that Article 90(3) also empowers it to take the necessary preventive measures to allow it to carry out its monitoring function.[161]

---

[158] France v. Commission, cited above, at para. 14; Spain and Others v. Commission, cited above, at para. 12. According to the Court, the subject-matter of the power conferred on the Commission by Article 90(3) is different from, and more specific than, that of the powers conferred on the Council by Article 100a or Article 87. Moreover, the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission. France v. Commission, cited above, at paras. 25-26; Joined Cases C-271/90, C-281/90 and C-289/90, Spain and Others v. Commission, [1992] ECR I-5833, at para. 14.

[159] Spain and Others v. Commission, cited above, at para. 12.

[160] Commission, XXIVth Report on Competition Policy 1994, at para. 215.

[161] Commission, XXVth Report on Competition Policy - COM(96)126 final, at para. 100. According to the Commission, it has always used its power to adopt directives under Article 90(3) with caution and has used it "*only in situations where the existence of many infringements of the fundamental rules of the EC Treaty made them necessary to avoid a multiplicity of infringement proceedings and to give operators a minimum amount of legal certainty. These initiatives have generally been taken in response to concerns expressed by the Council or Parliament. The Commission has always attached the greatest importance to the need for this instrument to be used as part of a transparent procedure involving the broadest possible dialogue with the other Union institutions, Member States and interested parties.*" Id.

Directives adopted by the Commission under Article 90(3) fall within the general category of directives referred to in Article 189.[162] According to Article 189, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. In other words, the directive lays down an objective but the Member States are entitled to achieve that objective through the means of their choice. According to the Court of Justice, each Member State has a duty to implement a directive in a way which fully meets the requirements of clarity and certainty.[163] The failure of a Member State to implement an Article 90(3) directive in accordance with this duty could give rise to an application by the Commission to the Court of Justice under Article 169 for failure to fulfil an obligation.

I.B.1.3 Article 90(3) decisions

In addition to directives, the Commission is entitled to address decisions to individual Member States establishing that a given State measure is incompatible with the rules of the Treaty and indicating what measures the Member State must adopt in order to comply with its obligations under Community law. According to the Court of Justice, this power emanates, *inter alia*, from the principle of *effet utile*, as it is essential for the Commission so as to allow it to discharge the duty imposed upon it by Articles 85 to 93 of the Treaty to ensure the application of the competition rules.[164] Unlike a directive, a decision is adopted in respect of a specific situation in one or more Member States and necessarily involves an appreciation of that situation in the light of Community law.[165]

Decisions adopted by the Commission under Article 90(3) fall within the general category of decisions referred to in Article 189.[166] According to Article 189, a decision is binding in its entirety upon those to whom it is addressed.[167] The failure of a Member State to which an Article 90(3) decision has been addressed to comply with the decision could give rise to an application by the Commission to the Court of Justice under Article 169 for failure to fulfil an obligation.

---

[162] Case 226/87, Commission v. Greece, [1988] ECR 3611, at para. 11.

[163] Case 102/79, Commission v. Belgium, [1980] ECR 1473, at para. 11.

[164] Joined Cases C-48/90 and C-66/90, Netherlands and Others v. Commission, [1992] ECR I-565, at paras. 28-29.

[165] Netherlands and Others v. Commission, cited above, at para. 27.

[166] Commission v. Greece, cited above, at para. 11.

[167] According to the Court of Justice, a "decision" is characterized by the limited number of persons to whom it is addressed. Case 25/62, Plaumann & Co. v. Commission, [1963] 9 Rec. 197.

I.B.2 The use made by the Commission of its powers in the telecommunications sector to adopt directives and decisions under Article 90(3)

The Commission has used Article 90(3) directives as the legal basis for its regulatory initiatives aimed at liberalizing competition in the telecommunication sector.[168]

Through these directives, the Commission has already abolished special and exclusive rights granted by Member States for the importation, marketing, connection, bringing into service and maintenance of terminal equipment (Terminal Equipment Directive) and for the provision of telecommunications services other than voice telephony (Services Directive, as amended). It has also used these directives to remove restrictions on the use of cable TV and other alternative infrastructures for the provision of liberalized telecommunications services (Cable TV Directive and Full Competition Directive) and to liberalize satellite services and satellite terminals (Satellite Services Directive) and mobile and personal communications services (Mobile Services Directive). Under the Full Competition Directive, the market for voice telephony and the market for voice telephony infrastructure must also be liberalized by 1 January 1998 (subject to longer periods for countries with small or less developed networks).

A number of Member States challenged the power of the Commission to use Article 90(3) as the basis for the Terminal Equipment Directive[169] and the Telecommunications Services Directive.[170] [171] The Court of Justice, however, confirmed in broad terms the Commission's power under Article 90(3) to lay down in a directive general rules specifying the obligations arising from the Treaty which are

---

[168] Commission Directive 88/723/EEC of 16 May 1988, competition in the markets in telecommunications terminal equipment, O.J. 1988, L 131/73 ("Terminal Equipment Directive"); Commission Directive 90/388/EEC of 28 June 1990, competition in the markets for telecommunications services, O.J. 1990, L 192/10 ("Telecommunications Services Directive"), as amended by Commission Directives 94/46/EC of 13 October 1994, satellite communications, O.J. 1994, L 268/15 ("Satellite Services Directive"), 95/15/EC of 18 October 1995, abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, O.J. 1995, L 256/49 ("Cable TV Directive"), 96/2/EC of 16 January 1996, mobile and personal communications, O.J. 1996, L 20/59 ("Mobile Services Directive") and 96/19/EC, full competition in telecommunications markets, O.J. 1996, L 74/13 ("Full Competition Directive").

[169] France v. Commission, cited above.

[170] Spain and Others v. Commission, cited above.

[171] Applications for annulment of provisions in the Cable TV Directive have also been filed by Spain and Portugal and are still pending. They contend, *inter alia*, that the Commission exceeded its competence under Article 90(3) on the ground that it did not specify obligations already in existence under Article 90(1), but instead laid down a new obligation to liberalize the market going beyond the relevant legislation in existence at that time. Case C-11/96, Spain v. Commission, O.J. 1996, C 95/5; Case C-12/96, Portugal v. Commission, O.J. 1996 C 95/5. At the time of writing only the Spanish approval was still pending as the appeal by Portugal had been withdrawn.

binding on the Member States in regard to public undertakings and undertakings to which the Member States have granted special or exclusive rights.[172]

In addition to the foregoing directives, the Commission has, for example, also adopted Article 90(3) decisions addressed to Italy and Spain, respectively, requiring them to take the steps necessary to remove the distortion of competition resulting from initial payments which they imposed on second operators of GSM radiotelephony and to secure equal conditions of competition for such second operators within fixed time limits.[173]

I.B.3 Lines of reasoning in current Article 90(3) directives and decisions

The Commission's Article 90 directives in the telecommunications sector have been based in large measure on the doctrines already discussed in Section I.A above. The doctrine of "automatic/necessary abuse" is the key ground for the combined Article 90/86 reasoning underlying the Cable TV Directive, the Satellite Services Directive, the Full Competition Directive[174] and the Commission's Article 90 decisions relating to the second GSM operators in Spain and Italy. The doctrine of the "illegal

---

[172] On relatively limited grounds, the Court annulled all references in the Terminal Equipment Directive and the Telecommunications Services Directive to "special rights" on the ground that the Commission had failed to specify the types of special rights which are actually involved and in what respect the existence of such rights was contrary to the provisions of the Treaty. The Commission rectified this omission in the Satellite Services Directive. The Court also held that Article 90 was, in the circumstances at issue (since the Commission had not demonstrated that the restrictions concerned resulted from a State measure), not an appropriate basis for the removal of obstacles to competition resulting from long-term contracts, with the consequence that it annulled provisions in the two Directives requiring Member State action to make it possible for certain types of long-term contracts to be terminated. It held that Article 90 confers powers on the Commission only in relation to State measures and that anti-competitive conduct engaged in by undertakings acting on their own initiative can be called into question only by means of individual decisions adopted under Articles 85 and 86 of the Treaty.

[173] Commission Decision of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy, O.J. 1995, L 280/49; Commission Decision of 18 December 1996 concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain, O.J. 1997, L 76/19. Italy and Spain had required the second GSM operators in their respective countries to make sizeable initial payments to the State as a condition of obtaining the license, whereas they had not required similar payments from the first GSM operators which were in each case public undertakings (Telecom Italia SpA, controlled by STET, in Italy, and Telefonica de Espana in Spain). Appeals have been lodged against the decision concerning Italy. For summaries of the appeals, see Case C-406/95, Italy v. Commission, O.J. 1995, C 46/10; Case T-215/95, Telecom Italia SpA v. Commission, O.J. 1995, C 46/15; Case T-229/95, Telecom Italia Mobile SpA, O.J. 1995, C 46/17.

[174] Although it could be argued that both the Terminal Equipment Directive and the Telecommunications Services Directives are based at least in part on the doctrine of the "automatic/necessary abuse" of a dominant position, in the authors' opinion these directives are based primarily on the doctrine of the "illegal extension/strengthening" of a dominant position.

extension/strengthening" of a dominant position[175] was used by the Commission as one of the bases for the combined applications of Articles 90 and 86 in the Telecommunications Services Directive, the Satellite Services Directive and the Full Competition Directive and was confirmed by the Court of Justice in its judgment on the Telecommunications Services Directive. The "equality of opportunity" doctrine[176] was first developed by the Court of Justice in the context of its ruling on the Terminal Equipment Directive's provision requiring the separation of regulator and operator[177] before being further developed in GB-INNO-BM[178] and applied expressly by the Commission in its Article 90 decisions relating to conditions imposed by Italy and Spain, respectively, on the second GSM operators in those countries. The Commission's use of these doctrines in the foregoing directives and decisions is briefly discussed below.

I.B.3.1 Doctrine of "automatic/necessary abuse" of a dominant position"

The doctrine of "automatic/necessary abuse" is developed at length in the preamble to the Cable TV Directive.[179] The Commission's reasoning starts with a description of the special nature of the dominant positions held by incumbent telecommunications operators in telecommunications infrastructure, which is especially relevant to the subject of the present study. In recital 10, the Commission described the

---

[175] As discussed in Section I.A above, the doctrine of the "illegal extension/strengthening" of a dominant position was developed in parallel with the doctrine of "automatic/necessary abuse". In the context of Article 90(3), the Commission has considered an illegal extension or strengthening of the dominant position to be one of the automatic abuses which may give rise to the combined application of Articles 90(1) and 86, as shown in particular by the Commission's decisions on the second GSM operators in Spain and Italy as discussed in Section I.B.3.1 below.

[176] As indicated in the discussion of the Full Competition Directive in Section I.B.3.1 below, the Commission has considered a violation of the "equal opportunity" doctrine to constitute an automatic abuse of dominant position giving rise to the combined application of Articles 90(1) and 86 where the violation of this doctrine results from a State measure.

[177] France v. Commission, cited above.

[178] Cited above and discussed in Section I.A.

[179] The doctrine is also used in the Satellite Services Directive (cited above), in particular in recital 14, where the Commission notes that exclusive rights in the satellite communications field have the effect of restricting or preventing, to the detriment of users, the use of satellite communications that could be offered, thereby holding back technical progress. The Commission reasoned that the exclusive rights implied a restriction on the development of satellite communication, because investment decisions were likely to be based on the exclusive rights with the consequence that the undertakings concerned would often be in a position to decide to give priority to terrestrial technologies. According to the Commission, incumbent telecommunications operators did not use satellites as a fully complementary transmission technology in its own right, but had instead generally given preference to the development of optical-fibre terrestrial links and used satellite communications mainly as a technical solution of last resort in cases where the cost of the terrestrial alternatives had been prohibitive, or for the purpose of data broadcasting and/or television broadcasting. In contrast, it was considered that new entrants might instead exploit satellite technology.

nature of the dominant position held by the telecommunications organizations in the relevant national markets: "*In each relevant national market the telecommunications organizations hold a dominant position for the provision of transmission capacity for telecommunications services because they are the only ones with a public telecommunications network covering the whole territory of those States. Another factor in this dominant position concerns the peculiar characteristics of the market and in particular its highly capital-intensive nature. Taking account of the amount of investment needed to duplicate a network, there is a high reliance on use of existing networks. This enhances the structural dominance of the relevant telecommunications organizations and constitutes a potential barrier to entry. Thirdly, as a result of their market share, the telecommunications organizations further benefit from detailed information on telecommunications flows which is not available to new entrants. It includes information on subscribers' usage patterns, necessary to target specific groups of users, and on price elasticities of demand in each market segment and region of the country. Finally, the fact that the relevant telecommunications organizations enjoy exclusive rights for the provision of voice telephony also contributes to their dominance in the neighbouring, but distinct, market for telecommunications capacity.*" (emphasis added)

In this context, the Commission concluded that the State's maintenance of a legal monopoly over telecommunications capacity would compel or induce the telecommunications operator to abuse its dominant position in a way that is liable to affect trade between Member States resulting in a violation of Article 90(1) in conjunction with Article 86 under the doctrine of "automatic/necessary abuse of a dominant position".[180] According to the preamble, the prevention of new entrants' use of cable TV infrastructure "compels or induces" the telecommunications operators to commit six different types of abuses, as follows:[181]

- encouraging them to charge higher prices for capacity which are abusive because they are not justified on the basis of higher costs and which are a direct consequence of the restrictions on alternative infrastructure;

- restricting the overall supply of capacity in the market and eliminating incentives for telecommunications operators to increase quickly the capacity of their networks, to reduce average costs and to lower tariffs;

- delaying the widespread development of high-speed corporate networks, remote accessing of databases and deployment of innovative services, as a result of the above high tariffs and shortage of capacity;

---

[180] Cable TV Directive, cited above, at recitals 11-13.

[181] Cable TV Directive, cited above, recitals 12-14.

- limiting the emergence of new audio-visual-telecommunications applications and multimedia services;

- causing cable TV operators to postpone investments in their networks and the introduction of optical fibre, because it is not profitable unless spread over a larger number of services, thereby delaying the development of new telecommunications and multimedia services and holding back technical progress in this way as well; and

- putting telecommunications operators at an obvious advantage over competitors in violation of the "equal opportunity" doctrine.[182]

In light of these factors, the Cable TV Directive required the Member States to abolish restrictions on the use of cable TV networks and required them to allow the use of such networks for the provision of telecommunications services other than voice telephony.[183]

The Cable TV Directive also indicates possible "automatic abuses" which may result from the situation where a Member State grants to the same undertaking the right to establish both cable TV and telecommunications networks, the subject of the present study. In recital 18, the Commission noted the possible anti-competitive consequences, in particular the fact that such undertaking has no incentive to attract users to the cable TV network as long as it has spare capacity on the telecommunications network. The Commission concluded that the national authorities were best able to assess which measures are appropriate to address these concerns. However, in Article 2 of the Directive, the Commission nevertheless required the Member States to take certain minimum measures, as follows:

---

[182] *"Lastly, as was recalled by the Court of Justice of the European Communities in its Judgment of 19 March 1991 in Case C-202/88, France v. Commission, a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators. Reserving to one undertaking which markets telecommunications services the task of supplying the indispensable raw material - transmission capacity - to all companies offering telecommunications services provided, however, [is] tantamount to conferring upon it the power to determine at will which service could be offered by its competitors, at which costs and in which time periods, and to monitor their clients and the traffic generated by its competitors, thereby putting that undertaking at an obvious advantage over its competitors."* Cable TV Directive, cited above, at recital 14.

[183] Spain and Portugal filed actions with the Court of Justice seeking the annulment of the Cable TV Directive. Case C-11/96, Spain v. Commission, O.J. 1996, C 95/5; Case C-12/96, Portugal v. Commission, O.J. 1996 C 95/5 (appeal withdrawn). Spain contends that the Commission lacks competence to abolish restrictions on the provision of network transmission capacity for cable TV by means of an Article 90(3) directive. Spain also contends that the Commission has misused its powers by in fact implementing a harmonization measure in breach of the principles of inter-institutional balance enshrined in the Treaty and the case law.

- to ensure accounting transparency and prevent discriminatory behaviour, where a telecommunications operator with an exclusive right to provide public telecommunications network infrastructure also provides cable TV network infrastructure;

- to ensure the separation of financial accounts as concerns the provision of each network and the telecommunications operator's activity as provider of telecommunications services; and

- to ensure that an operator with an exclusive right to provide cable TV network infrastructure in a given area in a Member State keeps separate financial accounts regarding its activity as a telecommunications network capacity provider when its turnover exceeds a certain level.[184]

It is obvious from the foregoing and from the explanation of these measures in the preamble of the directive that the Commission's principal concern was to address the situation where a dominant operator in one of these businesses also engages in the other business: "*Where Member States grant to the same undertaking the right to establish both cable TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for overcharging for use of the cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications networks. The introduction of fair competition will often require specific measures that take into account the specific circumstances of the relevant markets. Given the disparities between Member States, the national authorities are best able to assess which measures are most appropriate, and in particular to judge whether a separation of the activities is indispensable. In early stages of liberalisation, detailed control of cross-subsidies and accounting transparency are essential. To allow the monitoring of any improper behaviour, Member States should therefore at least impose a clear separation of financial records between the two activities, though full structural separation is preferable.*"[185]

The Commission foresaw in the Cable TV Directive that the above minimum measures would not necessarily suffice to eliminate "automatic abuses" resulting from a dominant telecommunications operator also being dominant in the cable TV business.

---

[184] In the appeal which it had lodged in Case C-12/96, Portugal v. Commission, cited above, (but which has been withdrawn) Portugal contended that the Commission lacks competence under Article 90(3) to order accounting separation, on the ground that Article 90 only confers powers on the Commission in respect of measures adopted by the Member States and not in respect of anti-competitive conduct which undertakings themselves might adopt. According to Portugal, no specific State measure imposes upon the telecommunications operators or cable TV network operators any obligation as regards the organization of their respective accounting procedures. Portugal claimed that the absence of accounting separation was due only to the operators and not to Member State measures.

[185] Cable TV Directive, cited above, at recital 18.

As already indicated, the Cable TV Directive provides that the Commission will, before 1 January 1998, carry out an overall assessment of the impact where a single operator provides both telecommunications and cable TV networks or both services. According to the preamble (recital 20), in the event that no competing home-delivery system is authorized by the relevant Member State, the Commission will reconsider whether separation of accounts is sufficient to avoid improper practices and will assess whether such joint provision does not result in a limitation of the potential supply of transmission capacity at the expense of the services providers in the relevant area, or whether further measures are warranted.

The Commission also made an extensive use of the doctrine of "automatic/necessary abuse" in the Full Competition Directive, in which it required Member States to eliminate, effective 1 January 1998 (subject to longer periods for Member States with small or less developed networks), all measures granting special or exclusive rights for the provision of voice telephony services and the provision of telecommunications networks required for the provision of voice telephony services. The Commission's reasoning in the preamble to the directive is directly relevant to the present study,[186] as it emphasizes the importance of granting new entrants to the voice telephony market free choice as regards the underlying infrastructure on which to provide their services in competition with the dominant TO. This reasoning, as shown below, represents a novel application of the doctrine of "the automatic abuse of a dominant position" in that it is based on the conflict of interest which results from the telecommunications operator's dominance in both the network infrastructure and the services markets. Under the reasoning applied by the Commission, the "automatic/necessary abuse" is the direct consequence of the existence of this conflict of interest resulting from the dominance in two markets.

According to the preamble, the absence of free choice regarding underlying infrastructure will have the *de facto* effect of preventing new entrants from entering the market for voice telephony and will deprive the abolition of special and exclusive rights for the provision of voice telephony of its *effet utile*.[187] It would do so because the dominant TO would have a "conflict of interest" as both an infrastructure and a service provider with the consequence that it would be induced to abuse its dominant position, through its power to determine at will where, when and at what cost services can be

---

[186] In addition to the uses made of the "automatic/necessary abuse" doctrine discussed here, the Commission also made use of this doctrine in the Full Competition Directive as the legal basis for various other provisions, including the provisions on the control of numbering (recital 11), information on new numbers and number portability (recital 11) and infrastructure for high bandwidth services other than voice telephony (recital 25).

[187] Full Competition Directive, cited above, at recital 7: "*[T]he abolition of exclusive and special rights on the provision of voice telephony would have little or no effect, if new entrants would be obliged to use the public telecommunications network of the incumbent telecommunications organizations, with whom they compete in the voice telephony market.*"

offered by its competitors and through its power to monitor the clients and traffic generated by its competitors.[188]

According to the preamble, this conclusion was supported by complaints illustrating that telecommunications operators use their control of the access conditions to the network at the expense of their competitors in the service market and use information acquired as infrastructure providers regarding the services planned by their competitors to target clients in the services market. The Commission therefore concluded that the most appropriate remedy to this conflict of interest is to allow service providers to use own or third party telecommunications infrastructure to provide their services to the final consumer instead of the infrastructure of their main competitor.[189]

As already indicated, the Commission applied the doctrine of "automatic/necessary abuse" in the Article 90 decisions on second GSM operators in Spain and Italy.[190] In these decisions, the Commission described the case law of the Court of Justice on "automatic/necessary abuse" as precluding "*Member States from enacting measures likely to cause an undertaking to infringe the provisions to which it refers, in particular, in the case in point, those contained in Article 86*".[191] The Commission reasoned that, as a direct consequence of the additional financial burdens imposed by Spain and Italy on the second GSM operators in their countries, the

---

[188] As stated by the Commission: "*Reserving to one undertaking which markets telecommunications services the task of supplying the indispensable raw material, i.e. the transmission capacity, to all its competitors would be tantamount to conferring upon it the power to determine at will where and when services can be offered by its competitors, at what cost, and to monitor their clients and the traffic generated by its competitors, placing that undertaking in a position where it would be induced to abuse its dominant position.*" Full Competition Directive, cited above, at recital 7.

[189] Id. As already indicated above, the Commission also applied the doctrine of "the automatic abuse of a dominant position" in its reasoning regarding the TO's power to allocate numbers to the customers of new entrants. According to the Commission (at recital 11), if telecommunications operators maintain the power to allocate numbers to the customers of new entrants, they "*will be induced to reserve the best numbers for themselves and to give their competitors insufficient numbers or numbers which are commercially less attractive, for example, because of their length. By maintaining such power in the hands of their telecommunications organizations Member States would therefore induce the former to abuse their power on the market for voice telephony and infringe Article 90 of the Treaty, in conjunction with Article 86.*" As a consequence, the Commission required that the national numbering plan should be entrusted to an independent body.

[190] Cited above. Both decisions, adopted approximately one year apart, involved similar facts and almost identical reasoning. Italy and Spain charged very large "up-front" and annual fees to the second GSM operators in their countries. The Commission held that these conditions violated Article 90 in conjunction with Article 86, by leading, *inter alia*, to "automatic/necessary abuses" by the Italian and Spanish incumbent telecommunications operators which were holders of the first GSM licenses in their respective countries, in three different markets in which these operators were dominant -- the markets for public telecommunications networks, voice telephony and analogue radiotelephony. The appeals lodged against the decision concerning Italy have been referred to above.

[191] Second GSM operator in Italy, cited above, at para. 17, penultimate sub-para; Second GSM operator in Spain, cited above, at para. 21, penultimate sub-para.

incumbent telecommunications operators which were also the holders of the first GSM licences in each of those countries would have a choice between two different commercial strategies, each of which would amount to an abuse of dominant position in violation of Article 90(1) in conjunction with Article 86.

The first commercial strategy which would be abusive was found to consist of the extension to GSM of the incumbent operator's existing dominance in the markets for public telecommunications networks, voice telephony and analogue radiotelephony. The Commission found that the extension of the dominant position would result from the fact that the incumbent telecommunications operator "could be encouraged" to reduce its tariffs to take advantage of the distortion of cost structure due to the initial payment the State required from the second operator. In the decision on the conditions imposed on the second Spanish GSM operator, the Commission also found that the incumbent telecommunications operator's dominant positions would be strengthened as a result of the fact that this operator "could use" the savings resulting from the fact that it did not have to make an equivalent payment as a means for pricing its services aggressively in areas where it faced competition from the second operator. It could also use these savings as a means for making special offers and conducting intensive advertising campaigns which "could threaten" the economic viability of the second operator.

The alternative abusive commercial strategy was found to reside in the limitation of production, markets or technical development (Article 86(b) EC). The Commission reasoned that the reduction in capital resulting from the payment of the fee by the second operator meant that this money would not be available for investments. This factor "might encourage" the holder of the first license to delay the development of its GSM network, to concentrate on the analog system and to retain higher tariffs for its GSM services than it would in the absence of the State measure.

These directives and decisions indicate that the Commission gives the doctrine of "automatic/necessary abuse" a wide interpretation as applying in situations where State measures are likely to result in abuses of dominant positions; the Commission's interpretation of this doctrine could be described as the doctrine of "automatic/likely abuse". While for certain types of automatic abuses the Commission indicates in the preambles to the Article 90 directives and in its Article 90 decisions that it already has evidence of past abuses in support of its findings of "automatic/likely abuses", it is clear especially from the two GSM decisions that the Commission does not consider the existence of such evidence to be necessary for the application of the doctrine.

I.B.3.2 Doctrine of the "illegal extension/strengthening" of a dominant position

The doctrine of the "illegal extension/strengthening" of a dominant position underlies both the Terminal Equipment Directive and the Telecommunications Services Directive. Moreover, the Commission has used this doctrine as one of the legal

grounds for the combined applications of Articles 90 and 86 in the Satellite Services Directive and the Full Competition Directive.

Although no mention of this doctrine is made in the preamble of the Terminal Equipment Directive or in the judgment of the Court of Justice on this directive,[192] it follows from the reasoning of the Court of Justice in GB-INNO-BM that the latter would consider the Terminal Equipment Directive to be based on this doctrine. It was argued before the Court that there could be a finding of an infringement of Article 90(1) only if the Member State had favoured an abuse that the dominant operator had in fact committed and that the fact that the latter operator was designated as both the authority for granting approval to telecommunications equipment and was competing with suppliers of such equipment could not in itself amount to an abuse of dominant position. The Court of Justice responded, however, that it was "*the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension results from a measure adopted by a State.*"[193]

The Commission applied reasoning based on the illegal extension/strengthening of a dominant position in the preamble of the Telecommunications Services Directive, in which it stated that the special or exclusive rights granted to the incumbent telecommunications operator for the provision of telecommunications services strengthened that operator's dominant position in creating and operating the network, by extending it to services.[194]

The Commission applied the same reasoning in the preamble of the Satellite Services Directive, where it noted that exclusive rights held by incumbent telecommunications operators in the satellite communications field had the effect of extending the dominant position enjoyed by such operators in creating the terrestrial networks, thereby strengthening that position.[195]

This doctrine was used by the Commission as the legal basis for the provisions in the Full Competition Directive concerning telephone directories[196] and universal

---

[192] France v. Commission, cited above.

[193] RTT v. GB-INNO-BM, cited above, at para. 24. See also the discussion above on the full reasoning followed by the Court of Justice.

[194] Telecommunications Services Directive, cited above, at recital 15.

[195] Satellite Services Directive, cited above, at para. 13.

[196] Full Competition Directive, cited above, at recital 17. The Commission reasoned that exclusive rights held by incumbent telecommunications operators over telephone directories have the effect of extending the dominant position enjoyed by the telecommunications operators in providing voice telephony and therefore strengthen that position. Such rights were therefore incompatible with Article 90(1) in conjunction with Article 86, as were any restrictions on the provision of directory information by new

service financing schemes.[197]

Finally, as already indicated in the preceding section, in its Article 90 decisions on the second GSM operators in Spain and Italy, the Commission used the doctrine of the "illegal extension/strengthening" of a dominant position as one of the two "automatic/likely abuses" found to exist in those decisions.

I.B.3.3 Doctrine of "equality of opportunity"

As already indicated, the Court of Justice developed the doctrine of "equality of opportunity" in the context of its judgment on the Terminal Equipment Directive.[198] The issue arose in connection with the provisions of that directive requiring the separation of the roles of regulator and operator. The Court of Justice stated that: "*a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors*" (emphasis added). The legal basis for this doctrine is not indicated by the Court of Justice.[199] However, the reference to the requirement in Article 3(g) of a system of undistorted competition strongly implies that the doctrine finds its legal basis in the latter Treaty provision.

The Commission emphasized this doctrine in the two second GSM operator decisions as being particularly important where the incumbent telecommunications operator holding the first GSM licence in the country concerned already enjoys a number of major advantages as a result of the fact that the first licensee is dominant on other markets.[200]

We shall revert to these various doctrines again in Section II.B below concerning the grounds of a new Article 90(3) directive aimed at completing and ensuring the effectiveness of the existing directives.

---

technological means and on the provision of specialized and/or regional and local directories.

197 Full Competition Directive, cited above, at recital 19.

198 France v. Commission, cited above, at para. 51.

199 Nor is it indicated in the Court's later GB-INNO-BM decision. RTT v. GB-INNO-BM, cited above, at para. 25. See the discussion of this case above.

200 Second operator of GSM radiotelephony services in Italy, cited above, at para. 15; Second operator of GSM radiotelephony services in Spain, cited above, at para. 19.

I.B.4 Scope for further Commission action under Article 90(3)

In view of the extensive liberalization under the above directives, and in particular the abolition of special and exclusive rights in respect of telecommunications infrastructure and services, the question arises whether there remains scope for further Commission directives applying Article 90(3) in the telecommunications sector.

First, under the principle of *effet utile*,[201] it is arguable that the Commission is empowered to adopt Article 90(3) directives aimed at ensuring the effectiveness of existing Article 90(3) directives. The Cable TV Directive is already an application of this principle. According to its preamble, the latter directive was adopted in part because the Commission found that regulatory restrictions preventing the use of alternative network infrastructures for the provision of liberalised services, and in particular the restrictions on the use of cable TV networks, were the main cause of a continuing bottleneck situation preventing the liberalisation under the Telecommunications Services Directive from being effective. [202]

Second, it is not necessarily the case that all special rights in the telecommunications sector have been abolished in the existing directives.[203] For purposes of the latter, "special rights" have been defined in a specific manner which is not necessarily exhaustive. Broadly speaking, a "special right" is defined in Article 1(1) of the Telecommunications Services Directive (as amended) as consisting of any legal or regulatory advantages, granted otherwise than on the basis of objective, proportional and non-discriminatory criteria, which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions. In other contexts, other notions of "special rights" have already been used.[204] It is

---

201 See, e.g., Netherlands and Others v. Commission, cited above, at paras. 28-30. The Treaty requires the Member States not to take or maintain in force measures which could destroy the effectiveness of the Community's competition rules. Case 13/77, Inno v. ATAB, [1977] ECR 2115, at paras. 31-32.

202 The pending annulment applications filed by Spain and Portugal (cited above) appear to challenge the Commission's competence to use Article 90(3) in this manner in their contentions that the Commission in the Cable TV Directive is not specifying obligations already in existence under Article 90(1), but is rather laying down a new obligation to liberalize the market.

203 See, for example, the reasoning followed by the Commission in paragraph 6 of the Commission's decision on the conditions imposed on the second GSM operator in Italy (cited above), in which the Commission considered that Italy's grant of the first licence to operate a GSM network qualified as a special right since the operator had been designated otherwise than according to objective and non-discriminatory criteria. This could imply that an initial grant by the State of an exclusive right will automatically become and remain a special right after any future licences are granted to third parties on the basis of objective and non-discriminatory criteria. See, however, the grounds for appeal in Case T-215/95, Telecom Italia SpA v. Commission, summarized in O.J. 1995, C 46/15.

204 See Article 2(3) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, O.J. 1993, L 199/84, adopted under Article 100A, for a different concept of "special or exclusive" rights

untested whether these types of "special rights" would also qualify as "special rights" within the meaning of Article 90 EC. In this respect, it can be noted that the fact that the Commission has defined a specific notion in an act of secondary legislation does not necessarily mean that such a definition is exhaustive.[205]

Third, it follows from the Member States' duty to implement the objective laid down in an Article 90(3) directive that the Member States may not enact or maintain in force any measure which has the effect of resulting in the *de facto* continuation of special and exclusive rights which have been abolished in that directive and that the Commission is empowered to adopt a new Article 90(3) directive or decision (as appropriate) prohibiting such measures. The Full Competition Directive contains an application of this principle in recital 13 when it refers to the fact that dealys in interconnection of new operators due to disputes as to terms and conditions would jeopardize the market entry of new entrants and hence prevent the abolition of special and exclusive rights to become effective. According to the Commission, the "*failure by Member States to adopt the necessary safeguards to prevent such a situation would lead to a continuation* ***de facto*** *of the current special and exclusive rights, which as set out above are considered to be incompatible with Article 90(1) of the Treaty, in conjunction with Articles 59 and 86 of the Treaty.*"

Finally, the abolition of special and exclusive rights under the existing directives does not affect the use of Article 90(3) directives by the Commission in respect of Member State measures relating to TOs which are "public undertakings".[206]

---

as consisting of the reservation for one or more entities of the exploitation of an activity covered by the directive; it provides that a special right exists for the purpose of constructing, *inter alia*, public telecommunications networks if the undertaking may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway. Another kind of "special" right may also be found in the *Foster* case law, which refers to undertakings holding "special powers" (in French "pouvoirs exorbitants") beyond those which result from the normal rules applicable to relations between individuals. Case C-188/89, Foster and Others v. British Gas, [1990] ECR I 3313, at para. 18.

[205] See the case law, discussed in the next footnote, on the concept of "public undertaking" as defined in the Transparency Directive.

[206] Indeed, it can be noted that the abolition of special and exclusive rights under the existing directives does not affect the use of Article 90(3) directives by the Commission in respect of Member State measures relating to TOs which are "public undertakings". The concept of "public undertaking" is not defined in the Treaty. The Commission defined the concept in the so-called "Transparency" Directive (Directive 80/723 on the transparency of financial relations between Member States and public undertakings, O.J. 1980, L 195.35) as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it" (emphasis added). Under the Transparency Directive, a dominant influence is presumed when the public authorities directly or indirectly hold the major part of the undertaking's subscribed capital, control the majority of the voting rights, or can appoint more than half the members of the undertaking's administrative, managerial or supervisory body." The Council has incorporated the same definition of "public undertakings" in the public procurement directives. See, e.g. Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, O.J. 1993, L 199/84, Art.

We revert in Part II.2 to the manners in which the Commission could still use Article 90(3) in the telecommunications sector and, more particularly, in the context of the currently ongoing process of review of certain situations in the telecommunications and cable TV sectors.

1(2). The criteria in the Transparency Directive were accepted by the Court of Justice in Joined Cases 188-90/80, France, Italy and UK v. Commission, [1982] ECR 2545. However, the Court of Justice made it clear that the definition of public undertaking for purposes of the Transparency Directive is not necessarily the same as for Article 90 itself. In GSM radiotelephony services in Italy, cited above, State ownership of 55% of the capital of Telecom Italia SpA was sufficient for it to be considered a "public undertaking" within the meaning of Article 90(1). In GSM radiotelephony services in Spain, cited above, the Commission concluded, by reference to the "decisive influence" test laid down in the Transparency Directive, cited above, that the Spanish Government had decisive influence over Telefonica de Espana by virtue of its ownership of 21.16% of the share capital of Telefonica de Espana, combined with the right to appoint a representative with the right of veto over the decisions of the board of directors and the right directly to appoint 25% of the members of the board of directors.

II. Application of the Treaty rules regarding operators active in telecommunications and cable TV activities

In the Sections which follow, an examination is made of two basic instruments (i.e., the application of Article 86 and the other EC competition rules as applied to individual undertakings, on the one hand, and the use of Article 90(3) in respect of Member State legislation and other rules in the national legal orders) which could be used by the European Commission in dealing with certain practices and market situations in which undertakings, after the liberalization of the markets, are active in a simultaneous manner in the converging sectors of telecommunications services and cable TV and (multi-)media services (or are prevented by way of State regulation to employ such a double activity). In particular, the focus will be on those undertakings which are in a dominant position both over telecommunications infrastructure and over cable TV infrastructure and networks and which are in such a position as a consequence of the legal monopoly rights from which they have benefitted throughout the years prior to the liberalization process implemented at the EC level. In the discussion on Article 90(3), we will also examine the restrictions placed by the State on the use of telecommunications infrastructure for the provision of cable TV services.

In this respect, a graduated approach will be followed indicating the various degrees of specific interventions and control which could be considered and/or implemented by the European Commission on the basis of the existing Treaty provisions and those in secondary legislation on competition. Obviously, the discussion below will draw on the results and the findings of the preceding background study which will be supplemented with a more practical application of the principles developed in those Sections to the situations of fact in the telecommunications and cable TV sectors.

II.A Case-approach - Application to individual undertakings

This Section of the study focuses on the constraints imposed by the EC competition rules on the conduct of an undertaking holding a dual monopoly or, in the alternative, a dual dominant position over telecommunications network infrastructure and cable TV network infrastructure. It intends to demonstrate the ways in which the provisions of EC competition law impose rigorous constraints on such conduct. These constraints result, in particular, from the unique position in which the undertaking is placed in the market and which imposes on it a "special responsibility" not to weaken competition further and not to extend its market power to other markets. Both from a legal and a policy perspective, this should result in the strictest scrutiny and application of the competition rules not only because of the fact that very often the conduct of the undertaking concerned will almost automatically lead to a further strengthening of its dominant position but also because of the seriousness of any abuses committed which would occur in a market where rapid developments and growth are expected.

This part of the study will also address the issue whether, on the basis of existing law, the application of the EC competition rules in connection with applicable secondary legislation may result in the obligation on the undertaking which is in the specific situation of holding a dual dominant position over telecommunications network infrastructure and cable TV networks to take certain positive measures in order to avoid a finding that its conduct infringes the competition rules, in particular Article 86. Measures which could be envisaged in this respect are accounting separation and structural separation which do not require a modification to the ownership structure, as well as a more far-reaching obligation to divest one of the two network infrastructures.

The emphasis in the Sections below will be on the application of Article 86 EC but references will be included to specific issues which may arise under Article 85 and the Merger Control Regulation as well as to existing precedents under those instruments which may provide guidance on the interpretation of the competition rules in the present context.

II.A.1 Direct constraints resulting from the application of the EC competition rules (Articles 85 and 86 EC and the EC Merger Control Regulation) on the commercial conduct of an undertaking holding a dominant position over both cable TV and telecommunications networks

The obvious starting point of the analysis below is that an undertaking holding a dominant position over both cable TV and telecommunications networks is subject to the application of the competition rules. This implies that its conduct is subject to the scrutiny under the various provisions of EC competition law (Article 86 EC, Article 85 EC or the Merger Control Regulation[207]), each of these provisions setting out specific criteria for assessing the conduct concerned and each providing the authorities concerned with different procedural means for controlling such conduct, *ex post* and/or *a priori*. For the sake of convenience, the undertaking holding a dominant position over telecommunications and cable TV infrastructure is referred to below as the "Dominant Undertaking".

II.A.1.1 The application of the EC competition rules to the market behaviour of the undertaking holding a dual dominant position will place a number of constraints on that undertaking's conduct

The competition rules, and in particular Article 86, can be applied to the actual conduct of the Dominant Undertaking to address any abusive elements. Such elements can fall within the various categories of abusive practices which have already been discussed in Section I.A.1 above, namely: "direct" abusive exploitation of suppliers, customers and end-users, exclusionary abuses, abuses based on monopoly leverage and structural abuses.

---

[207] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. 1989, L 395/1.

For the above reasons, the existing and draft instruments on the application of the competition rules to the telecommunications sector, including the Commission Guidelines on the application of EEC Competition Rules in the telecommunications sector (the "Competition Guidelines)[208] and the Draft Notice on the application of the competition rules to access agreements in the telecommunications sector[209], provide already substantial guidance as to what kinds of behaviour can be considered as abusive within the meaning of Article 86 EC. In addition, further guidance can also be drawn from the liberalization directives adopted by the Commission. So, for example, recital 18 of the Cable Television Directive, which is one of the starting points of this study, provides that "*[w]here Member States grant to the same undertaking the right to establish both cable TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for overcharging for use of the cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications networks.*" The rationale underlying that statement should in fact also apply where the *de facto* dual dominant position is "inherited" from a previously existing legal monopoly and where the undertaking actually engages in the conduct concerned.

The illustrations of abusive behaviour which are briefly discussed below are clearly not intended to be exhaustive. Rather, the intention is to recall a number of the practices which have already been condemned in the case law and the administrative practice as basic abuses within the meaning of Article 86 EC and show how they could occur in the present context. The headings followed below correspond with the categories of abuses used in Section I.A.1 above.[210]

---

[208] O.J. 1991, C 233/2. As a general matter and by way of introduction, it is worth noting that the Competition Guidelines contain on certain points an already extensive interpretation of Article 86 EC. So, for example, it is stated that "*it is not necessary for the purpose of the application of Article 86 that competition be restricted as to a service which is supported by the monopoly provision in question. It would suffice that the behavior results in an appreciable restriction of competition in whatever way. This means that an abuse may occur when the company affected by the behavior is not a service provider but an end user who could himself be disadvantaged in competition in the course of his own business.*" (at para. 85).

[209] Cited above.

[210] As indicated above, this classification may be considered as being a bit artificial in specific cases since one and the same conduct may fall within several types of abuse. Thus, the granting of financial or other advantages to a favored (large) customer may at the same time result in exclusionary effects for a competitor of the Dominant Undertaking and may also involve elements of discrimination in favor of the customer concerned putting it at a competitive advantage as compared with its competitors which do not receive the privileged treatment.

(i) Direct abusive exploitation of suppliers, customers and end-users

Direct abusive exploitation of suppliers, customers or end-users can take a broad variety of forms. A general distinction can be drawn between conduct which is related to prices and conduct relating to other unilateral or contractual terms and conditions of purchase and/or supply. Furthermore, the Competition Guidelines state in this respect that "*Article 86 can apply to behavior of dominant undertakings [in the telecommunications sector] resulting in a refusal to supply, discrimination, restrictive tying clauses, unfair prices or other inequitable conditions*"[211].

Price-related conduct: As is confirmed by the extensive case law, not only prices which are excessively high can be considered as abusive but also those which are discriminatory or those which have predatory effects.

As far as selling prices are concerned, the above quoted language from the Cable TV Directive already gives a good example of the manner in which the Dominant Undertaking may breach Article 86 EC by charging excessively high prices (through an unfavorable allocation of resources). As concerns purchase prices, the Competition Guidelines make it clear that Article 86 would apply to conduct of the Dominant Undertaking through which it attempts to "negotiate" with its suppliers excessively low purchase prices.[212]

Although it is not the purpose of this study to discuss the question of when prices can be considered to be abusively high,[213] one question which merits further attention in the context of this study is the question of the burden of proof (which will also be discussed further in Section II.A.3). Indeed, the position and the combined activities of the Dominant Undertaking may give rise to specific difficulties in verifying whether a certain price level is justifiable.

---

[211] Competition Guidelines, at para. 85.

[212] Given the fact that the Dominant Undertaking could, subject to verification in each individual case (in which the definition of the relevant market could play a significant role), also have a dominant position in respect of the purchasing of a broad variety of goods and/or services, there could indeed be room for this type of an abuse in the present context.

[213] In this respect, we simply note that a number of different tests have already been used in the past case law under Article 86 in this respect, in particular: the use of geographic price discrimination not based on differences in costs for establishing that the higher price was abusive (see, for example, United Brands, cited above), the relationship between the price and the "economic value" of the product or the service concerned (see, for example, Case 26/75, General Motors v. Commission, [1975] ECR 207, at para. 11), the relationship with the cost of production (United Brands, cited above), the relationship with the price charged for equivalent products or services by competitors (Case 226/84, British Leyland v. Commission, [1986] ECR 3263), the reference to interpretative criteria set out in secondary Community legislation (see Ahmed Saeed, cited and discussed above), the benchmarking with prices applied in other regions and countries where a reasonable common base for comparison can be established (see, for example, Case 30/87, Bodson v. Commission, [1988] ECR 2479, at para. 31; and also Case 395/87, Ministère Public v. Tournier, [1989] ECR 2521, para. 38 and Joined Cases 110/88 a.o., Lucazeau v. SACEM, [1989] ECR 2811, at para. 25).

It is an established rule that in competition cases it is incumbent upon the Commission to demonstrate in a sufficient manner any finding of an infringement of the competition rules and, in particular, of an abuse of a dominant position.[214] However, the Court has recognised and, in fact, compelled the Commission to verify the costs of an undertaking which was alleged and found to practice abusively high prices.[215] This makes it arguable that the undertaking which is alleged to charge excessively high prices is under an obligation (to be able) to provide the Commission, at the latter's request, with the costing information which may be required to allow the Commission to carry out its verification. This can further be interpreted as meaning that in such cases there is a certain reversal of the burden of proof since it is arguable that the undertaking concerned should provide such information which allows an effective verification. An essential point in respect of the Dominant Undertaking would be that it should be made possible to make a verification of the appropriate nature of the allocation of costs between the various activities and services provided by the said undertaking. We revert to these questions in more detail below.

Product-related conduct: With regard to non-price related forms of conduct, a variety of practices engaged in by the Dominant Undertaking may be considered as abusive. One of these forms of exploitative conduct is tying (which may also have at the same time certain exclusionary effects on competitors). Tying practices[216] engaged in by a dominant undertaking are generally abusive unless they can be objectively

---

[214] It is incumbent on the Commission to bring evidence of infringements; see, in particular, Joined Cases 100/80 a.o., Musique Diffusion Française v. Commission, [1983] ECR 1825, where it is stated that the Commission must produce "*sufficiently precise and coherent proof*". It has also already been held that instances where the evidence is equivocal will be resolved in favor of the undertaking (Joined Cases 29 & 30/83, CRAM & Rheinzink v. Commission, [1984] ECR 1679). In Wood Pulp (Joined Cases C-89/85 a.o., Ahlström and Others v. Commission, [1993] ECR I-1307, at para. 71), the Court annulled, among others, the Commission's finding of concertation ruling that parallel conduct cannot be regarded as furnishing proof of concertation unless it is the only plausible explanation for such conduct (the Court considered that Article 85 did not prevent the undertaking from intelligently adapting or anticipating the conduct of competitors). By contrast, where the undertaking engages in equivocal if not "suspicious" conduct such as attending a meeting at which prices are discussed, this alone can suffice to find an infringement (see Case T-6/89, Enichem v. Commission, [1991] ECR 1623, at para. 112).

[215] In United Brands, cited above, the Court annulled the Commission's finding that United Brands had set unfair prices. The Court ruled that the Commission should have assessed the unfairness of United Brand's prices by comparing the selling price and its cost of production, which the Commission had not done (at para. 251). The Court recognized that calculating the production cost could be a difficult and complex task, but was not so in the case of bananas (at para 254-255). Consequently, the Court stated that the Commission was "*at least under a duty to require UBC to produce particulars of all the constituent elements of its production costs*" and that the "*accuracy of the contents of the documents produced by UBC could have been challenged but that would have been a question of proof.*" (at paras. 256-257).

[216] According to Article 86(d), tying consists of "*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*"

justified.[217] The Competition Guidelines already provide a substantial list of examples of how tying of telecommunications services may occur.[218] While these examples are mainly oriented towards the old notions of "reserved services" and the extension of dominance and/or the leverage into markets for "non-reserved services", the principles for which they stand clearly apply in respect of "markets in which there is dominance" and "markets in which there is no dominance".[219]

The fact that the Dominant Undertaking is dominant over both telecommunications infrastructure and cable TV infrastructure and provides a wide range of both wholesale and retail products and services, shows that there is a large potential for abusive tying practices by the Dominant Undertaking. These practices will need to be monitored very closely and any "objective justification" which is put forward will need to be examined carefully.[220]

Other abuses: Reference is made to the obligation of dominant undertakings not to apply discriminatory conditions with respect to prices as well as with regard to other trading conditions.[221] Given the fact that the Dominant Undertaking is faced with

---

217 See Hilti (Commission Decision of 22 December 1987, O.J. 1988, L 65/19; and Case T-30/89, Hilti v. Commission, [1991] ECR II-1439) and Tetra Pak (Commission Decision of 24 July 1991, Tetra Pak II, O.J. 1992, L 72/1; Case T-83/91, Tetra Pak v. Commission, [1994] ECR 755, and Case C-333/94 P, Tetra Pak International v. Commission, Judgment of 14 November 1996, not yet reported).

218 For example, tying the provision of the reserved services to the supply by a TO or others of terminal equipment to be interconnected or interoperated, in particular through imposition, pressure, offer of special prices or other trading conditions for the reserved service linked to the equipment; tying the provision of the reserved services to the agreement of the user to enter into cooperation with the reserved service provider himself as to the non-reserved service to be carried on the network; the imposition of unneeded services by supplying reserved and/or non-reserved services when the reserved services are reasonably separable from the others, Competition Guidelines, cited above, at para. 98.

219 See also the Draft Notice on access agreements in the telecommunications sector where it is set out that where the vertically integrated dominant service operator obliges the party requesting access to purchase one or more services which are superfluous to the latter without adequate justification, this would constitute an abuse under Article 86 sub-paragraph (d) which expressly prohibits "making the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." Moreover, such tying can result in excluding competitors of the access provider from offering these elements of the package independently.

220 For cases in which such objective justifications were rejected since there were other lesser restrictive means to achieve the goal pursued, see in particular Hilti (Commission Decision of 22 December 1987, O.J. 1988, L 65/19; and Case T-30/89, Hilti v. Commission, [1991] ECR II-1439) and Tetra Pak (Commission Decision of 24 July 1991, Tetra Pak II, O.J. 1992, L 72/1; Case T-83/91, Tetra Pak v. Commission, [1994] ECR 755, and Case C-333/94 P, Tetra Pak International v. Commission, Judgment of 14 November 1996, not yet reported).

221 Applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage is also expressly prohibited in Article 86(c). See also the Competition Guidelines in which a number of discriminatory practices which could occur in the telecommunications sector are listed, in particular: discrimination (other than tariff discrimination) may take the form of restrictions or delays in connection to the public switched network or leased circuit provision, in

almost no, if any, competition and that it can be considered as an unavoidable source of supply (both for consumers as well as for competitors), it may be apparent that its market position creates substantial room for discrimination.[222]

Other types of abuses which may be particularly relevant to the conduct of the Dominant Undertaking can be found in the case law on the combined application of Articles 90 and 86 EC.[223] In particular, in Porto di Genova,[224] the Court held that the conduct of an undertaking which was granted an exclusive right to organize dock work at Genoa's port was abusive in that it refused to use modern technology, resulting in an increase in costs and prolonged delays in performance. In fact, this element can also be found in the text of Article 86(b) which expressly prohibits the limiting of production, markets or technical development to the prejudice of consumers. Therefore, the rationale underlying that case and the abuse found there should also be applicable in pure Article 86 cases. Accordingly, "inefficiency, idleness, mismanagement or wilful neglect" or other forms of "quiet life"[225] should also be considered as possible abuses.[226] Subject to verification through economic theory and analysis, it can be argued that the absence of competitive pressure on the Dominant Undertaking may lead to a number of inefficiencies, delays in investments and innovation and the withholding from the consumer of new and enhanced services.

---

installation, maintenance and repair, in effecting interconnection of systems or in providing information concerning networks planning, signalling protocols, technical standards and all other information necessary for an appropriate interconnection and interoperation with the (reserved) service which may affect the interworking of competitive services or terminal equipment offerings. Discrimination obviously may also have certain exclusionary effects where it puts competitors at a competitive disadvantage as compared with the dominant undertaking's own activities. The Competition Guidelines also list various forms of usage restrictions which the dominant operator may attempt to impose, such as the prohibition to connect private leased circuits by means of concentrator, multiplexer or other equipment to the public switched network, the prohibition to use private leased circuits for providing services, or the imposition of extra charges or other special conditions for certain usages of services supported by the legal or *de facto* monopoly (at paras. 88-97).

222 In this respect, it should also be borne in mind that the Dominant Undertaking can control the supplies of certain of its services (including for example the physical connection to the network(s)) in an almost absolute manner and is not faced with certain resellers which would function as arbitrageurs on the market.

223 See the discussion above.

224 Cited above.

225 Bellamy & Child, Common Market Law of Competition, Fourth Edition 1993 (1996 Supplement), p. 640.

226 See also Commission Decision of 4 November 1988, London European/Sabena, O.J. 1988, L 317/47 and Joined Cases 110, 241 and 242/88, Lucazeau v. SACEM, [1989] ECR 2811.

(ii) Indirect exclusionary abuses

Indirect abuses may also take a number of different forms. Two of them are discussed in some more detail below.

Price-related exclusionary abuses: Predatory pricing, cross-subsidisation and fidelity rebate-schemes are three examples of price-related exclusionary abuses which could be of particular relevance in examining the market conduct of the Dominant Undertaking.[227]

As far as predatory pricing[228] and cross-subsidisation are concerned, it will be necessary to monitor closely the behaviour of the Dominant Undertaking. However, since the examination of both of these practices is directly related to and based on the costs and the cost allocation of the Dominant Undertaking, issues of proof similar to those described above regarding excessive prices are likely to arise come up. This point is further discussed below in Section II.A.3.[229]

As far as rebate schemes are concerned, a number of scenarios can be considered in which a rebate scheme implemented by the Dominant Undertaking could be qualified as abusive. First, the rebate scheme could fall within the prohibited category of what has generally been referred to as fidelity rebates tying the customers to the Dominant Undertaking.[230] Second, it should always be examined whether any rebate scheme is used as an instrument for a different type of tying practice through the bundling in one scheme of services for which there is no or little competition and services for which there is a higher degree of competition. Third, any allegations by the Dominant Undertaking that a rebate scheme is objectively justified by cost-savings would need

---

227 Equally, the implementation of excessively high or discriminatory access prices may also have exclusionary effects on competitors requiring such access.

228 See, in particular, the general test for predatory pricing set out by the Court of Justice in AKZO (cited above) and Tetra Pak II (cited above). See also the test specific to the telecommunications sector developed by the Commission in the Draft Notice on access agreements in the telecommunications sector (at para. 91 and footnote 66).

229 It can already be noted here that the Competition Guidelines refer to the possible use of presumptions of abuse in the context of predatory pricing and cross-subsidies. In particular, there it is stated that "*if in a specific case there are substantial elements converging in indicating the existence of an abusive cross-subsidization and/or predatory pricing, the Commission could establish a presumption of such cross-subsidization and predatory pricing. An appropriate separate accounting system could be important in order to counter this presumption.*" (at para. 108).

230 See, in particular, Joined Cases 40/73 a.o., Suiker Unie v. Commission, [1975] ECR 1663; Hoffmann-La Roche, cited and discussed above; Case T-65/89, BPB Industries/British Gypsum v. Commission, [1993] ECR II-389; and Case C-310/93P, BPB Industries /British Gypsum v. Commission, [1995] ECR I-865. See also Almelo (Case C-293/92, Almelo, [1994] ECR 1477) in which the Court of Justice confirmed that it is an abuse for a dominant undertaking to include a loyalty obligation in its contracts, even at the buyer's request.

to be examined carefully and would require that the means for effective verification of the lawfulness of the arguments invoked are available.

Other exclusionary abuses (in particular, refusals to provide access): Given the fact that the Dominant Undertaking would hold the control over the two essential sources of supply of transmission capacity in the telecommunications sector as well as over the access through (local loop) customer lines, any refusal by that undertaking to provide access to its networks and facilities would require very close attention since it would clearly raise competitive concerns. Subject to verification through economic theory and analysis, the Dominant Undertaking with its bundled control over the telecommunications and the cable TV network could reasonably be expected to control in fact a clear essential facility and would therefore be subject to the obligations which are attached to this concept.[231]

II.A.1.2 The Undertaking's commercial conduct will require an increased scrutiny since a large potential for abusive conduct and foreclosure effects exists

The position which is occupied in the market by the Dominant Undertaking may require a particularly strict and vigilant application of the competition rules.

First, the position of the Dominant Undertaking, due to its unique nature, creates a very large potential for abuses. As is already stated in the recitals to the liberalization directives, the position of the Dominant Undertaking is such that it can be considered that it will be induced to abuse of its dominant position. In particular, recital 18 to the Cable TV Directive indicates that where Member States grant to the same undertaking the right to establish both cable TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for overcharging for use of the cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications networks. Subject to verification through economic theory and analysis, it is prudent to consider that this situation of fact, which raises in itself competitive concerns, will not substantially change immediately after the abolition of subsisting special and exclusive rights. In particular, where, following liberalization, a legal monopoly is replaced by a *de facto* monopoly or dominant position over telecommunications networks and cable TV networks, the Dominant Undertaking's potential for abusive conduct could remain virtually unchanged.

---

[231] See, in particular, the rules applicable to essential facilities as summarized in the Draft Notice on access agreements in the telecommunications sector and the individual cases on essential facilities referred to therein.

Second, the need for strict scrutiny is confirmed by certain practices which have already occurred in the past and which could allegedly have been viewed as abusive. As is reflected in the recitals to the Cable TV Directive the "bottleneck" situation which was created through regulatory constraints and which forced potential service providers to rely on transmission capacities provided by the telecommunications organizations has encouraged them to charge high prices in comparison with prices in other countries. For example, it is stated that tariffs for high-capacity infrastructure were (in 1995) on average 10 times higher in the Community than equivalent capacity over equivalent distances in the United States.[232] It is clear that one of the policy objectives should be that these practices do not re-occur and that potential market entrants are not discouraged to make a market entry.

Third, (tele)communications activities are currently considered to be one of the essential sectors and driving forces of the economy in which rapid development, technological innovation and growth are expected. Therefore, any conduct by the Dominant Undertaking which would impair the achievement of these essential objectives of the liberalization program should raise serious concern and when falling within the definition of abuse under Article 86 should be considered as a serious abuse requiring rapid elimination and possibly severe penalties.

II.A.2 The special responsibility and special position of the Dominant Undertaking resulting from the fact that virtually each conduct of that undertaking is likely to strengthen its dominant position

The Dominant Undertaking holding control over both the telecommunications and the cable TV infrastructure has a special responsibility resulting in a rather general obligation not to weaken competition further.[233] Therefore, the maintenance of such a position will in principle result, through the application of the competition rules, in severe constraints on the business conduct of such undertaking. Indeed, virtually any

---

[232] For other types of abuses which may have occurred in the past, see also the recitals to the Full Competition Directive.

[233] In addition to the references already made above regarding the "special responsibility" of dominant undertakings and the discussion of those cases on the "strengthening of a dominant position", reference may also be made to the XXIVth Report on Competition Policy (1994), at para. 207, in which the Commission restated its approach to the concept of abuse as follows: "*The existence of a dominant position is not in itself against the rules of competition. Consumers can suffer from a dominant company exploiting this position, the most likely way being through prices higher than would be found if the market were subject to effective competition. However, the Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behavior of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it. A dominant company therefore has a special obligation not to do anything that would cause further deterioration to the already fragile structure of competition or to unfairly prevent the emergence and growth of new or existing competitors who might challenge this dominance and bring about the establishment of effective competition.*" (emphasis added).

of such business conduct (including, in particular, the realization of mergers or joint ventures and the entry into cooperation or supply agreements) could be likely to strengthen and reinforce the existing position of economic strength of the Dominant Undertaking and could therefore be open to challenge and criticism under the EC competition rules (Articles 85 and 86 EC and/or the Merger Control Regulation depending on the nature of the business conduct concerned).

Both the recent prohibition decisions in the telecommunications and media sectors adopted under the Merger Control Regulation and the analysis of strategic alliances under Article 85 in the telecommunications sector already illustrate that transactions involving already dominant undertakings may incur substantial difficulties in obtaining clearance and, where they are cleared, may result in the imposition of strict conditions and undertakings bringing anti-competitive effects within acceptable limits and eliminating the grounds for future abusive behaviour in as far as possible. One basic element in these precedents is that the control over essential and other bottleneck facilities is considered as a basic concern for anti-competitive effects which in itself may discourage market entry by potential entrants and which, when it is combined with the control over other facilities either horizontally or vertically (for example, through an alliance or concentration with undertakings in upstream or downstream markets) will often give rise to unacceptable levels of elimination of competition and foreclosure effects. By way of illustration, some of the relevant recent decisions are briefly summarized below.[234]

II.A.2.1 Merger control decisions

Not surprisingly, nearly all of the transactions where vertical foreclosure concerns triggered Commission enforcement action involved undertakings from the telecommunications sector. Moreover, of the six prohibition decisions issued to date under the Merger Control Regulation, three involved the media and telecommunications sectors.

MSG Media Service[235] provides the only example (to the best of our knowledge) of the special obligations incumbent upon a Dominant Undertaking holding

---

[234] In this respect, see also the observations made in the Competition Guidelines (at paras. 129 and following). For example, it is stated in respect of vertical integration by a service provider into the equipment market that if "*dominant service providers are allowed to integrate into the equipment market by way of mergers, access to this market by other equipment suppliers may be seriously hindered. A dominant service provider is likely to give preferential treatment to its own equipment subsidiary.*"

[235] Commission Decision of 9 November 1994 (Case IV/M.469), O.J. 1994 L 364, p. 1. Media Service GmbH ("MSG") was a proposed joint venture between Deutsche Bundespost Telekom (now Deutsche Telekom or "DT"), Bertelsmann AG and Taurus Beteiligungs GmbH, which belongs to the Kirch group. At the time of the Commission decision, DT had a monopoly over the German telephone network and was the owner and operator of nearly all the German cable networks (90%). In its decision under the Merger Control Regulation, the Commission prohibited the joint venture as being likely to create or reinforce a dominant position in three separate markets (*i.e.*, the market for pay-television services, the market for technological services, and the market for cable network services).

control over both the telecommunications and the cable TV infrastructures. As pertinent to the present study, this decision stands for the general proposition that the holder of dominant positions in broadband cable network and fixed telephone network infrastructures may not extend these dominant positions into the market for pay-TV technical and administrative services.[236] It also stands for the general proposition that the holder of a dominant position in the cable TV network may not strengthen its dominance by obtaining privileged links with the leading suppliers of pay-TV and pay-TV programming in a way which makes it more difficult for other cable network operators to compete.[237]

In Nordic Satellite Distribution[238] ("NSD"), the Commission refused to allow

---

[236] The Commission noted (paragraph 61) that DT, as the owner of the broadband cable network and at the same time the holder of the monopoly for the fixed telephone network, controlled the two main means of transmission that can provide the return channel required for interactive digital television. As the mobile phone system was an uneconomical alternative and the broadband cable network could not immediately be used for this purpose for technical reasons, this made DT's telephone network or its glass fibre network all the more important as the only channel currently available for interactive television. Moreover, as a cable and telephone network operator, DT had experience in network management and the technological know-how for communications services. Because of MSG's shareholder structure involving DT, Bertelsmann and Kirch, the Commission found that any new pay-TV suppliers would probably be largely dependent on the joint venture's supply of services, especially because the links with Bertelsmann and Kirch meant that the joint venture could provide the largest number of programmes and the most attractive programmes, thus occupying a favoured position against which the other service providers would have difficulty in asserting themselves (para. 71). The Commission found that the "suction effect" of a service undertaking controlled by Bertelsmann and Kirch could be countered most easily by a cable network operator that took over pay-TV subscriber management itself and possibly offered cable customers programme packages which it had itself put together (para. 72). Because of the structural conditions in Germany, such a function could be performed only by DT, which dominates the market for cable networks. As a result of DT's involvement in the joint venture, therefore, a market structure was created which suggested that the joint venture would have a dominant position in the market for technical and administrative services for pay-TV and other payment-financed communications services in Germany.

[237] According to the Commission, there was a danger that, by jointly operating the pay-TV structure together with the leading pay-TV suppliers, DT would strengthen its position as a cable network operator in such a way that, following liberalization, competition in the cable network market will be substantially impeded and thus DT's dominant position safeguarded. In the Commission's view, the concentration would remove DT as a potential competitor of Bertelsmann and Kirch in related service markets and, simultaneously, remove Bertelsmann and Kirch from being available as potential partners for other future cable network operators. Moreover, the Commission stated that the entry of private cable network operators following the liberalization in 1998 would be much more difficult if DT together with Bertelsmann and Kirch controlled MSG as the dominant service company.

[238] Commission Decision of 19 July 1995 (Case IV/M.490), O.J. 1996 L 53, p. 20. NSD was a planned joint venture between Norsk Telekom, the largest cable TV operator in Norway with about 30 percent of connections and satellite capacity on one of the Nordic satellite positions; TeleDanmark, the largest cable TV operator in Denmark with about 50 percent of the connections and holding a "privileged position" as regards cable TV operations until the liberalization of the Danish market on 1 January, 1998; and the Swedish conglomerate, Kinnevik, the most important provider of Nordic satellite TV programs and the largest pay-TV distributor in the Nordic countries with important stakes in a Swedish cable TV company and in TV4, the largest advertising-financed Swedish channel. The joint venture was intended to transmit satellite TV programs to cable TV operators and households with a dish. The

the creation of a joint venture holding a "gatekeeper function" (or "bottleneck" position) which NSD would have gained on the Nordic market for satellite TV broadcasting due to its dominant position on the market for transponder capacity. As pertinent to the present study, it stands for the proposition that a dominant cable TV operator may not strengthen its dominant position by participating in the creation of a "gatekeeper" through which other cable TV operators must go to obtain TV channels and through which broadcasters would have to go to reach the cable TV operators.[239]

Although it does not involve telecommunications or cable TV operators, Holland Media Group is a further example of the Commission's strict position against vertical link ups between dominant media content providers and dominant downstream providers of services using such content.[240]

Moreover, this case also illustrates the risk for holders of dominant positions in national markets in countries which do not have national merger control laws, where the dominant undertaking participates in a merger or an acquisition falling below the

---

Commission prohibited the operation after finding that NSD would have led to a concentration of the activities of its parent companies creating a highly vertically integrated operation including the operation of satellite and cable TV networks, the production of TV programs to retail distribution services for pay-TV and other encrypted channels.

239 The planned joint venture was intended to transmit satellite TV programmes to cable TV operators and households and would have held a monopoly position as regards provision of such programmes. The Commission found that the participation in the proposed joint venture of Tele Danmark ("TD"), the holder of the legal monopoly in Denmark for the ownership of commercial cable TV infrastructure and the transmission of TV signals by cable across municipal borders, and also the operator of the largest cable TV network and the largest supplier of cable TV in Denmark (para. 114), would strengthen TD's dominant position in the market for cable TV networks in Denmark (para. 132). It would do so because the joint venture would be able to discriminate in favour of TD when offering channels to competing Danish cable operators. Moreover, the joint venture's monopoly position as regards provision of programming would mean that the terms offered to cable operators would be those most favourable to TD, rather than to others. Finally, cable operators in competition with TD would have to negotiate with TD as a partner in the joint venture. The Commission also noted in a different context that TD was in a position where it would obtain knowledge about the strategic considerations of its competitors, since all offers made by TD's competitors would necessarily involve a contractual relationship with TD regarding the use of TD's infrastructure, while TD could make an offer without being forced to negotiate the terms for using another company's infrastructure (para. 116).

240 Commission Decision of 20 September 1995, RTL/Veronica/Endemol, O.J. 1996, L 134/32. As originally proposed, HMG was a joint venture between RTL (a supplier of Dutch language TV and radio programmes), Veronica (the leading TV broadcaster in the Netherlands) and Endemol Entertainment Holding BV ("Endemol"). The Commission found that, through its three channels, HMG would achieve a very strong position on the Dutch market for TV broadcasting (40% plus audience share) and a dominant position in the Dutch market for TV advertising (60% market share). In addition, the Commission found that the structural links of Endemol, the largest independent producer of TV programmes in the Netherlands and already in a dominant position due to the diminutive size of its competitors, with the leading Dutch broadcaster would have further strengthened Endemol's dominant position by providing it with preferential access to the largest customer in the TV production market. In early 1996 Endemol withdrew from HMG, thereby removing the foregoing structural link as well as HMG's preferential access to Endemol's productions and weakening HMG's position in the TV advertising market. The Commission subsequently approved the new shareholding structure.

Community dimension thresholds. The Holland Media Group merger was referred to the Commission under Article 22 of the Merger Control Regulation. In such cases, the Merger Control Regulation's rules on suspension do not apply, with the consequence that, if the dominant undertaking implements the merger or the acquisition before obtaining clearance from the Commission, it may have to divest the target company in the event of a negative decision by the Commission pursuant to the Article 22 referral.

II.A.2.2 Assessment of strategic alliances

In the context of merger control, the Commission is provided by the Merger Control Regulation with broad powers enabling it to prevent market foreclosure before it occurs, thus contributing to the preservation of competitive market conditions. Even outside the context of merger decisions, the Commission uses all its possibilities to strictly apply the EC competition rules to undertakings, whether dominant or not, and to prevent that foreclosure occurs.

In several decisions and pending decisions relating to the telecommunications sector, most notably BT/MCI,[241] Atlas,[242] Phoenix/Global One,[243] Unisource/Telefonica[244] and Uniworld,[245] the Commission had occasion to assess agreements which established strategic alliances for the provision of liberalized telecommunications services and which were ultimately aimed at positioning the parties to take advantage of full liberalization of the European telecommunications markets after 1 January 1998.

In examining these alliances under the criteria for exemption under Article 85(3), the Commission was particularly diligent to ensure that the creation of the strategic alliances would not allow telecommunications operators dominant in their home countries to insulate themselves from competition in their national markets at the same time as they participated in the alliances to take advantage of liberalization in European-wide markets.

In these decisions and pending decisions, the Commission employed substantial leverage power to obtain numerous behavioural (and in certain cases also structural) undertakings from the parties as conditions for the grant of exemptions under Article

---

241 Commission Decision of 27 July 1994, BT/MCI, OJ 1994, L 223/36.

242 Cited above.

243 Commission Decision of 17 July 1996, Phoenix/GlobalOne, O.J. 1996, L 239/57.

244 Notice pursuant to Article 19(3) of Council Regulation No 17 and Article 3 of Protocol 21 of the EEA Agreement, Unisource - Telefonica, O.J. 1997, C 44/15.

245 Notice pursuant to Article 19(3) of Council Regulation No 17 and Article 3 of Protocol 21 of the EEA Agreement, Uniworld, O.J. 1997, C 44/4.

85(3).[246] In addition, in the Atlas and pending Unisource/Telefonica decisions, the Commission required, as a condition of exemption, that the Governments of the home countries of the European telecommunications organizations participating in the strategic alliances agree to liberalize telecommunications infrastructures.[247]

Apart from control of specific transactions qualifying under the technical rules of Article 85 and the Merger Control Regulation in the light of the above precedents, the business conduct of the Dominant Undertaking would also remain subject to the "strengthening of dominance" and "extension or leverage of dominance" tests of Article 86 as already indicated above. Although each time subject to economic analysis on the basis of the facts of each individual case at issue, it can be anticipated that a number of practices and agreements engaged in by the Dominant Undertaking could run against these tests and may therefore be challengeable. Tetra Pak II[248] is a good illustration of this principle which could, for example, find an application in the event that the Dominant Undertaking enters into certain exclusive or other (for example, long-term) agreements with undertakings active in upstream and downstream markets or even with (large) customers.

II.A.3 The Dominant Undertaking needs to take a number of measures in order to ensure that its conduct does not infringe the competition rules

II.A.3.1 Accounting separation and cost allocation

As has already been discussed above, the pricing practices of the Dominant Undertaking will need to be kept under strict and almost continuous control under the competition rules, at least at the early stages of liberalization. In this respect, fundamental questions are likely to arise regarding the costing and accounting structures and methods and the cost allocation systems used by the Dominant Undertaking to calculate and set its prices. The importance of appropriate accounting and costing methods is already underscored in part by the rules set out in the ONP sector specific legislation. In this Section, we examine whether the Dominant Undertaking can be

---

[246] The behavioural undertakings aim in particular at ensuring that the national telecommunications operators parties to the agreements will not: discriminate in favour of the joint venture as regards the provision of leased lines, interconnection and other matters; misuse any confidential information which they would acquire as a result of their provision of infrastructure and services to third party competitors of the joint venture; cross-subsidize within the meaning of the Commission's Competition Guidelines (cited above); bundle reserved and non-reserved services; or bundle TO and joint venture services. In Uniworld, the Commission also required certain undertakings from AT&T regarding access to and interconnection with AT&T's international facilities and services. See Section I.A.3 for a discussion of the structural undertakings in the Atlas decision.

[247] The exemption of the Atlas strategic alliance was set to apply from the prospective date on which two or more licences for the construction or ownership and control of alternative infrastructure for the provision of liberalized telecommunications services take effect in Germany and France.

[248] Cited and discussed above.

obliged under the competition rules to take specific measures regarding its cost accounting.

It may first be observed that the Dominant Undertaking will clearly have an individual interest to implement appropriate cost accounting and cost allocation methods at its internal level. As has been indicated above, when the Commission opens an investigation into particular pricing practices, it should be considered as entitled or even obliged to request the undertaking targeted by the investigation to provide it with the necessary costing information allowing the Commission to conduct its investigation in an effective manner.[249] If the undertaking would fail to provide such information (in particular, when it did not implement the necessary costing methods), it is strongly arguable that there would be a presumption that the prices concerned are not justified and therefore abusive within the meaning of Article 86, at least when there are some other *prima facie* elements hinting at potentially abusive pricing.[250] If the Dominant Undertaking wants to be in a position to rebut such a presumption, it should take all steps necessary in its accounting and costing methods to be able to do so.[251] In this respect, and given the market position of the Dominant Undertaking and the variety of its activities, one of the essential elements in its accounting should be that it keeps separate accounts at least for those activities for which it has a dominant position.

Apart from the issue described in the preceding paragraph which should be duly taken into account by the Dominant Undertaking if it wants to avoid findings of an abuse of a dominant position, a number of other arguments or circumstances support the position that the Commission could compel a Dominant Undertaking to implement appropriate cost accounting and allocation methods. These arguments and circumstances are described below following a graduated approach.

Firstly, following a specific investigation under the competition rules leading to a finding of an infringement of Article 86 EC, the Commission should have the power to impose certain obligations on the dominant undertaking in order to avoid that the abusive practices would re-occur in the future.[252] In particular, in a case where there is a finding of illegal cross-subsidies or where the Dominant Undertaking is not in a position to rebut in an adequate manner the presumption mentioned in the preceding

---

[249] See the discussion in Section II.A.1 above.

[250] For example, these *prima facie* elements could be deduced from certain types of bench-markings with other jurisdictions and/or other operators as well as from sudden changes in the level of the prices.

[251] For a parallel argument and reasoning, see the Competition Guidelines, cited above, where it is stated that "*if in a specific case there are substantial elements converging in indicating the existence of an abusive cross-subsidization and/or predatory pricing, the Commission could establish a presumption of such cross-subsidization and predatory pricing. An appropriate separate accounting system could be important in order to counter this presumption.*" (at para. 108).

[252] For a general discussion of the powers of the Commission to impose certain remedies pursuant to Article 3 of Regulation 17/62, see the discussion in Section I.A.4 above.

paragraphs, the Commission should be entitled to impose on the undertaking concerned certain reporting and monitoring obligations as well as to require that undertaking to implement appropriate cost allocation and accounting separation systems in order to make the reporting and monitoring obligations effective.[253] In order to justify the proportional and indispensable nature of imposing such measures in a particular case, arguments could also be invoked along the lines of those listed in Section II.A.1 which demonstrate the particular need for close scrutiny on the business conduct (including pricing practices) of the Dominant Undertaking.

A second manner for setting out an obligation under the competition rules to implement appropriate accounting rules (including accounting separation) would be to refer, where possible, to the obligations and requirements set out in secondary legislation (including, in particular, the ONP framework[254] and the liberalization directives). As indicated above, the Court has already indicated that provisions and rules included in secondary Community legislation can be used as interpretative criteria for the interpretation and the application of the EC competition rules.[255] It is arguable that a natural corollary of this principle should be that the failure to respect certain obligations set out in secondary legislation should in itself constitute an infringement of the competition rules. From a legal perspective, such a reasoning would mean that the existing case law would need to be extended since, to the best of the authors' knowledge, this argument has so far not yet been used in an explicit manner in existing precedents. Although establishing such a principle would be helpful in ensuring a more effective scrutiny of dominant undertakings, it may however not be sufficient since the secondary legislation could fall short of covering all situations and services where accounting transparency and separation is needed. Therefore, it may be necessary to follow a more general reasoning, as described in the following paragraph, which could, where necessary, be combined with the reasoning set out in the present paragraph.

Thirdly, the specific duties and the "special responsibility" of the Dominant Undertaking could be used to construct a more general rule stemming from the competition provisions that a failure to implement appropriate accounting separation and cost allocation mechanisms would infringe in itself Article 86 EC and constitute an abuse of a dominant position. In fact, although this element does not appear as such in existing case law and precedents, it is at least arguable that any dominant undertaking is under a general duty of care and is, in addition to its obligation not to

---

253 The Commission has already imposed in the past annual reporting requirements in Article 86 cases. For example, in Tetra Pak II (Commission Decision of 24 July 1991, O.J. 1992, L 72/1), the Commission ordered Tetra Pak, among others, to abstain from certain pricing practices in the future and to submit, during a period of five years, a yearly report to the Commission enabling it to establish whether Tetra Pak has complied with its obligations. See also Commission Decision of 14 December 1985, ECS/AKZO, O.J. 1985, L 374/1.

254 See, in particular, the principles of cost-orientation, transparency and cost-allocation set out in the ONP rules.

255 See, in particular, the discussion of Ahmed Saeed above.

abuse its dominant position, also under an obligation to take all precautions necessary to exclude the occurrence of such abuses. Indeed, it seems reasonable to consider that each dominant undertaking should at least be able itself to verify whether its conduct is in compliance with the competition rules and that it would be negligent and abusive if it were not to implement sufficient measures which allow it to control and examine its own behaviour. In the present context, this argument could have a particular weight since the Dominant Undertaking should be fully aware of the fact that any of its abuses may have particularly serious consequences. Furthermore, the considerations described in Section II.A.1 above can clearly be used to argue that an obligation on the Dominant Undertaking to keep separate accounts and to implement appropriate cost allocation methods, allowing an effective scrutiny under the competition rules, would be justified as reasonable and proportional in the particular circumstances concerned. Then, the failure by the Dominant Undertaking to comply with such an obligation could be qualified in itself as an abusive conduct under Article 86 EC.

II.A.3.2 Structural separation without modification to the ownership structure

Whereas accounting separation and the implementation of appropriate cost allocation methods can help in verifying and avoiding a number of possibly abusive practices by the Dominant Undertaking, the beneficial effects of such rules remain largely limited to pricing practices. However, as is anticipated in the Cable TV Directive,[256] the position of the Dominant Undertaking may also give rise to more fundamental concerns which go back to the essential "conflict of interest" which is inherent in that position due to the control over both the telecommunications and cable TV infrastructure.

For the above reason, it needs to be examined whether the competition rules can be used to compel the Dominant Undertaking to proceed with a structural internal separation through which the two basic activities of the Dominant Undertaking would be placed in separate entities. It is submitted that the analysis which could be followed to come to such a conclusion is in essence the same as that to be made in order to examine whether certain divestiture measures (including a change in the ownership over certain of the assets and activities of the Dominant Undertaking) can be imposed on the Dominant Undertaking. For that reason, the relevant analysis is made in the Section which follows. It can already be noted here that, if after a full analysis of the matter it is concluded that, pursuant to the competition rules, structural measures can indeed be imposed on the Dominant Undertaking, it then needs to be examined whether a structural separation would be sufficient to achieve the goals pursued and to eliminate the abusive situation or whether it would be indispensable to impose the more severe divestiture measures.

It should already be noted here that in order to be effective any structural separation should be accompanied by sufficient guarantees which would exclude, in an

---

[256] See the citations above.

effective manner, the possible negative effects resulting from the bundling of the telecommunications and the cable TV infrastructure in one hand.[257] As is the case for the possible obligation to divest in the circumstances at hand, an obligation to proceed with a structural separation in those circumstances would also be an innovation to the current application of the competition rules (in particular, Article 86 EC).[258]

II.A.4 Divestiture

At the present time, an obligation on undertakings holding a dominant position both over telecommunications networks and services and over cable TV networks and services to divest part of their assets and activities appears to be one of the most ultimate means to ensure a minimum degree of competition on the markets, equality of opportunities and a level playing field.

In addition, even if structural divestiture measures are adopted, this will not be sufficient to create automatically a level and fair playing field in which competition is not distorted. Indeed, even after the adoption of such measures there will clearly remain a need for strict enforcement of the competition rules. First, it will continue to be necessary to ensure that the practices of the undertakings on the market (of which there will be at least two after a successful divestiture) are in full compliance with the competition rules. Indeed, immediately after a divestiture, the traditional operator may be expected to maintain for at least a certain period of time a dominant position[259] on a number of markets which it could abuse in order to strengthen or maintain its position on those markets. Those practices (for example, refusals to provide access or the provision of access under unfair pricing or technical conditions and the application of excessively low and predatory prices intended to eliminate new competitors) will require specific attention under Articles 85 and 86 in order to ensure the full effects on the market of the said divestiture. Second, the divestiture could in principle, and at least for a certain period of time, also give rise to a duopolistic market structure in which

---

[257] In this respect, reference can be made to the findings in Section I.A.3 above. The conditions imposed in the cases discussed there, where structural separation was ordered as a temporary measure prior to the divestiture of a certain business entity, should be considered as minimum conditions which would be required in the event of the implementation of a structural separation on a more permanent basis.

[258] In this respect, it may be noted that a number of the essential facilities cases (see, in particular, Commission Decision of 23 December 1993, Sea Containers, O.J. 1994, L 15/8, at para. 75) may be interpreted as containing a test of "virtual separation" since it was indicated that the conduct of the dominant undertaking, as the controller of the essential facility, needed to be compared with that of an independent authority which would have controlled the essential facility without having activities in the downstream market for the provision of services.

[259] In each individual case, the position of market strength of the operators concerned should be examined on the basis of the classical tests developed in this respect in the case law of the Court and the administrative practice of the European Commission. See also the criteria for assessing dominance set out in Section 1 of Part III of the Draft Notice on access agreements in the telecommunications sector.

there could be a likelihood for collective dominance.[260] In such circumstances, the competitive behaviour of the undertakings concerned should be closely monitored under the competition rules in order to avoid that such undertakings would engage, through collusion or otherwise, in certain practices which would have as their purpose or effect the exploitation of customers and consumers (for example, through market sharing agreements or direct and indirect price fixing agreements) or the foreclosure of market entry of new operators and/or service providers (for example, through collective boycotts).

If divestiture is imposed as a structural measure on the basis of the competition rules, the implementation of and the conditions for such divestiture could be inspired on the existing precedents in EC competition law in which such measures have already been used as an instrument to establish or re-establish competitive market structures. These principles have been described in Section I.A.3 above. In addition, use could also be made of the experience with these types of measures in other jurisdictions.

In accordance with the graduated approach which is followed in this part of the study, two separate scenarios will be examined below. In the first scenario, it is examined whether divestiture can be ordered after the finding and establishment of actual abusive practices by an undertaking which holds a dominant position both over telecommunications infrastructure and over cable TV infrastructure. In the second scenario, there will be no findings of specific actual abuses.

II.A.4.1 First scenario: findings of actual abusive behaviour by the Dominant Undertaking have been established

As has been indicated above, a situation in which an undertaking holds a dominant position both over the telecommunications infrastructure and over the cable TV infrastructure creates a very large potential for abusive behaviour which can take a wide variety of forms. Admittedly, this is the case for any dominant undertaking in whatever market since by virtue of the definition of the concept of "dominance" such undertaking enjoys a substantial freedom to determine its market behaviour since it "*has the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*"[261], which should create at least a potential for abusive behaviour. However, it is submitted that the above described situation can be differentiated from situations which have already been examined in the past under the EC competition rules (in particular, Article 86 EC).

In particular, the situation concerned arises in a sector which is characterised by the implementation of the process of full liberalization and by the convergence of

---

[260] In this respect, see also Section 1.3. "Joint dominance" of Part III of the Commission's Draft Notice on access in the telecommunications sector. In particular, at para. 70, where an assessment is made of the position in the local loop of the incumbent telecommunications operators and the cable operators.

[261] Case 27/76, United Brands v. Commission, [1978] ECR 207, at para. 65.

technologies and activities which both create new opportunities anticipated to result in substantial market development and growth. This is to result in very rapid developments in the markets with the implementation of new technologies leading to the provision of new and enhanced services. In this environment, two infrastructures are expected to play a crucial role, namely the telecommunications infrastructure and the cable TV infrastructure. The increasing degree of convergence and competition between these two infrastructures in different market segments should become one of the main driving forces of the new expected market developments. Where these two infrastructures are bundled in and controlled by one hand, this mechanism of auto-regulation of the market through strong competitive pressure stimulating investments and innovation would be absent and may distort competition, namely by putting the dominant undertaking in a position of economic strength which is quite unique as compared to more traditional types of dominant positions in, for example, the production and trade in goods where the risk of the withholding from customers and consumers of new services and developments is far less pronounced than in the sector which is the object of this study and where the barriers to entry are very often much lower than in the latter sector.

It is almost inevitable that the Commission and/or other enforcement authorities will be called upon in the near future to examine, under the competition rules as well as under other regulatory frameworks, practices of dominant telecommunications/cable TV operators which could be considered as abusive under Article 86 EC. Through their enforcement actions, the competition authorities could be in a position to establish a number of anti-competitive abusive practices. If a series of such findings is made, then it could be considered whether or not divestiture of certain activities and assets would not be an appropriate remedy.[262] To the best of the authors' knowledge, such a remedy has so far not yet been used or considered in individual cases examined under Article 86 EC except in those cases in which the abuse consisted of the acquisition of certain assets or other undertakings which then needed to be separated again from the dominant undertaking.[263] However, it is at least arguable that in specific circumstances in which there is a cumulation of various and consecutive findings of abuses of one or more dominant positions by a single undertaking which are a direct consequence of the position of economic strength which it holds, structural measures are required in order to ensure that the said undertaking will not continue to engage in any further foreseeable abuses.

Such structural measures should be justifiable, in particular, either where the series of abuses concerned consist of exclusionary conduct or where the said abuses are accompanied by a situation where due to the presence and/or the behaviour of the dominant undertaking it is clear that market entry by other undertakings has become

---

[262] Individual abuses would of course remain subject to the normal liabilities for infringement of the EC competition rules (including the imposition of fines for intentional or negligent infringement of those rules).

[263] See, in particular, the discussion in Section I.A.1 of Continental Can and Tetra Pak I.

unlikely or virtually impossible. In the latter respect, the occurrence of repeated or a series of different abuses directly detrimental to customers and consumers could in itself be an indication that an increased degree of competition in the market is unlikely.

It is impossible to set out very specific theoretical criteria as to the level, number and degree of anti-competitive practices and findings of infringements of the competition rules which would be required for being able to justify the imposition of structural measures such as a divestiture of a part of the assets or the activities of the dominant undertaking. This analysis should mainly be made on the basis of general principles including, in particular, the principles of proportionality and reasonableness. However, it appears *a priori* that there could be certain exceptional circumstances in which these tests would not exclude the imposition of structural measures.

It could be argued against the above course of action that the Commission holds powers other than the imposition of far reaching structural measures which should allow it, through a case-by-case approach, to remedy a situation in which an undertaking engages at several occasions and at different levels in abusive conduct. In particular, it could be argued that the Commission has the necessary powers to impose fines for abuse of a dominant position and that it has also the power to provide for the imposition of periodic penalty payments on undertakings which do not put to an end an infringement of the EC competition rules in accordance with a Commission Decision[264]. It is submitted that the validity of this type of argument should be examined on a case-by-case basis but that the fact that there have indeed been repeated abuses of a dominant position, which were the subject of a Commission or other competition law investigation, could be used in order to hold that the above mentioned powers of the Commission are not sufficiently effective in order to control the undertaking(s) concerned in an efficient manner.[265] Furthermore, the analysis of the existing administrative practice of the Commission already demonstrates that there are clearly circumstances in which behavioural measures or obligations[266] are not sufficient to exclude the existence or emergence of anti-competitive situations. In particular, it has already been concluded in cases in the past that such behavioural measures may be too difficult to monitor and to enforce and do not provide for sufficient guarantees of compliance with the competition rules.[267] In addition, both

---

[264] See Article 16 of Regulation 17/62.

[265] See the parallel with the principle of "effectiveness" of remedies which has been used by the Court of Justice in the past to examine whether or not the Commission had the power under Regulation 17/62 to impose a specific remedy in a specific case. This case law is summarized in Section I.A.4 above and has, as indicated in that Section, already given rise to the confirmation of "new" powers of the Commission including the right to impose interim measures.

[266] Measures imposed by the Commission on the basis of its existing powers under Regulation 17/62 would necessarily have this behavioral nature if the Commission were to be precluded from adopting structural measures on the basis of those existing powers.

[267] See the discussion in Section I.A.3 above in which the evolution from behavioural towards structural commitments under EC competition law has been described.

from a practical and from a legal point of view, it appears to be virtually impossible to develop, through a number of individual case approaches, specific behavioural rules which would be, on the one hand, precise enough to be fully effective and easily and rapidly enforceable and, on the other hand, sufficiently broad to cover the various types of conduct which could be engaged in by the dominant undertaking(s) concerned on subsequent occasions. This, again, could be used as an additional argument to demonstrate that in certain circumstances the following of a case-by-case approach would not be an effective approach under the competition rules to control the behaviour of a dominant undertaking which can allow itself in the market to abuse, in a repeated and almost continuous manner, its economic strength.

One of the advantages of following the above approach which is based on the assessment of the situation after the establishment, at different subsequent occasions, of a series of abuses is that the enforcement of the competition rules would not be based on assumptions but on elements of actual abuses. Thus, an undertaking in the dominant position(s) described above would at least be given a chance to demonstrate that notwithstanding its very important position of economic strength it can still and does still behave in a manner which is compatible with the competition rules. Furthermore, such undertakings would be given different warnings and the opportunity to correct their conduct and behaviour before the ultimate structural measure of divestiture would be imposed on the basis of the competition rules.[268]

An important disadvantage of following the scenario described in this Section could be that it would take a very substantial amount of time before the structural measures could be considered and eventually imposed since there would be a need to find and establish first a critical mass of various types of abuses prior to moving to the imposition of structural measures. Given the complexity of the issues which are likely to arise in such individual cases and the normal length of competition law enforcement actions, this could mean that the competition law enforcement would be too slow to go hand in hand with and to stimulate the rapid market developments which are expected to occur and that such market developments could be considerably delayed by the presence and conduct of the dominant undertakings.

---

[268] Another advantage which could result from this is that the enforcement of competition law would leave room for diversity in different Member States and would not be used directly for "harmonizing" the structure of the sectors concerned in all Member States. This could possibly also be seen as an application of the principle of subsidiarity given the fact that the Member States at the national level could also take a number of measures (either regulatory measures or direct measures where the Member State concerned is an important or majority shareholder in the undertaking concerned) which could contribute to ensuring that the undertaking does not abuse its position of economic strength but meets its special responsibilities.

II.A.4.2 Second scenario: no findings of actual abusive behaviour by the Dominant Undertaking have been established

The scenario described in the present Section is clearly the most far reaching and novel in the graduated approach followed so far. A number of arguments will be outlined which could be used for bringing a case under Article 86 EC leading to an obligation for a dominant undertaking holding a dominant position both over telecommunications and cable TV networks to divest at least one of those two. At the present stage, most of these arguments are largely untested both from a legal perspective, since there are no direct precedents on these points, and from an economic and market perspective, since the arguments will need to be supplemented and supported by further economic and market analysis.

It should also be noted that certain of the arguments discussed below could also be combined with the approach followed in preceding Section since they could be used to support and strengthen that approach. In addition, it seems very reasonable to consider that the strength of the arguments presented in this Section will clearly be greater if they can be used in an investigation or case in which there is at least some proof of actual abusive conduct engaged in by the undertakings concerned.

One of the main starting points of the reasoning followed is that the situation of fact in which are currently the undertakings holding the control over both the existing telecommunications infrastructure and the existing cable TV networks is a situation which could, in principle, not be achieved, as illustrated below, at the present stage of development of the markets and Community law. Indeed, notwithstanding the fact that each individual case would have to be judged on the basis of its own merits, this existing situation with a double monopoly or double dominant position is a position which could, in principle, in the current new regulatory environment not be achieved:

- by an individual undertaking: for example, through the acquisition by a national telecommunications operator of the existing nation-wide cable TV network. Such a transaction would fail to meet the test for permissibility under the EC Merger Control Regulation and/or would constitute a prohibited extension or strengthening of a dominant position[269]; or

[269] The latter reasoning would need to be followed with regard to transactions/concentrations which would fail to meet the threshold criteria set out in the EC Merger Control Regulation. Article 86 EC of the Treaty remains applicable to such transactions even if Regulation 17/62 would no longer apply pursuant to Article 22(2) of the EC Merger Control Regulation. However, it is generally admitted that even in the absence of an implementing regulation adopted pursuant to Article 87 EC, Article 86 would continue to produce its full and direct effect (see the parallel with the reasoning followed by the Court of Justice in Ahmed Saeed, cited above, at para. 32, regarding the absence of implementing rules for certain practices in the air transport sector).

- by a structural agreement between undertakings: for example, through the creation of a joint venture. Such a joint venture, whether concentrative or cooperative, could be expected to fail to meet the standards for permissibility and/or exemption under the EC Merger Control Regulation and Article 85[270], respectively; or

- by a cooperation agreement or concerted practice between undertakings: for example, through a market sharing agreement or a price fixing agreement between the independent telecommunications operator and the independent operator(s) of the cable TV networks (who could, furthermore, be in a position of joint dominance); or

- by a Member State: for example, through the granting of special or exclusive rights extending the dominant position of the undertaking concerned.

In this context, it is necessary in order to achieve equality of opportunities that at the time of the entry into force of the liberalization programme not only "new" practices, agreements and transactions are examined which occur after that entry into force but that also existing and past practices, agreements and transactions are examined in the new regulatory environment and technological context. Throughout the years, these situations have been sheltered, to a large extent, from the application of the competition rules and could not be controlled owing to the still lawful nature of national monopoly situations. Now these situations may need to be revisited in order to ensure a market structure in which competition is not distorted. In order to achieve this goal, certain arguments could be constructed on the basis of existing case law which could be used to carry out an analysis of the legality of existing market situations.

(i) Automatic abuse

As has been concluded in Section I.A.2 above, the case law of the Court of Justice arguably leaves scope to transpose the doctrine of "automatic abuse" into cases regarding the application of Article 86 EC to individual undertakings. That doctrine applies if an undertaking is placed in a situation in which it cannot avoid abusing its dominant position or in which it is led or encouraged to abuse its dominant position. In the present context, it does not appear to be necessary to examine the situation in which an undertaking has put itself in such a position (in particular, through competition based on performance and merits) since it is clear that the positions and

---

[270] In this respect, it should be noted that the main problem for such a joint venture, which would fall within the prohibition of Article 85(1), would be to demonstrate that the inherent restrictions on competition, both on the parent companies as well as through foreclosure effects on third parties, to which it gives rise would be indispensable and that it does not exclude competition in a substantial part of the goods and services concerned under the conditions for exemption of Article 85(3).

situations which are the subject of this study are still the direct consequence of State regulations which have brought about the current situations.[271]

The recitals to the Cable TV Directive already contain the starting point of the doctrine on automatic abuse where it is stated that "*[w]here Member States grant to the same undertaking the right to establish both cable TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for overcharging for use of the cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications network*".[272] Those considerations should not only apply to an undertaking whose position on the market is protected by certain special or exclusive rights but also to an undertaking which is as a matter of fact in such a position and is not faced with substantial competition on the market. Such an undertaking can also be considered to be induced to abuse its dominant position. At least from a theoretical perspective, it seems possible to develop a number of other "automatic abuses" which would be the result of the situation in which the undertaking with the double dominant position finds itself.[273] One of these automatic abuses could be that the dominant undertaking will not have sufficient incentives to and will not realise the necessary investments and innovations in its two networks but will allocate resources in a manner which is different from the most efficient allocation of resources. This would then lead to delays in the implementation of new and enhanced technologies thus withholding new services and technological innovation from customers and consumers (which would not have a possibility of choice as to what network operator to use since the networks would be bundled in one hand).

It is submitted that any argument based on the "automatic abuse" doctrine should be carefully constructed and duly supported by economic theory and facts in order to have chances of success. In particular, it is submitted that it should be demonstrated that, on the basis of the facts of the matter, there is a very high degree of likelihood that the abuses will indeed occur on the market and that these abuses will almost necessarily result from the position of economic strength of the dominant

---

271 We consider that there might be certain arguments to differentiate between positions which are the consequence of State regulation and positions which result from serious entrepreneurial effort by the undertaking concerned. Contrary to what is the case in certain other jurisdictions, EC competition law as it stands today does not seem to make such a distinction in any specific manner.

272 See recital 18 to the Cable TV Directive. See also the types of abuses described in the recitals to the Full Competition Directive and, in particular, the fact that the undertaking would always be acting in a kind of "conflict of interest" situation.

273 It is submitted that prior to using any allegations of "automatic abuse", it should be carefully examined on the basis of economic theory and analysis whether there is a sufficient likelihood that the abuses concerned will indeed be automatic and result directly from the market position which the undertaking concerned occupies.

undertaking.[274] In the authors' view, such a demonstration is necessary because otherwise it would be argued against such a finding that what is being challenged is not an abuse of a dominant position but a dominant position itself. Such a counter-argument would normally have very considerable chances of success with the European Courts as has been discussed above.

As a general point, the test outlined in the preceding paragraph appears very difficult to meet. However, it is understood that economic theory should here be used to confirm that the situation in the telecommunications/cable TV sector is very specific and will indeed give rise to "automatic abuses" if situations subsist where an undertaking controls both the telecommunications infrastructure and the cable TV networks in a given country. In the preceding sections, a number of arguments have already been outlined which differentiate such a position from positions which have already been examined in past case law and administrative practice.

It also needs to be examined what can be achieved through the application of the doctrine on "automatic abuse". In this respect, reference is first made to the discussion in Section I.A.2 above in which we examined the results so far obtained through the application of the doctrine on automatic/necessary abuse under Article 90 in conjunction with Article 86. On the basis of that case law, a line of reasoning based on the "abolition of monopoly" argument could be followed in transposing the said case law to the case here under Article 86 EC.

As indicated above, in most of the cases on the combined application of Article 90 and 86 EC, the result obtained was that the national legislation granting one or more monopolies, under the form of special or exclusive rights, to an individual undertaking needed to be abolished and that other undertakings had to be allowed to engage in the "legally reserved" activity. In the present context, such a reasoning and result would not help since there would, in principle, be no absolute legal barriers or exclusive rights anymore barring access to market entry. Therefore, a reasoning by analogy would need to be followed.

In such a reasoning, the specific market position of the dominant undertaking would need to be considered as constituting the fact which triggers the automatic abuse and also the element which constitutes the virtually absolute barrier to market entry, comparable to the exclusive right examined and condemned in the case law on the combined application of Articles 90 and 86 EC. If a demonstration can be made that the position of the dominant undertaking constitutes a virtually absolute barrier to market entry by other undertakings (i.e., producing effects similar to those of the

---

[274] As a matter of fact, it would be advisable to bring a case in which it is established that the undertaking concerned will not be able to avoid committing abuses. This would then also meet the concerns expressed in Section I.A.2 above in which we indicated that it is arguable that an evolution has taken place in the case law of the Court and that the test which must be met for the doctrine on "automatic abuse" to apply is a test of "necessity and impossibility for the dominant undertaking to avoid abusive conduct".

exclusive rights at issue in the cases on the combined application of Articles 90 and 86 EC), then it seems that it should be possible to argue that the only efficient measure which can be used to eliminate the situation leading to the automatic abuse would be to oblige the undertaking concerned to divest part of its activities or assets in order to ensure that provision is made for the entry into the market of a viable competing undertaking.

The above reasoning would clearly be novel in nature but if the Court would accept the application of the theory of "automatic abuse" in cases applying Article 86 to individual undertakings this could be the logical outcome of the matter provided it can be demonstrated that there are no other reasonable means which can be used to eliminate the anti-competitive situation.

(ii) Extension of a dominant position and maintenance or strengthening of a dominant position

As indicated in the introduction to this Section, undertakings holding a dominant position over both telecommunications infrastructure and cable TV networks are in a position which, in the new regulatory environment, in principle, cannot be achieved through the combination of the existing networks. In fact, those undertakings have been put in such a position because, at the time, no control was exercised on the granting of specific rights to these undertakings. For many years, that situation has been "neutral" from a competition law perspective since the specific rights concerned were compatible with these rules and could not be challenged.[275] In other words, there was basically no significant competition which could be restricted within the meaning of the competition law provisions of the EC Treaty through the granting or the exercise of the rights concerned.

However, it is in fact at the time of the entry into force of the liberalization that this situation is starting to produce its negative effects on competition. In addition, it is also at the time that technological developments are resulting in the possibility of increased convergence between the two networks and the services which can be provided over and carried by them that the effects of the existing bundling of the two networks and infrastructures in one hand produces its full effects on competition. It could therefore be possible to construct an argument that the strengthening and/or the extension of the dominant undertaking's position occurs at the time of these developments in the regulatory and technological environment and therefore need to be examined under the competition rules at that time.[276]

---

[275] In fact, it were only certain practices (for example, the charging of excessively high practices) by the individual undertakings which could be challenged under the competition rules in as far as competition law enforcement was not barred by the application of the exception of Article 90(2) EC.

[276] For a more general description of the possible impact of regulatory and technological developments on the assessment under EC competition law, see the discussion in Section I.A.3 above.

The above reasoning would result in at least one substantial innovation as compared with existing case law and practice.[277] The factor triggering the application of Article 86 EC would not be a conduct by the dominant undertaking (or even an assumed conduct by the dominant undertaking such as under the "automatic abuse" doctrine) but basically "external events and developments". However, it can be argued that there is indeed a certain conduct by the dominant undertaking which needs to be examined under Article 86 EC and that this conduct consists of the failure by that undertaking to take pro-active measures to avoid the emergence of the anti-competitive situation resulting from the strengthening or extension of its dominant position. Thus, the failure to take such measures (including the divestiture of certain assets and/or activities) could, in such a scenario, be qualified as the conduct (i.e., the abuse under Article 86 EC) which strengthens or extends the dominant position of the undertaking concerned taking into account the developments in the market and the regulations which give rise to the anti-competitive situation.

The reasoning outlined in the preceding paragraph is novel, is not directly supported in the existing case law and administrative practice and would therefore need to rely heavily on the concept of "special responsibility" which accompanies the holding of a dominant position.[278] Therefore, the chances of succeeding with this reasoning, if it would be brought before the European Courts, are virtually impossible to assess. However, as we will discuss in Section II.B, certain of the principles established in the case law on Article 90 EC could be interpreted as showing a reasoning very similar to the above. In such cases, it is the Member State which fails to take a pro-active measure to eliminate a situation which has become anti-competitive and against the EC competition rules. Although we believe that in the context of the application of Article 90 EC that argument has greater weight,[279] it is not totally excluded that it could also be used as a valid argument under Article 86 EC as applied to individual undertakings, both public[280] and private, and may then serve as a means for achieving the objectives of the Treaty.

---

277 See the conclusions in Section I.A.1 above.

278 In this respect, it is also helpful to bear in mind, as has been discussed above, that the Court has indicated that the "degree and scope" of the special responsibility of the dominant undertakings depends on the specific circumstances of each individual case.

279 In this respect, it is also worth recalling that the doctrine of automatic abuse itself is one which is already well-established under Article 90 EC but less, or even not, known in individual cases on the application of Article 86 EC.

280 It is debatable whether the argument could be stronger when a public undertaking is involved than if a purely private undertaking is concerned. Such a thesis would appear to go against the basic principle that public and private undertakings are treated on an equal footing in the Treaty. On the other hand, the case law of the Court of Justice contains at least some elements from which it appears that private and public undertakings are not necessarily always treated in an identical manner under EC law, in particular, where such public undertakings can be considered as "emanations of the State" (see, in particular, Case C-188/89, Foster and Others v. British Gas, [1990] ECR I-3313, in which the Court confirmed that directly effective provisions of directives may be invoked against certain public undertakings which are "emanations of the State" and may thus create additional obligations and constraints on such undertakings which do not apply to private undertakings).

II.A.4.3 Conclusions on divestiture and considerations related to property rights. Divestiture and structural separation

Any arguments in favor of divestiture would need to be balanced against the long-term and short-term effects on the businesses concerned. This balancing process could be seen as a specific application of the tests of proportionality and reasonableness mentioned above in this Section. The assessment of the possible drawbacks on efficiencies and market development of structural measures of divestiture is not the purpose of the present study and the weighing process, which goes far beyond purely legal considerations, can therefore not be made in this study.[281] It is only noted here that it would not be excluded that in different circumstances of fact (for example, related to the organisation of the network infrastructure concerned) the end-result of the weighing process would lead to different results and that, therefore, divestiture could be warranted in some and not in other cases.

A possible line of defense for the undertakings facing a possible order to divest could also be to allege that the EC competition rules cannot affect their property rights and cannot, therefore, compel them to sell certain of their assets. This defense would most likely be based on Article 222 of the Treaty which provides that "*[t]his Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*" and/or on the fact that property rights have been recognized by the Court of Justice as a fundamental right[282].

Most commentators agree that Article 222 of the Treaty essentially expresses the neutrality of the Treaty towards national "systems" of property ownership, including phenomena such as nationalization and privatization.[283] However, Article 222 EC has already been used in more specific contexts. In particular, the provisions of Article 222 EC are one of the bases for the well known distinction which has been made in the field of intellectual property rights between the "existence of a right" and the "exercise of a right", a distinction which was made in fact to reconcile the imperatives of

---

281 An undertaking faced with a possible order to divest could possibly invoke such elements of fact and allege that they should be qualified as an objective justification for the situation concerned. As we have indicated above, the notion of "objective justification" is recurrent in Article 86 EC and has also been used by the Court of Justice in the cases on the combined application of Articles 90 and 86 EC on automatic abuse and extension of a dominant position.

282 See, in particular, the judgments in Nold (Case 4/73, [1974] ECR 491) and Liselotte Hauer v. Land Rheinland-Pfalz (Case 44/79, [1979] ECR 3727). In particular, in the latter case the Court considered that "*[t]he right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the protection of human rights*" (at para. 4). See also Case 41/83, Italy v. Commission, [1985] ECR 873, at paras. 21-23.

283 See, in particular, the Opinion of Advocate-General Jacobs in Spain v. Council (Case C-350/92, [1995] ECR I-1985, Opinion at para. 29 and references cited in footnote 25). See also the discussion to this effect in the context of Article 90 EC (in particular, Opinion of Advocate-General Tesauro in Terminal Equipment Directive, cited above, at para. 11).

intellectual property rights and those of competition law.[284] The distinction between the existence of property rights and the exercise or use of property rights is also reflected in the case law of the Court of Justice recognizing property rights as a fundamental right within the Community legal order which appears to set out a general principle that the substance of property rights cannot be affected.[285]

On the basis of the case law referred to in the preceding paragraph, it should at least be considered that an obligation to divest certain assets or activities, based on the EC competition rules, could only be imposed in very exceptional circumstances. In fact, in order to have a chance of being able to set aside the fundamental principles mentioned above, it would appear to be necessary to bring very strong evidence of the fact that the divestiture measure is absolutely indispensable to ensure compatibility with the Treaty rules. Even then, it could be considered that there would still need to be a weighing process between the degree of protection merited by the right of the undertaking to have its property rights protected ("individual/private interest") and the need to achieve the specific goals of the Treaty ("general/public interest"). In this weighing process, any relevant interests and factors would need to be taken into account. One of the elements which could possibly be used to support the favouring of the public interest in this context could be the fact that the situation which has been created is not the result of own-initiative entrepreneurial efforts but is to a large extent a consequence of legal monopoly rights which have been enjoyed throughout the years and led to a substantial distortion of competition within the market.[286]

In addition, prior to imposing any obligation of divestiture it would also be necessary to verify whether there are no less restrictive means which could be used to eliminate the anti-competitive situation. In Section II.A.3, reference has already been made to the possibility of considering to require the dominant undertaking to proceed with a structural separation. The choice between divestiture and a less restrictive

---

[284] See, in particular, Joined Cases 56 and 58/64, Consten and Grundig v. Commission, [1966] ECR 299. For a more detailed summary of this doctrine, see the Opinion of Advocate-General Gulman in Magill, cited above.

[285] See, in particular, Liselotte Hauer v. Land Rheinland-Pfalz in which the Court considered that restrictions on property rights "*should in fact correspond to objectives of general interest pursued by the Community and that, with regard to the aim pursued, they should not constitute a disproportionate and intolerable interference with the rights of the owner, such as to impinge upon the very substance of the right to property*" (cited above, at para. 5, emphasis added). Equally, in Nold the Court had considered that property rights are "*protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched*" (cited above, at para. 14, emphasis added).

[286] This kind of reasoning is also reflected in the Draft Notice on access agreements in the telecommunications sector where it is stated that, while it is in general "*pro-competitive to allow a company to retain for its own exclusive use advantages, which it has obtained competitively [...] the advantages of the incumbent [telecommunications] operators, although legitimately obtained, were not obtained competitively but as a result of legislative intervention.*" (cited above, at para. 78).

solution such as structural separation should be governed by the principle of proportionality.[287] It is submitted that the practical application of this test should be made on the basis of a full economic analysis which is not the subject of the present study.

It can also be noted that there may be another distinction which can be made, at least from a conceptual point of view, between the situation of divestiture and that of structural separation. In fact, in the foregoing reasoning regarding the arguments which can possibly be constructed to result in an obligation to divest, reference has been made to two different kinds of abuses: on the one hand, the theory of the automatic abuse of a dominant position and, on the other hand, the argument of the strengthening of a dominant position. In this respect, it is arguable that a structural separation could only eliminate the former type of abuse (principally based on the inherent conflict of interest which will exist and which will lead to the automatic abuse) and not the abuse based on the strengthening of a dominant position. Also, from an economic point of view, it could be verified whether the existence on the market of two structurally separated entities which are under a same ownership but under separate management does not in fact result in more extensive foreclosure effects (for example, on potential service providers) than a situation in which there are at least two owners of infrastructure able to provide transmission capacity. If on the basis of economic theory and analysis this were to be confirmed, this could be considered as additional support for the argument that a divestiture measure would be warranted.

[287] See the discussion of the powers of the Commission to impose remedies for the violation of the competition rules in Section I.A.4.

II.B Article 90(3)-Approach - Application to Member States

As discussed in Section I.B above, the Commission has the power under Article 90(3) to adopt directives and decisions requiring Member States to comply with their obligation under Article 90(1) EC not to enact or maintain in force measures contrary to the Treaty, in particular Article 86 EC, in respect of undertakings to which Member States grant special or exclusive rights and public undertakings. As also discussed in Section I.B, these provisions are the principal legal basis for the power of the Commission which it has used to adopt directives aimed at liberalizing competition in the telecommunications sector and decisions aimed at removing distortions of competition introduced by individual Member States in newly liberalized telecommunications markets. These directives and decisions are based in large measure on reasoning, under a combination of Articles 90(1) and 86, based on the doctrines of "automatic/necessary abuse", "equality of opportunity" and "illegal extension/strengthening of dominance".

As also discussed in Section I.B, the existing Article 90 directives imply that there is still scope for further Commission action under Article 90(3) EC, in particular to ensure the effectiveness of these existing directives and to ensure that Member States do not enact or maintain in force any measure which results in the *de facto* continuation of the special and exclusive rights which have already been abolished.

In this section we focus on the possibilities for the Commission to adopt a new Article 90(3) directive to address (i) restrictions imposed by the Member States on the use of telecommunications capacity for the provision of cable TV services (Section II.B.2 below) and (ii) the situation where an undertaking holds dominant positions in the markets for telecommunications and cable TV capacities (and/or both services) (Section II.B.3 below). We first note, however, the powers of the Commission to act on these issues under the review process mandated by the Cable TV and Full Competition Directives (Section II.B.1 below).

II.B.1 Powers of the Commission to act under the review process mandated by the Full Competition Directive and the Cable TV Directive

The Commission's Cable TV and Full Competition Directives provide mandates for the Commission to review the above mentioned issues. Regarding restrictions on the use of public telecommunications networks for the provision of TV capacity, the Full Competition Directive notes that some Member States still maintain such restrictions and amends Article 9 of the Telecommunications Services Directive to provide that the Commission will, by 1 January 1998, carry out an overall assessment of the situation with regard to such restrictions. According to the preamble of the directive, the purpose of this assessment is to examine these restrictions in the light of the objectives of the Cable TV Directive once the telecommunications markets approach full liberalization.

Regarding the special situation of double dominance over telecommunications and cable TV network infrastructures, the Commission provides in the Cable TV Directive that it will, before 1 January 1998, carry out an overall assessment of the impact where a single operator provides both telecommunications and cable TV networks or both services. According to the preamble (recital 20), in the event that no competing home-delivery system is authorized by the relevant Member State in the meantime, the Commission will reconsider whether separation of accounts (provided for in the directive) is sufficient to avoid improper practices and will assess whether joint provision does not result in a limitation of the potential supply of transmission capacity at the expense of the services providers in the relevant area, or whether further measures are warranted.[288]

II.B.2 Restrictions imposed by the Member States on the use of telecommunications capacity for the provision of cable TV services

In this section, we review the legal grounds on which the Commission could base a new Article 90(3) directive or decision to abolish Member State restrictions on the use of telecommunications capacity for the provision of cable TV services.

It is assumed in this section that the cable TV operator (or operators) which are protected by the restrictions imposed on the telecommunications operators hold special or exclusive rights granted by the Member State and that as a result such cable TV operator (or operators) hold(s) individually (or jointly) a dominant position in the markets for cable TV network infrastructure and services.[289] Under those

---

[288] The European Parliament, in its Resolution of 20 April 1993, called upon the Commission to adopt as soon as possible the necessary measures to take full advantage of the potential of the existing infrastructure of cable networks for telecommunications services and to abolish without delay the existing restrictions in the Member States on the use of cable networks for non-reserved services. The Cable TV Directive was in part a response. The European Parliament, in its Resolution of 19 May 1995, asks that particular attention be paid to the free access of competitors to any appropriate network, and demands that network operators wishing to provide services keep these functions separated through the implementation of a transparent accounting system and do not grant themselves or specific partners privileged accesses, terms or conditions. In the same Resolution (para. 29), the European Parliament points out that, with scarce capacities and shortage of frequencies, broadcasting programmes (TV and radio) must have priority in decisions on access in relation to telecommunication services and other multi-value services, and that networks and frequencies that have been used for broadcasting (TV and radio) in the past will in the future also primarily be used for purposes of broadcasting.

[289] In the situation in which the cable TV operator has not been expressly granted a special or exclusive right, it can be argued that the Member State's imposition of the restriction on the telecommunications operators amounts to a measure granting a kind of "special" right to the cable TV operators within the meaning of Article 90(1), because it protects them from competition by telecommunications operators in the cable TV sector and the new multimedia sector. This interpretation could be considered as consistent with the definition of "special rights" in Article 1(1) of the Telecommunications Services Directive, which refers to any legal or regulatory advantages, granted otherwise than on the basis of objective, proportional and non-discriminatory criteria, which substantially affects the ability of any other undertaking to provide the same service in the same geographical area under substantially the same conditions. Unless the restriction works to the advantage of one or more cable TV operators holding a single or joint dominant position in the Member State concerned, there is limited scope for

circumstances, it is submitted that the Commission has the power to adopt a new Article 90(3) directive or decision requiring the Member States concerned to abolish the restrictions on the use of telecommunications capacity for the provision of cable TV services, if economic and other evidence support the conclusion that the maintenance of such restrictions is likely to deter investments in new multimedia services unless competition is ensured in both telecommunications and cable TV markets.

In adopting such a directive, and depending on the availability of supporting evidence, the Commission could apply Article 90(1) in conjunction with Article 86 based on the doctrines of the "automatic/necessary abuse" and "equality of opportunity" already discussed in Section I.B above. The doctrine of the "automatic abuse of dominant position" could be applied, on the grounds that the restriction imposed on the telecommunications operators in conjunction with the exclusive or special rights granted to the cable TV operators are likely have the effect of inhibiting the emergence of new audio-visual-telecommunications applications and multimedia services and of holding back technical progress in a country in which the provision of cable TV services is still subject to special or exclusive rights. It could do so, for example, by creating a situation in which the mere exercise by the dominant cable TV operator of its exclusive right to provide cable TV services limits, within the meaning of point (b) of the second paragraph of Article 86, the emergence of, *inter alia*, new applications developed by a telecommunications operator combining both audio-visual and telecommunications, if these new applications cannot be adequately provided on the networks of the cable TV operator.[290] It could also give rise to some of the other "automatic" abuses (but by the dominant cable TV operator instead of the dominant telecommunications operator) described in recitals 12 to 14 of the Cable TV Directive.

The applicability of the "equality of opportunity" doctrine appears self-evident; under this principle as developed by the Court of Justice in France v. Commission and

---

the argument that the restrictions violate Article 90(1) in conjunction with Article 86. It could be argued that the restriction violates the "equality of opportunity" principle discussed in the text, but neither the Commission nor the European Courts have addressed the issue of whether Article 90(1) can be applied in conjunction with Article 3(g) in a case in which it appears that Articles 85 and 86 cannot be applied in conjunction with those provisions. This reasoning would arguably have as consequence that any grant of an exclusive right by a Member State, by eliminating equality of opportunity for other operators, would violate Articles 3(g) and 90, but the Court of Justice has held repeatedly that the grant of an exclusive right is not as such contrary to the Treaty. The application of Articles 90 and 3(g) under circumstances in which the conditions for the application of Articles 85 and 86 are not present also appears to run counter to the reasoning in the line of cases applying Articles 3(g), 5, 85 and 86 to Member State measures which deprive the competition rules of their effectiveness. Case C-245/91, Ohra, [1993] ECR I 5851; Case C-185/91, Reiff, [1993] ECR I 5801; Case C-2/91, Meng, [1993] ECR I 5751. According to these cases, a Member State measure cannot infringe Articles 3(g), 5, 85 and 86 in the absence of any link with conduct on the part of undertakings of the kinds referred to in Articles 85(1) and 86. Although such an argument would therefore not be without difficulties, it may nevertheless be arguable that a Member State measure which infringes the "equality of opportunity" principle contrary to Article 3(g) and benefits undertakings holding the special right described at the outset of this footnote is a violation of Article 90(1) in conjunction with Article 3(g).

[290] Cable TV Directive, cited above, at recital 13.

GB-INNO-BM, a system of undistorted competition can be guaranteed only if equality of opportunity is secured between the various economic operators.[291] The restrictions may inhibit the ability of new telecommunications operators to compete effectively with cable TV operators in the provision of telecommunications services, because the latter operators may have a competitive advantage due to their ability to obtain higher market penetration rates for both telecommunications and cable TV services than operators providing only one service. In addition, in a country in which there is a dominant telecommunications operator and the cable TV operator(s) hold(s) (special or) exclusive rights, the restrictions may not only have all of the effects already noted above, but may also inhibit new telecommunications operators from competing effectively with the dominant telecommunications operator in the provision of telecommunications services, due to their inability to make their service offers more attractive to customers by being able to provide both telecommunications and cable TV services.

In adopting a new Article 90(3) directive to address the foregoing concerns, the Commission would need to consider carefully the special situation in which the incumbent telecommunications operator is dominant in the telecommunications network infrastructure and services markets. The Commission would need to balance the benefits of exposing the dominant cable TV operator(s) to competition against the benefits of possibly preventing the dominant telecommunications operator from extending its dominance into another market (cable TV) and a new market (multimedia) or creating duopolistic or oligopolistic dominance for the incumbent telecommunications and cable TV operators. Depending on the outcome of this balancing test, there may be circumstances in which the abolition of the restrictions would be warranted on competition grounds only with respect to new telecommunications operators or in which the abolition of such restrictions with respect to the dominant telecommunications operator would need to be made subject to conditions aimed at ensuring that there is no extension of dominance or creation of duopolistic or oligopolistic dominance.

As the incumbent telecommunications operator is likely to be in a better position than new telecommunications entrants to introduce effective competition into the market for cable TV services in a country where the cable TV operator holds a dominant position in that market, the principal emphasis would need to be on specifying the conditions which should be imposed on the incumbent telecommunications operator to allow its entry into the cable TV market. One minimum condition should be accounting separation and transparency, as already required under certain circumstances under the Cable TV Directive. This should allow an effective monitoring and control of certain types of behaviour of the undertaking concerned. If this is considered as not sufficient to ensure an equal playing field and safeguard against the risk/likelihood of abuses of a dominant position, then more far-reaching

---

[291] France v. Commission, cited above, at para. 51; RTT v. GB-INNO-BM, cited above, at para. 25; Cable TV Directive, cited above, at recital 14; Conditions imposed on the second operator of GSM radiotelephony services in Italy, cited above, at paras. 15 and following; Conditions imposed on the second operator of GSM radiotelephony services in Spain, cited above, at paras. 19 and following.

solutions can be considered including structural separation between the different activities of the undertakings concerned.

II.B.3 One undertaking with dominant positions in the same geographic market in the markets for telecommunications and cable TV capacities and/or both services

In this section, we review the legal grounds on which the Commission could base a new Article 90(3) directive or decision to address the special situation in which one undertaking holds dominant positions in the markets for telecommunications and cable TV.

It is submitted that the Commission could address this situation in an Article 90(3) directive or decision by developing a line of reasoning derived from its reasoning in the existing Article 90(3) directives. Under this reasoning, it could be argued (if supported by economic or other evidence) that the elimination of the restrictions on the use of cable TV infrastructure for the provision of telecommunications services, in combination with technological changes leading to the convergence of the telecommunications and media sectors, resulted in the strengthening of the dominant position of the operator concerned in the telecommunications market, by making it more difficult for new entrants to enter this market, and thereby also resulted in the *de facto* continuation of this operator's exclusive rights over telecommunications infrastructures and services. If the economic and other evidence supports this argument, it could further be argued that the foregoing factors also led to the strengthening of the dominant position in the cable TV market and that the strengthening of the operator's dominant positions in both the telecommunications and the cable TV markets led to the creation of an impregnable dominant position in the new multimedia market which may in fact impede the emergence of new audio-visual-telecommunications applications and multimedia services. These points are addressed in more detail below.

II.B.3.1 Strengthening of dominance and "automatic/necessary" abuse

It can be argued, in line with the reasoning in the preamble to the Full Competition Directive, that the fact that one undertaking is dominant over both telecommunications and cable TV infrastructure in and of itself prevents new entrants from having a free choice as to underlying infrastructure at least until such time as other alternative infrastructures are able to compete effectively with the dominant operator's telecommunications and cable TV infrastructures. It can be further argued on the basis of the preamble to the Full Competition Directive, and the third party complaints to which reference is made there, that the continuing absence of a free choice of underlying infrastructure will result in a "conflict of interest" which will induce the dominant telecommunications operator to abuse its dominant position in the relevant telecommunications markets, through its power to determine at will where, when and at what cost services can be offered by its competitors and through its power

to monitor the clients and traffic generated by its competitors.[292] The situation therefore threatens to undermine the effectiveness of the liberalization of telephone services. It could also be argued, subject to verification and confirmation on the basis of economic theory, that this situation is tantamount to the *de facto* continuation of special or exclusive rights in regard to telephone services, because it puts the dominant TO in a position to maintain its dominant position indefinitely through the exercise of the foregoing power.

It may also be possible to argue that this situation in and of itself strengthens the existing dominant position of the telecommunications operator in the market for telecommunications infrastructure to a degree which threatens the effectiveness of the existing liberalization measures and deprives the abolition of special and exclusive rights over telecommunications network infrastructure of its *effet utile*. In particular, it may be possible to argue that the co-existing dominance of the telecommunications operator in the market for cable TV capacity strengthens the dominant position in telecommunications capacity by making it more difficult for new entrants to establish their own infrastructures. This is because it will be more difficult for new entrants to justify the substantial investments required for new networks given their doubtful ability to spread this investment over a large number of services.

These same factors may contribute to a strengthening of the dominant position in the cable TV market. The strengthening of the dominant positions in both the telecommunications and the cable TV markets may in turn lead to the creation of a virtually impregnable position for the dominant operator in the emerging multimedia market, due to the technological changes resulting in the convergence of the telecommunications and media sectors into a "multimedia" sector. The strengthening of the dual dominance may thereby inhibit the emergence of new audio-visual-telecommunications applications and multimedia services and hold back technical progress, by resulting in "automatic/necessary abuses" of the strengthened dominant position similar to those identified in recitals 11 to 13 of the Cable TV Directive.

II.B.3.2 Member State "measure"

The new Article 90 directive could address the foregoing concerns if it can be demonstrated that the strengthening of the dual dominance and the "automatic/necessary abuses" are the consequence of a Member State measure.

A Member State measure can consist of a legislative act, administrative direction, and even the exercise of shareholders' rights and non-binding recommendations.[293] It can be argued that the situation described above is a direct

---

[292] See the discussion of the Full Competition Directive above.

[293] Derrick Wyatt & Alan Dashwood, European Community Law 553 (3d ed. 1993); Bellamy & Child, Common Market Law of Competition para. 13-105 (4th ed., 1993), also referring in a footnote to the wide definition given to the word "measure" as used in Article 30 of the EC Treaty and citing to the

consequence of the Member State's original grant of an exclusive right to the undertaking concerned. However, this grant of an exclusive right has now been eliminated. This raises the question whether it can be argued that the concept of the enactment or maintenance in force of a Member State measure under Article 90(1) also applies where the situation which gives rise to the likelihood of abusive conduct can be said to result from the failure of the Member State to take action to eliminate this situation.

Two separate theories have developed in the context of Article 90 on the issue of whether Article 90(1) is also violated by the inaction of the State: (i) the theory of a special Member State responsibility to supervise the behaviour of State undertakings; and (ii) the theory of the failure of a Member State to respond to changes in market circumstances.

(i) Theory of special responsibility to supervise

Under the first theory, it is argued that the Member States have a special responsibility to supervise the behaviour of public undertakings. The Commission publicly supported this position in the Second and Sixth Reports on Competition Policy.

In its Second Report on Competition Policy, the Commission took the position that Article 90 implies a duty on the part of the Member States to act in such a way that a State undertaking's "*behaviour does not produce effects which, if they resulted from actions by the States themselves, would constitute a violation of the Treaty*".[294] In other words, the failure of the Member State to prevent such behaviour would amount to a "measure" within the meaning of Article 90(1).[295]

The Commission took a similar position in the Sixth Report on Competition Policy, noting its implications for the Commission's powers under Article 90(3): "*Article 90(3) allows the Commission to act where a Member State, while possessing the necessary authority, fails to cause a 'public undertaking' to put an end to objectionable practices, i.e. practices which, had they been engaged in by the State*

---

following cases: Case 249/81, Commission v. Ireland, [1982] ECR 4005 and Greek Insurance, O.J. 1985, L 152/25. See also Ehlermann, "Managing Monopolies: The Role of the State in Controlling Market Dominance in the European Community," [1993] 2 ECLR 61, at 65.

[294] Second Report on Competition Policy, at para. 129. The Commission indicated that it was examining the possibility of demanding, by appropriate directives or decisions under Article 90(3), that the Member States, in certain fields where the risk of such behaviour was apparent, should take the necessary steps to stop the undertakings referred to in Article 90(1) from excluding all or some of the products or services of the other Member States when placing their contracts.

[295] In essence, this position equates an undertaking referenced in Article 90(1) to the Member State itself, which would have as its logical consequence that these undertakings would become subject not only to the competition rules in Articles 85 and 86 applicable to undertakings but also to other Treaty provisions applicable to Member States. See Page, "Member States, Public Undertakings and Article 90," 7 ELR 19, 25-26 (1982).

itself, would have constituted an infringement of the Treaty. [...] Where a Member State has not got the necessary authority to correct objectionable behaviour on the part of a 'public undertaking', the Commission may invoke Article 90 to call on the Member State to fill the gap in its relationship with the undertaking in question. The Member State must then take the necessary powers and use them to end behaviour incompatible with the common market."[296]

It has been argued persuasively that this special responsibility to supervise is implicit in the wording of Article 90(1) and is consistent with the obligation to take general and particular measures imposed on Member States by Article 5 and with the policy of Article 90(1).[297] The argument in favour of this position has been stated succinctly as follows: "*If State responsibility under this paragraph is derived, respectively, from the ability to influence public undertakings and from the assumption of the risk inherent in the deliberate distortion of competition by a grant of special or exclusive rights, it ought to make no difference whether the role of the State has been active, in imposing or encouraging certain behaviour, or passive, in failing to correct it. Furthermore, this view entirely reflects the steps already taken by the Court in relation to State directions or encouragement for enterprises to infringe Articles 85-86 in situations where no exclusive or special rights are involved.*"[298]

It is submitted, however, that the Court of Justice has discredited this theory of special responsibility at least to some degree in its judgments on the Terminal Equipment Directive and the Telecommunications Services Directive. In those directives the Commission required the Member States to take the necessary steps to ensure that customers could terminate long term contracts for liberalized terminal equipment or services which they had concluded with undertakings holding the special or exclusive rights abolished pursuant to the directives.

The Court of Justice held that: "*Article 90 of the Treaty confers powers on the Commission only in relation to State measures (see paragraph 24) and that the anti-competitive conduct engaged in by undertakings on their own initiative can be called*

---

[296] Sixth Report on Competition Policy, at para. 274. The Commission used as an example of the latter case, if a "public undertaking" systematically favoured national suppliers and the Member State did not possess the powers necessary to make the undertaking act in accordance with the principle of the common market.

[297] Some legal commentators have nevertheless questioned whether the mere failure of a Member State to prevent an undertaking within the meaning of Article 90(1) from acting contrary to the Treaty can amount to a "measure", on the ground that an interpretation to this effect would violate the language of Article 90(1). Bellamy & Child, cited above, at para. 13-015 and footnote 54; Page, cited above, at page 24. According to Page: "*the imposition of this additional obligation on Member States stretches, at the very least, the literal wording of Article 90(1) in that it treats the failure of a Member State to intervene where a public undertaking is acting contrary to the Treaty rules as equivalent to the "maintenance" in force of a measure and thus as engaging its responsibility to act.*"

[298] Wyatt & Dashwood, cited above, at page 554, citing Case 311/85, *Vereniging van Vlaamse Reisbureaus*, [1987] ECR 3801 and Gyselen, (1989) 26 C.M.L. Rev. 33.

into question only by individual decisions adopted under Articles 85 and 86 of the Treaty. It does not appear either from the provisions of the directive or from the preamble thereto that the holders of special or exclusive rights were compelled or encouraged by State regulations to conclude long-term contracts. Article 90 cannot therefore be regarded as an appropriate basis for dealing with the obstacles to competition which are purportedly created by the long-term contracts referred to in the directive."[299]

It follows from this holding that Member States are not accountable for the behaviour of public or privileged undertakings engaged in on their own initiative; the Member States are only accountable if they have compelled or encouraged that behaviour. Nevertheless, there remain at least some arguments that this holding does not necessarily exclude the possibility for the Member State to infringe Article 90(1) where it is precisely the failure of the State to act which compels or encourages the behaviour.

In addition, it can still be argued that the State does have a special responsibility to supervise the dominant undertaking under circumstances in which the failure to do so would result in the *de facto* continuation of the abolished special or exclusive rights. The Commission employed this line of reasoning in recital 19 of the Full Competition Directive in regard to the responsibility of the Member States to adopt the necessary safeguards to prevent the interconnection of new entrants from being delayed by disputes between the new entrants and the dominant telecommunications operator regarding interconnection terms and conditions. According to the Commission, the *"failure by Member States to adopt the necessary safeguards to prevent such a situation would lead to a continuation* ***de facto*** *of the current special and exclusive rights, which as set out above are considered to be incompatible with Article 90(1) of the Treaty, in conjunction with Articles 59 and 86 of the Treaty."* It is submitted that the above ruling of the Court of Justice does not address this particular situation in which State inactivity leads to the *de facto* continuation of abolished special or exclusive rights.

(ii) Theory of failure to respond to changes in market circumstances

Under the second theory, it has been argued that, under certain circumstances, a Member State may infringe Article 90(1) if it fails to redefine and circumscribe the scope of an exclusive right to take account of changes in the market situation occurring over time.[300] This reasoning is based upon a particular reading of the *Corbeau*

---

[299] France v. Commission, cited above, at paras. 55-57. Paragraph 24 states that it is only with regard to *"measures adopted by the Member States [...] that Article 90 imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives and decisions addressed to the Member States."* See also Spain and Others v. Commission, cited above, at paras. 23-27.

[300] Siragusa, "Privatization and EU Competition Law," Fordham Corporate Law Institute 375, 420 (1995); Hancher, Case Note on Corbeau, 31 C.M.L. Rev. 105, 115-16 (1994); Edward & Hoskins, Article 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference, 32 C.M.L. Rev. 157,

judgment.[301]

The case involved an individual (Mr. Corbeau) who provided postal services in and around Liège under service contracts in which he undertook to collect correspondence from the sender's address and deliver it by the next morning. Criminal proceedings were brought against him for infringement of the legal monopoly of the Régie des Postes to collect, transport and deliver correspondence in Belgium. The Liege court referred various questions to the Court of Justice concerning the compatibility of the Belgian postal monopoly with Articles 90, 85 and 86 and the duty of a Member State under Article 90(1) to modify the monopoly to comply with Community law. The case before the Court of Justice hinged on whether the Belgian postal monopoly could also be applied to new kinds of "value added" services (such as those provided by Mr. Corbeau) which did not exist at the time the postal monopoly was granted to the Régie des Postes.

In paragraphs 1 to 12 of the judgment, the Court of Justice confirmed that the Belgian postal authority enjoyed exclusive rights within the meaning of Article 90(1) and restated the standard proposition that the mere fact that a Member State creates a dominant position by granting the exclusive right is not as such incompatible with Article 86, although the Treaty nonetheless requires the Member States not to adopt or maintain in force any measure which might deprive Article 86 of its effectiveness (citing ERT and noting the confirmation of this principle in Article 90(1)). The Court then (in paragraphs 13 to 19) examined the scope of the postal monopoly under Article 90(2), stating that what falls to be considered is the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary to allow the holder of the exclusive right to perform its task of general economic interest and have the benefit of economically acceptable conditions. It concluded that the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, provided the provision of these additional services by another operator does not compromise the economic equilibrium of the service of general economic interest.

The Court's opinion suggests that the grant of an exclusive right is *prima facie* illegal (under Article 90 in conjunction with Article 86) where it leads to the exclusion of all other economic operators from the market concerned (as it must do as an "exclusive" right), unless this exclusion can be justified on the basis of Article 90(2).[302] It has been argued, however, that *Corbeau* instead stands for the proposition

---

167-68 (1995).

[301] Case C-320/91, Paul Corbeau, [1993] ECR I-2533.

[302] Or on the basis of one of the Treaty exemptions for Member States or the "mandatory requirements". Hancher, Case Note on Corbeau, cited above, at page 114.

that the abuse giving rise to the violation of Articles 90 and 86 lay in the *failure of the Member State to respond to changes in the market situation* by redefining the scope of the exclusive right granted to the postal monopoly.[303] In other words, the failure of the Member State to respond to such changes and redefine the scope of the exclusive right would amount to the maintenance in force of a measure which deprives Article 86 of its *effet utile*, and therefore violates Article 90(1) in conjunction with Article 86, unless the existing scope of the measure can be justified on the basis of Article 90(2). This interpretation has subsequently found support from other legal commentators.[304]

II.B.3.3 Possible reasoning in context of dual dominance

It is difficult to apply the above reasoning directly to the subject of the present study, precisely because the relevant exclusive rights have already been abolished (or will be in the near future). However, the above reasoning supports the argument that changes in economic, social, technological or regulatory conditions may under certain circumstances impose a duty on the Member State, in particular under the principle of *effet utile*, to restore effective competition in a market which has been removed from such competition pursuant to a Member State measure. A combination of this reasoning with the concept of the *de facto* maintenance of exclusive rights as a result of Member State inaction may allow the Commission to proceed against the situation of dual dominance under Article 90. Although the logic is complicated (and therefore open to challenge on multiple fronts, as is always the case with complicated logic), it may be possible to bring the subject of the present study within the scope of Article 90 based on the following reasoning.

---

[303] Hancher, Case Note on Corbeau, cited above, at page 116: "*The Court was effectively being asked to rule upon the compatibility with Community competition rules of a measure which had conferred an exclusive right in general terms on an undertaking, almost forty years previously to a market situation which had altered fundamentally with the passage of time. The abuse, if any, lay in the failure on the part of the Member State to respond to such changes, by refining [sic] the scope of the initial right. Thus inaction could be considered a violation of Article 90(1). This was obviously the essence of the second question referred by the national court. If this interpretation is correct, then the first part of the* **Corbeau** *ruling represents a significant extension of the Court's jurisprudence of the* **effet utile** *of the Treaty's competition rules to situations where the development of competition is restricted because the market itself has changed, and not necessarily as a result of any independent action on the part of either the Member State or the statutory monopoly. The first part of the Court's reasoning in* **Corbeau** *[paragraphs 1 to 12] suggests that failure to redefine a right conferring a wide-ranging exclusivity can indeed amount to a breach of Articles 90(1) and 86, unless there are objective justifications for maintaining a monopoly of this scope. These justifications are to be sought in Article 90(2).*"

[304] It found support at the XVI FIDE Conference. See Edward & Hoskins, Article 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference, cited above, at pages 167-68. It also found support in Siragusa, cited above, at pages 420-23. It should be noted that the Court's judgment is also subject to an alternative interpretation, i.e. that it is based on the reasoning that the abuse lay in the Member State's (in effect) *extending* the scope of the exclusive right to cover a new kind of service that did not exist when the original grant of the right was made.

(1) A change in market circumstances has occurred, i.e. restrictions on the use of cable TV network infrastructure for the provision of telecommunications services have been eliminated pursuant to the Cable TV Directive.

(2) However, there is a special circumstance present, i.e. before such liberalization one undertaking held exclusive rights over both telecommunications and cable TV network infrastructures, and after liberalization that undertaking continues to hold dominant positions in the telecommunications and cable TV markets.

(3) Instead of opening the telecommunications market to competition, the direct consequence of the change in market circumstances is that it in fact strengthens the dominant positions of the undertaking concerned in the telecommunications market (and the cable TV market), because the dual dominance makes it more difficult for new entrants to enter this market (see the discussion in the sub-section above) and because technological changes have also occurred which are leading to the convergence of the telecommunications and media sectors into a "multimedia" sector.

(4) The change in market circumstances resulting from the elimination of the restrictions on the use of cable TV network infrastructures for the provision of telecommunications services therefore results in the *de facto* continuation of the exclusive rights over telecommunications infrastructures and services.

(5) This *de facto* continuation of exclusive rights and the strengthening of the dual dominant positions are the result of Member State measures, consisting of the original grants of exclusive rights (giving rise to the dominant positions in both markets) and the Member State measures abolishing these exclusive rights pursuant to the Commission's Article 90(3) directive.

(6) The Member State had a duty, under the principle of effet utile and the principle of "equality of opportunity", to take steps to prevent such strengthening of the dominant positions, and the Commission drew the Member State's attention to that duty in recital 18 of the Cable TV Directive.[305]

(7) The failure of the Member State to take such steps is equivalent to maintaining in force a measure granting exclusive rights within the meaning of Article 90(1).

A number of the steps in the above reasoning are more or less identical with the arguments developed in Section II.A above with regard to an infringement of Article 86. As under Article 86, the reasoning is based upon both the strengthening and the automatic abuse of a dominant position. In the context of Article 90, these elements are

---

[305] *"Given the disparities between Member States, the national authorities are best able to assess which measures are the most appropriate, and in particular to judge whether a separation of the activities is indispensable."*

combined with a State measure which consists of the failure to take the steps which are necessary in order to abolish the *de facto* continuation of exclusive rights.

II.B.3.4 Application of the findings in a graduated approach

The result of the above seven-step reasoning, which is subject to the different qualifications and reservations which have been indicated above, should be that a Member State which fails to take the necessary measures to eliminate the anti-competitive situation (which results from "State measures" as interpreted above) fails to fulfil its obligations under the Treaty (and, in particular, under Article 90 in conjunction with Article 86 EC). For this reason, the Commission should have the power to adopt a directive under Article 90(3)[306] which specifies the obligations of the Member States in this respect. Some of the obligations which could be considered under a graduated approach are discussed below.

(i) Generalised principle of accounting separation

It is first recalled that Article 2 of the Cable TV Directive imposes a specific obligation of accounting separation only where an operator having an exclusive right to provide telecommunications network infrastructure also provides cable TV network infrastructure. Therefore, this obligation could become largely ineffective after full infrastructure liberalization.

However, as has been indicated in the above seven-step reasoning, it is arguable that the failure of a Member State to take specific measures at the time of liberalization to eliminate the situation in which one undertaking is dominant over both telecommunications and cable TV infrastructure would lead to a situation in which *de facto* exclusive rights continue to exist. Moreover, it has been indicated that such a situation could, on the basis of the above seven-step reasoning, be brought within Article 90 of the Treaty (i.e., the *de facto* exclusive right would be the consequence of a "State measure"). On the basis of this reasoning, it could be concluded that the Commission could include in an Article 90(3) directive obligations of accounting separation and transparency on the dominant undertaking for the same reasons as those underlying the identical obligations which are currently imposed on the telecommunications operators which benefit from *de jure* exclusive rights.

(ii) Divestiture and structural separation

Both structural separation and divestiture could be considered as possible measures to eliminate the anti-competitive situation at issue. One of these measures could therefore be included in an Article 90(3) directive and would then work through to the undertakings concerned via the implementation of the directive into the national legal order. The question of which of the two measures could be imposed should be

[306] Equally, there should be the possibility for the Commission to adopt a decision under Article 90(3).

examined on the basis of the same criteria as those which have been indicated above in Section II.A.

In the context of Article 90, it is also necessary to examine whether the principle of subsidiarity could not affect the analysis of the choice to be made between the two measures. In this respect, it is recalled that in the preamble to the Cable TV Directive (recital 19), the Commission stated its view that full structural separation of the telecommunications and cable TV network infrastructures would be preferable to accounting separation as a means of addressing the anti-competitive effects which could result. However, it expressly left the issue of separation of the activities to the judgment of the national authorities, as being "best able to assess which measures are most appropriate". The Commission expressly indicated that it would reconsider whether further measures are warranted in particular if no competing home-delivery system is authorized by the relevant Member State (recital 20).

The foregoing raises the issue of whether the Commission's statement was an application of the principle of subsidiarity under Article 3b of the Treaty and whether this would have as consequence that the Commission could intervene against a Member State under Article 90 only if no competing home-delivery system is authorized by the relevant Member State.[307] Under the subsidiarity principle, the Community shall take action in areas which do not fall within its exclusive competence only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. The Commission has taken the position that the general rules on competition, aimed at guaranteeing a level playing field in the internal market, fall, at least to a large degree, within the block of exclusive powers to which the principle of subsidiarity does not apply.[308] Among the competition rules, the rules applicable to Member States clearly fall within the Community's exclusive competence, as it is not possible for Member States to be required to monitor themselves or each other.[309] It follows that the above statement made by the Commission in the preamble to the Cable TV Directive cannot have any effect on the Commission's duty and power of supervision under Article 90 of the Treaty and should, therefore, not have a significant impact on the choice of the measure discussed above.

---

[307] The Commission could take the position that mere authorization of a competing home-delivery system would in any event not suffice to address the anti-competitive effects which may arise and that, even if a competing home-delivery system has been authorized, the Commission will still reconsider whether further measures are necessary to ensure that effective competition exists. Support for this position can be found in the British Telecommunications judgment of the Court of Justice under the so-called "Utilities Directive" (Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sections, O.J. 1990, L 297/1) under the public procurement rules. Case C-392/93, The Queen v. H.M. Treasury, Ex Parte British Telecommunications, [1996] ECR I-1654, at paras. 31-35.

[308] Commission communication of 27 October 1992 on the subsidiarity principle, Bull EC 10-1992, page 116, at page 121.

[309] XXIVth Report on Competition Policy 1994, page 29.

Finally, it can be noted that at least one Member State, namely the Netherlands, has already taken a number of steps to ensure a limitation of cross-ownership by the incumbent TO (KPN) over both telecommunications and cable TV infrastructure as well as to introduce a form of structural separation between those two activities. It is understood that the limitations on such cross-ownership have been required by the Dutch State in the context of the granting of a regional infrastructure license for the provision of telecommunications services to Casema (a cable operator which was owned in an indirect manner for 77% by KPN). In particular, KPN was required to reduce its ownership of 77% in Casema to a maximum level of 20%. In addition, specific obligations were developed to ensure that there would be no influence by the incumbent TO on the commercial behaviour of the cable TV operator and specific Chinese walls needed to be put in place in order to ensure that there would be no direct or indirect exchange of commercially sensitive information between the incumbent TO and the cable TV operator which would be granted the telecommunications infrastructure license.

* * * * *