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### Antitrust and Sector-Specific Regulation in the European Union

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PART V

*Policy*

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## CHAPTER 12

# *Antitrust and Sector-Specific Regulation in the European Union: The Case of Electronic Communications*

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## 12.1 INTRODUCTION

To guarantee access and effective competition in the electronic communications sector (i.e., the infrastructures for the services of the Information Society such as fixed telephony network, mobile telephony network, Internet connections, cable TV and satellite connections), public intervention in the European Union mainly takes place with two instruments that have converged over time.<sup>1</sup> On the one hand, there is the antitrust law that has been applied extensively to become a sort of 'regulatory antitrust'.<sup>2</sup> On the other hand, there is the sector regulation whose mode of intervention has been aligned on antitrust law methodologies to become a sort of 'pre-emptive competition law'.<sup>3</sup> Such evolution is interesting because it questions the (remaining) differences between both instruments and their optimal coordination and because the regulation of electronic communications is the most advanced and might be transposed to other networks industries (energy, railways or even possibly financial services).<sup>4</sup>

This paper studies this evolution in the following way. Section 12.2 gives a broad picture of the substantive and the institutional issues. Section 12.3 goes into more depth on the application of both branches of antitrust law (*ex post* and *ex ante*) since the last fifteen years. Section 12.4 deals with sector regulation since its last modification three years ago. Section 12.5 tries to propose an efficient balance between both instruments as well as an optimal coordination between the different institutions in charge. Finally, Section 12.6 provides a conclusion.

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<sup>1</sup> Contrast with the tendency in the US where there is no such convergence; see Geradin and Sidak (2005).

<sup>2</sup> To adopt the expression of Cave and Crowther (2005) and de Streel (2004).

<sup>3</sup> To adopt the expression of Buiges (2004).

<sup>4</sup> As suggested by the then Competition Commissioner Mario Monti (2003).

## 12.2 A BROAD PICTURE

### 12.2.1 Substantive law

In the European electronic communications sector,<sup>5</sup> public authorities rely on several instruments to discipline competitive behaviours, as shown in Table 12.1: (1) competition law that applies to electronic communications, for example, to any sector of the economy<sup>6</sup> and that may be divided into two branches (*ex post* competition law

Table 12.1 Competition law and sector regulation<sup>7</sup>

	Competition law – <i>ex post</i>	Competition law – <i>ex ante</i>	Sector regulation/ Significant market power (SMP) regime
<i>Objective</i>	Maintain competition Increase competition → Market structure is broadly satisfactory		Increase competition Mimic competition → Market structure is not satisfactory
<i>Burden of proof to inter-vene</i>	1. Market definition 2. Dominant 3. Anticompetitive conduct: agreement or abuse of dominance (high)	1a. Notified concentration 1b. Market definition 2. Significant impediment to effective Competition (low) (Conduct presumed)	1a. Market selection (very high) 1b. Market definition 2. SMP = dominance (Conduct presumed)
<i>Remedies</i>	Mainly behavioural Fines Private damages	Mainly structural	Mainly behavioural

*Note:* The shadow area is the triggering factor for each legal instrument.

<sup>5</sup> For the definition of electronic communication network and service, see article 2 of the *Framework Directive*.

<sup>6</sup> Case 41/83 *Italy v. Commission (British Telecommunications I)* [1985] ECR 873. Indeed, the application of sector regulation does not remove antitrust jurisdiction: Commission Access Notice, para 22. The situation is more nuanced in the US where the Supreme Court decided that, when sector regulation has been applied, competition laws should not be applied in addition: *Verizon v. Trinko* 540 U.S. 682 (2004). On the different of approaches, see Larouche (2006).

<sup>7</sup> This table is adapted from a presentation that Pierre Larouche made at an ETNO workshop in October 2005.

01 that punishes anticompetitive behaviours (agreements and abuses  
02 of dominant position),<sup>8</sup> and *ex ante* competition law that prevents  
03 anticompetitive behaviours (mergers and autonomous full function  
04 joint ventures));<sup>9</sup> (2) sector regulation that always applies *ex ante* to  
05 prevent anticompetitive behaviour.<sup>10</sup>

06 On the one hand, competition law has one main objective which  
07 has become prevalent over time and is the maximization of consumer  
08 welfare.<sup>11</sup> This implies that competition law aims at efficiencies  
09 (allocative, productive and dynamic) on the market by ensuring the  
10 competitive structure is maintained and possibly even strengthened.<sup>12</sup>

11 To achieve those goals, an antitrust authority applies *ex post com-*  
12 *petition law* in several steps: (1) it starts by defining the relevant  
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14  
15 <sup>8</sup> Articles 81 and 82 EC and Council regulation 1/2003 of 16 December 2002 on  
16 the implementation of the rules on competition laid down in articles 81 and 82 of  
17 the Treaty, O.J. [2003] L 1/1, hereinafter *Regulation 1/2003*.

18 <sup>9</sup> Council regulation 139/2004 of 20 January 2004 on the control of concentrations  
19 between undertakings, O.J. [2004] L 24/1, herein *Merger Regulation*.

20 <sup>10</sup> The sector regulation has been radically reformed in 2003 and is now mainly  
21 made of four harmonization directives adopted under article 95 EC: directive  
22 2002/21/EC of the European Parliament and of the Council of 7 March 2002  
23 on a common regulatory framework for electronic communications networks and  
24 services (*Framework Directive*), O.J. [2002] L 108/33; directive 2002/20/EC of  
25 the European Parliament and of the Council of 7 March 2002 on the authorization  
26 of electronic communications networks and services (*Authorisation Directive*),  
27 O.J. [2002] L 108/21; directive 2002/19/EC of the European Parliament and of  
28 the Council of 7 March 2002 on access to, and interconnection of, electronic  
29 communications networks and services (*Access Directive*), O.J. [2002] L 108/7;  
30 directive 2002/22/EC of the European Parliament and of the Council of 7 March  
31 2002 on universal service and users' rights relating to electronic communications  
32 networks and services (*Universal Service Directive*), O.J. [2002] L 108/51. It is  
33 also made of one liberalization directive adopted under article 86 EC: Commission  
34 directive 2002/77/EC of 16 September 2002 on competition in the markets for  
35 electronic communications networks and services, O.J. [2002] L 249/21.

36 <sup>11</sup> In general, on the objectives of European competition law, see the contributions  
in Ehlermann and Laudati (1998).

<sup>12</sup> See in particular, Case T-87/05 *Energias de Portugal v Commission* [2005]  
ECR II-0000, para 91 where the Court of First Instance accepted that European  
competition law (in the case merger control) may be used to increase the level of  
competition in the market.

01 market according to the small but significant nontransitory increase  
02 in price (SSNIP) or the ‘hypothetical monopolist test’;<sup>13</sup> (2) it then  
03 determines whether one or several undertakings have sufficient mar-  
04 ket power (in particular a single or joint dominant position, which  
05 is a level of market power sufficient to behave to an appreciable  
06 extent independently of competitors, customers, and ultimately con-  
07 sumers);<sup>14</sup> (3) finally, the authority determines whether the undertak-  
08 ings with market power have committed an anticompetitive practice  
09 (agreement or unilateral abuse). If it is this case, the authority  
10 imposes a fine and/or behavioural remedies (to put an end to the anti-  
11 competitive practice) or structural remedies if necessary and propor-  
12 tionate.<sup>15</sup> A national court may also provide for private damages.<sup>16</sup>  
13 Thus, an intervention under *ex post* competition law is triggered by  
14 an anticompetitive conduct.

15 Antitrust authority applies *ex ante competition law* in several steps.  
16 (1a) A concentration should be first notified when fulfilling certain  
17 criteria and should not be enforced before antitrust approval.<sup>17</sup> (1b)  
18 The authority then defines market according to the SSNIP economic  
19 methodology. (2) It also determines whether the concentration would  
20 significantly impede effective competition (in particular by creating  
21 a single or collective dominant position).<sup>18</sup> Such assessment is done  
22 in two phases. After the first phase, the authority decides if it does not  
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25 <sup>13</sup> Commission notice on the definition of relevant market for the purposes of com-  
26 munity competition law, O.J. [1997] C 372/5. For an application to the electronic  
27 communication sectors, see Commission Guidelines of 9 July 2002 on market  
28 analysis and the assessment of significant market power under the community  
29 regulatory framework for electronic communications networks and services, OJ  
[2002] C 165/6, herein *Commission Guidelines on market analysis*, para 33–69.

30 <sup>14</sup> Case 27/76 *United Brands v Commission* [1978] ECR 207; Case 85/76 *Hoffman-*  
31 *La Roche v Commission* [1979] ECR 461; Case T-342/99 *AirTours v. Commission*  
32 [2002] ECR II-2585, para 62; Guidelines on market analysis, paras 70 to 106.

33 <sup>15</sup> Article 7 of regulation 1/2003.

34 <sup>16</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

35 <sup>17</sup> A concentration should be notified to the European Commission when (1) it is a  
36 merger or an autonomous full function joint venture and (2) it reach certain thres-  
hold of worldwide and European turnover: Articles 1 and 3 of the Merger Regulation.

<sup>18</sup> Article 2 of the Merger Regulation.

01 have serious doubts that the concentration would impede effective  
02 competition, or conversely, it opens a second phase of investiga-  
03 tion.<sup>19</sup> After this second phase, the authority decides whether the  
04 concentration would significantly impede effective competition or  
05 not.<sup>20</sup> If the authority has doubts or thinks that the concentration  
06 would indeed impede competition, the notifying parties may pro-  
07 pose during the phase and/or phase remedies that should remove all  
08 competitive concerns (the remedies should preferably be structural,  
09 although they may be behavioural provided they affect the structure  
10 of the market).<sup>21</sup> Otherwise, the authority prohibits the merger. Thus,  
11 an intervention under *ex ante* competition is triggered by a notified  
12 concentration which significantly impedes effective competition.

13 On the other hand, *sector regulation* has three objectives: pro-  
14 motion of effective competition, the internal market, and the users'  
15 interest.<sup>22</sup> However, the law gives important margin of discretion to  
16 the regulatory actors on the ranking of those objectives that may be  
17 contradictory and on the means to achieve them. In particular, the  
18 law does not decide whether the regulators should actively promote  
19 the development of infrastructure (e.g., broadband connections) as a  
20 soft industrial policy marker<sup>23</sup> or merely control the market as a hard  
21 trustbuster.<sup>24</sup> The part of sector regulation that deals with market  
22 power mainly aims to ensure efficiency by favouring competitive  
23 market structure or by mimicking the results of a competitive market  
24 structure.<sup>25</sup>

26  
27 <sup>19</sup> Article 6 of the Merger Regulation. The first phase is of 25 or 35 working days.

28 <sup>20</sup> Article 8 of the Merger Regulation. The second phase is of 95 or 105 working days.

29 <sup>21</sup> Case T-102/96 *Gencor v Commission* [1999] ECR II-753, para 319; Case  
30 C-12/03P *Tetra Laval v Commission* [2005] ECR I-0000, para 86.

31 <sup>22</sup> Article 8 of the Framework Directive.

32 <sup>23</sup> As suggested in Communication from the Commission of 1 June 2005, i2010 –  
33 A European Information Society for growth and employment, COM(2005) 229.

34 <sup>24</sup> On those ambiguities in objectives, see Granham (2005, pp. 8–14) and Hocepić  
35 and de Streel (2005, pp. 147–154).

36 <sup>25</sup> European Regulators Group (ERG) Common Position of 1 April 2004 on the  
approach to appropriate remedies in the new regulatory framework, ERG (03)  
30rev1, herein *ERG Common Position on remedies*, Chapter 4.

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01 To achieve those goals, a regulatory authority follows three steps  
02 when imposing obligations on the operators.<sup>26</sup> (1a) It starts by select-  
03 ing markets where sector regulation would be more efficient than  
04 antitrust to solve competition problems.<sup>27</sup> In practice, it does so  
05 according to three cumulative criteria (high permanent and nonstrate-  
06 gic entry barriers, no competitive dynamics behind these barriers  
07 and inefficiency of antitrust remedies to solve the competitive prob-  
08 lems).<sup>28</sup> (1b) Then, it delineates the boundaries of the selected  
09 markets according to antitrust methodologies (the SSNIP or hypo-  
10 theoretical monopoly test).<sup>29</sup> (2) It determines also whether an operator  
11 enjoys a single or collective dominant position or could leverage a  
12 dominant position from a closely related market.<sup>30</sup> (3) If it is the  
13 case, it imposes proportionate regulatory remedies to be chosen from  
14 a menu provided in the directives (transparency, nondiscrimination,  
15 accounting separation, compulsory access and price control), or any  
16 other type of remedy (even structural ones like divestiture) with the  
17 prior agreement of the Commission.<sup>31</sup> Thus, an intervention under  
18 sector regulation is triggered by a market that has the characteristics  
19 where competition law remedies would be insufficient.  
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23 <sup>26</sup> On those steps, see Buiges (2004), Cave (2004), Garzaniti (2003, chapter 1),  
24 Krüger and Di Mauro (2003), and de Streel (2004).

25 <sup>27</sup> Recital 27 of the Framework Directive.

26 <sup>28</sup> Recitals 9–16 of the Commission Recommendation 2003/311 of 11 February  
27 2003 on relevant product and service markets within the electronic communi-  
28 cations sector susceptible to ex ante regulation, OJ [2003] L 114/45, herein  
*Commission Recommendation on relevant markets*.

29 <sup>29</sup> Article 15 of the Framework Directive; Commission Recommendation on rele-  
30 vant market; Commission Guidelines on market analysis, paras 33–69.

31 <sup>30</sup> Articles 14 and 16 of the Framework Directive; Commission Guidelines on  
32 market analysis, para 70–106; Revised European Regulators Group Working Paper  
33 of September 2005 on the SMP concept for the new regulatory framework, ERG  
34 (03) 09rev3.

35 <sup>31</sup> Articles 8–13 of the Access Directive (for the remedies regarding the wholesale  
36 markets); articles 16–19 of the Universal Service Directive (for the remedies  
regarding the retail markets); and ERG Common Position on remedies.

01 Sector regulation has been aligned to antitrust methodologies  
02 because it was supposed to meet several good governance prin-  
03 ciples.<sup>32</sup> It makes the regime more flexible and based on solidly  
04 grounded economic principles that ensure regulatory decisions closer  
05 to the reality of the market. And this increased flexibility would  
06 not be at the expense of legal certainty (as decisions will be based  
07 on more than forty years of antitrust case-law), nor harmonization  
08 (as NRAs' decisions are based on legal principles that are strongly  
09 Europeanized). The system was also deemed to ensure a progres-  
10 sive removal of obligations as competition develops in the different  
11 markets (market-by-market sunset clauses) and facilitates the tran-  
12 sition towards the mere application of competition law when sector  
13 regulation will no longer be necessary.

14

15

### 16 12.2.2 Institutional design

17

18 To implement such instruments, many institutions are involved as  
19 illustrated in Figure 12.1.

20 On the one hand, the main actors in applying antitrust are the  
21 twenty-five National Competition Authorities (NCAs), the European  
22 Commission, and the national courts. *Ex post* antitrust may gener-  
23 ally be applied concurrently by the Commission (its Competition  
24 Directorate General),<sup>33</sup> the NCAs,<sup>34</sup> and the national courts.<sup>35</sup>

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27 <sup>32</sup> Buiges (2004) and Cave (2004).

28

29 <sup>33</sup> Article 4 of regulation 1/2003. Note that the Commission may only intervene  
30 when the trade between member states is susceptible to be affected by the allegedly  
31 anticompetitive practice: Guidelines of the Commission of 30 March 2004 on the  
32 effect on trade concept contained in articles 81 and 82 of the Treaty, O.J. [2004]  
33 C 101/81.

34

35 <sup>34</sup> Article 5 of regulation 1/2003 and specific national competition laws. In some  
36 member states, the NRAs have concurrent powers with the NCAs to apply *ex post*  
37 antitrust in the electronic communications sector; see, for instance, the UK: Office  
38 of Fair Trading Guidelines of December 2004 on Concurrent application to regu-  
39 lated industries.

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41 <sup>35</sup> Article 6 of regulation 1/2003 and specific national competition laws.

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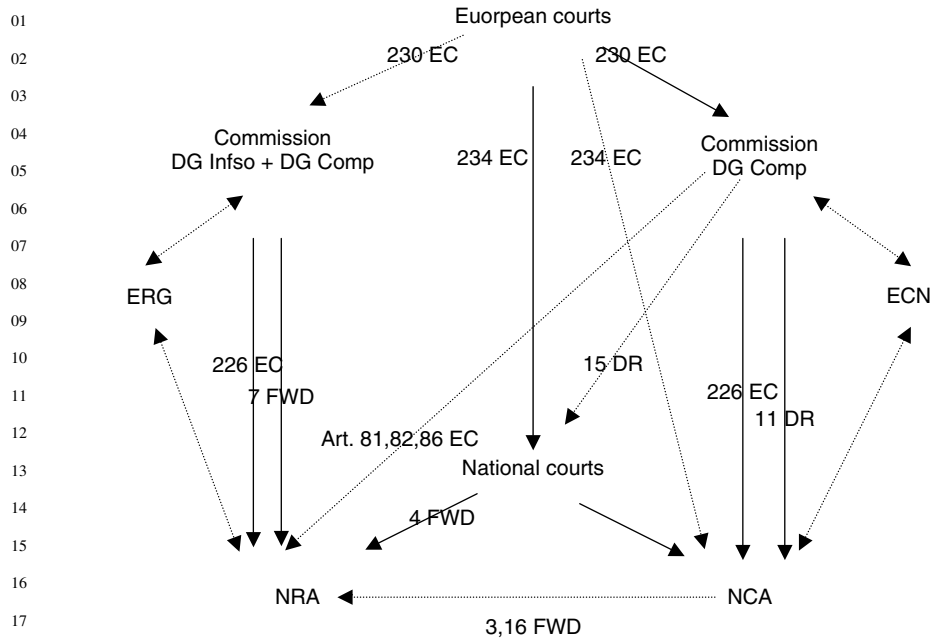


Figure 12.1 Relationship between regulatory actors.<sup>37</sup> Straight line: strict control; Dotted line: loose control; EC: EC Treaty; 226 EC: infringement procedure against a Member State; 230 EC: annulment procedure against the Commission; 234 EC: preliminary ruling question; FWD: Framework Directive 2002/21; DR: Decentralisation Regulation 1/2003; ERG: European Regulators Group; ECN: European Competition Network (Telecom Working Group); NRA: National Regulatory Authority; NCA: National Competition Authority.

*Ex ante* antitrust is applied exclusively by the Commission if the concentration has a community dimension<sup>38</sup> or by NCAs if the concentration does not have such community dimension.

To ensure checks and balances and efficient decisions, the NCAs are under the control of several authorities. At national level, they

<sup>36</sup> For simplicity, I do not include the role of the National Ministries, the CoCom and the Council.

<sup>37</sup> For simplicity, I do not include the role of the National Ministries, the CoCom and the Council.

<sup>38</sup> Article 2 of the Merger Regulation. In some circumstances, the Commission may refer back to a NCA a concentration with community dimension: articles 4 and 9 of the Merger Regulation.

01 are controlled by the national courts as any interested party may  
02 appeal an NCA decision.<sup>39</sup> At the European level, NCAs are under  
03 the double control of the Commission which may decess an NCA  
04 before it adopts a final decision to ensure the consistency of antitrust  
05 law across member states,<sup>40</sup> and which may initiate an infringement  
06 procedure at the Court of Justice against a member state whose NCA  
07 violated European law.<sup>41</sup> NCAs also face peer pressure through their  
08 participation in the European Competition Network,<sup>42</sup> which has a  
09 specific working group on telecommunications matters. Finally, the  
10 NCAs which have the characteristics of a tribunal (such as a body  
11 established by law, permanent, independent, applying rule of law  
12 and whose jurisdiction is compulsory, procedure is *inter partes*) may  
13 directly ask preliminary questions to the Court of Justice on the  
14 interpretation of European law.<sup>43</sup> In this sense, the NCAs are under  
15 the direct supervision of the Court of Justice.  
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18 <sup>39</sup> The organization of such appeal procedure is left to the member state according  
19 to their procedural autonomy, but should be effective according to the general  
20 principles of European law derived from article 10 EC: Case C-276/01 *Steffensen*  
21 [2003] ECR I-3755, para 60, case C-453/99 *Courage and Crehan* [2001] ECR  
22 I-6297, para 29, case C-255/00 *Grundig Italiana* [2002] ECR I-8003. Note that  
23 the Commission may help the national courts in their interpretation of Euro-  
24 pean antitrust: article 15 of the regulation 1/2003 and Commission notice of  
25 30 March 2004 on the cooperation between the Commission and the courts of  
26 the EU member states in the application of articles 81 and 82 EC, O.J. [2004]  
L 101/54.

27 <sup>40</sup> Article 11(6) of the regulation 1/2003 and paras 50–57 of the Commission notice  
28 of 30 March 2004 on cooperation within the Network of Competition Authorities,  
O.J. [2004] C 101/43.

29 <sup>41</sup> Article 226 EC, as interpreted by Case 103/88 *Fratelli Costanzo v Comune*  
30 *de Milano* [1989] ECR I-1839.

31 <sup>42</sup> Commission notice of 30 March 2004 on cooperation within the Network of  
32 Competition Authorities, O.J. [2004] C 101/43.

33 <sup>43</sup> Article 234 EC. According to these criteria, a preliminary question from the  
34 Spanish NCA was accepted in Case C-67/91 *Dirección General de Defensa de*  
35 *la Competencia v Asociación Española de Banca Privada and others (Spanish*  
36 *Banks)* [1992] ECR I-4785, but a question from the Greek NCA was refused in  
case C-53/03 *Syfait and Others v GlaxoSmithKline* [2005] ECR I-0000.

01 The Commission is controlled by the European courts where its  
02 decision may be appealed.<sup>44</sup> The courts examine whether the proce-  
03 dures have been respected, the substantive law (e.g., the concept of  
04 dominance) has been correctly interpreted, the facts have been cor-  
05 rectly established and no manifest errors in the economic assessment  
06 of those facts have been done.<sup>45</sup>

07 Thus, at the top of the pyramid lie the European courts whose case-  
08 law should be respected by all administrative and judicial national  
09 and European authorities according to the principle of the primacy  
10 of European law.<sup>46</sup> In this context, the national courts may refer  
11 preliminary ruling question to the Court of Justice.<sup>47</sup>

12 On the other hand, sector regulation is applied concurrently by  
13 the NRAs<sup>48</sup> and by the national courts.

14 To ensure checks and balances and efficient decisions, the NRAs  
15 are under the control of several authorities. At the national level,  
16 they should cooperate closely with the NCAs as SMP assessment  
17 involves antitrust methodologies,<sup>49</sup> hence are under the scrutiny of  
18 the antitrust authorities. In addition, NRAs are controlled by the  
19 national courts whose organization is left to the member states but the  
20 European law minimally provides that appeal body should take into  
21 account the merits of the case.<sup>50</sup> At the European level, the NRAs  
22 are under a triple control<sup>51</sup> of the Commission (Directorate General  
23 Information Society and Media and Competition Directorate Gen-  
24 eral): first, the Commission reviews (in a preventive manner) in two  
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29 <sup>44</sup> Article 230 EC.

30 <sup>45</sup> Case C-12/03P *Tetra Laval v Commission* [2005] ECR I-0000, para 39. See  
31 *Vesterdorf* (2005).

32 <sup>46</sup> Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

33 <sup>47</sup> Article 234 EC.

34 <sup>48</sup> Article 3 of the Framework Directive.

35 <sup>49</sup> Articles 3 and 16 of the Framework Directive.

36 <sup>50</sup> Article 4 of the Framework Directive, Lasok (2005).

<sup>51</sup> Hocepiéd and de Streel (2005).

01 phases all NRAs' draft decisions affecting trade between member  
02 states and may veto part of them when violating European law;<sup>52</sup> sec-  
03 ond the Commission may take (in a repressive manner) to the Court  
04 of Justice a member states whose NRA violated European law;<sup>53</sup>  
05 third the Commission may take an antitrust decision that would  
06 be an indirect critique of the regulator's policy.<sup>54</sup> NRAs also face  
07 peer pressure through their participation in the European Regulators  
08 Group (ERG).<sup>55</sup> However, contrary to their antitrust counterparts,  
09 the NRAs may not ask preliminary questions to the Court of Justice  
10 because of their obvious administrative nature.<sup>56</sup>

11 Again at the top of the pyramid lie the European courts whose  
12 case-law should be respected by all administrative and judicial  
13 national and European authorities.

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19 <sup>52</sup> Article 7 of the Framework Directive and Commission recommendation  
20 2003/561 of 23 July 2003 on notifications, time limits and consultations provided  
21 for in article 7 of directive 2002/21/EC of the European Parliament and of the  
22 Council of 7 March 2002 on a common regulatory framework for electronic com-  
23 munications networks and services, OJ [2003] L 190/13. After the first phase of  
24 one month, the Commission may merely comment on the compatibility of the  
25 NRA draft decision with EU law, or if it has doubts it may open a second phase  
26 review. After this second phase review of two months, the Commission may  
27 (but is not obliged to) veto the NRA draft decision if it violates EU law.

28 <sup>53</sup> Article 226 EC (see note 39). However, until now, the all infringement  
29 actions related to violation of European law by a national legislator and not by  
30 an NRA.

31 <sup>54</sup> Articles 81, 82, 86 EC. This was the case in the decision *Deutsche Telekom*.

32 <sup>55</sup> Commission decision of 29 July 2002 establishing the European Regulators  
33 Group for Electronic Communications Networks and Services, O.J. [2002] L  
34 200/38, as modified by Commission decision of 14 September 2004, O.J. [2004]  
35 L 293/30. See the website of ERG: <http://erg.eu.int>.

36 <sup>56</sup> Case C-256/05 *Telekom Austria* [2005] ECR I-0000, paras 10–11 and para  
45 of the Opinion of Advocate General Geelhoed in case C-462/99 *Connect  
Austria Gesellschaft für Telekommunikation v Telekom-Control-Kommission, and  
Mobilkom Austria* [2003] ECR I-5197.

## 12.3 COMPETITION LAW

### 12.3.1 *Ex post* competition law

#### 12.3.1.1 *Substantive issues*

(1) *The mode of intervention and the type of cases taken* At the European level, the mode of intervention of the Commission in the electronic communications sector was based on broad sectoral approach, which is different from the interventions in the other sectors of the economy based on a case-specific approach. In fact, the Commission behaves more like an industrial regulator than a mere antitrust authority. Thus, it adopted three general guidelines,<sup>57</sup> which explained how antitrust rules would apply to some competitive problems and were not based on a stock of previous individual cases: in 1991, on the application of competition rules to the telecommunications sectors;<sup>58</sup> in 1998, on the application of antitrust rules to access agreement;<sup>59</sup> and in 2000, on the application of antitrust rules to the compulsory access of the local loop (i.e., the last mile of the network where the economies of scale and scope are the largest).<sup>60</sup>

The Commission also conducted six sector enquiries or quasisector enquiries where the Commission sent questionnaire to all the operators to better understand the dynamics of the marketplace and

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<sup>57</sup> Guidelines have also been used in other network industries like the postal sector: notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain state measures relating to postal services, O.J. [1998] C 39/2.

<sup>58</sup> Commission guidelines on the application of EEC Competition rules in the telecommunications sector, O.J. [1991] C 233/2.

<sup>59</sup> Commission notice of 31 March 1998 on the application of competition rules to access agreements in the telecommunications sector, O.J. [1998] C 265/2, hereinafter *Access Notice*.

<sup>60</sup> Communication from the Communication of 26 April 2000 on the unbundled access to the local loop, O.J. [2000] C 272/55.

01 possibly identify anticompetitive practices:<sup>61</sup> in 1997, on the high  
02 prices for international calls;<sup>62</sup> in 1998, on the high prices for fixed-  
03 to-mobile calls;<sup>63</sup> in 1999, on the delivery of leased lines;<sup>64</sup> in 2000,  
04 on the high prices for mobile international roaming,<sup>65</sup> and on the  
05 refusal to give access to the local loop;<sup>66</sup> in 2004, on the sales of  
06 sports rights to 3G and Internet.<sup>67</sup>

07 In a second stage and on the basis of the information collected  
08 during the sector enquiries, the Commission opened several indi-  
09 vidual cases.<sup>68</sup> So far, all cases cover pricing practices that were  
10 either exploitative (excessive prices) or exclusionary (price squeeze  
11 or predatory pricing). They took on average two to three years to  
12 be decided and most of them have been settled informally. As a  
13 consequence of this approach, there has been few formal decision,  
14 hence the case-law in the sector is relatively poor. However, the few  
15 decisions should not hide the fact that Commission intervention has  
16 been more intense in electronic communication sector than in the  
17 other sectors of the economy (Table 12.2).

18  
19  
20 <sup>61</sup> Sector enquiries are based on article 17 of regulation 1/2003. In quasisector  
21 enquiries, no formal sector enquiry were opened, but questionnaires were sent to  
22 all operators of the market segment under review. On these enquiries: Choumelova  
23 and Delgado (2004).

24 <sup>62</sup> IP/97/1180 of 19 December 1997; IP/98/763 of 13 August 1998; IP/99/279 of  
25 24 April 1999.

26 <sup>63</sup> IP/98/141 of 10 February 1998; IP/98/707 of 27 July 1998; IP/98/1036 of  
27 26 November 1996; IP/99/298 of 4 May 1999.

28 <sup>64</sup> IP/99/786 of 22 October 1999; Working Document of the Commission services  
29 of 8 September 2000 on the initial results of the leased lines sector inquiry;  
30 IP/00/1043 of 22 September 2000; IP/02/1852 of 11 December 2002.

31 <sup>65</sup> IP/00/111 of 4 February 2000; Working Document of Commission services of  
32 13 December 2000 on the initial findings of the sector inquiry into mobile roaming  
33 charges.

34 <sup>66</sup> IP/00/765 of 12 July 2000. Report done by Squire-Sanders-Dempsey, Legal Study  
35 on Part II of the Local Loop Sectoral Inquiry, February 2002, available at [http://](http://www.europa.eu.int/comm/competition/antitrust/others/sector_inquiries/local_loop/)  
36 [www.europa.eu.int/comm/competition/antitrust/others/sector\\_inquiries/local\\_loop/](http://www.europa.eu.int/comm/competition/antitrust/others/sector_inquiries/local_loop/).

37 <sup>67</sup> IP/04/134 of 30 January 2004. Concluding Report of the Commission of  
38 21 September 2005 on the Sector Inquiry into the provision of sports content over  
39 third generation mobile networks.

40 <sup>68</sup> For an overview of the cases: Garzaniti (2003, chapter 6).

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01 Table 12.2 Commission abuse of dominant cases

02 <b>Market segment</b>	03 <b>Exclusionary pricing</b>	04 <b>Exploitative pricing</b>
05 <b>Fixed narrowband</b>	06 – Price squeeze between interconnection charges and retail business tariffs: DT 1996 <sup>69</sup>	07 – Excessive accounting rates: OTE, ETP, Austria Telekom, Finland, Telecom Italia, Ireland, Portugal <sup>70</sup>
08 <b>Fixed broadband</b>	09 – <i>Price squeeze between full unbundling charges and retail ADSL tariffs: DT 2003</i> 10 – Price squeeze between shared access charges and retail access tariffs: DT 2004 <sup>71</sup> 11 – <i>Predatory retail ADSL price: Wanadoo 2003</i> 12 – Price squeeze between national/regional bitstream and ADSL tariffs: Telefonica 2006 <sup>72</sup>	
13 <b>Leased lines</b>		14 – Excessive prices for international leased lines: Belgium, Italy, Spain 2002 <sup>73</sup>
15 <b>Mobile</b>	16 – Price squeeze between mobile termination charges and retail mobile tariffs: KPN 2002 <sup>74</sup>	17 – Excessive mobile termination: Germany and Italy 1999 <sup>75</sup> 18 – Excessive wholesale roaming charges: O2 and Vodafone UK 2004, <sup>76</sup> T-Mobile and Vodafone Germany 2005. <sup>77</sup>

23 *Note:* The cases in italics have led to a formal decision of the Commission and are cited in  
24 the Annex.

28 <sup>69</sup> Against Deutsche Telekom: IP/96/543 of 25 June 1996 and IP/96/975 of 31  
29 October 1996.

30 <sup>70</sup> In Greece, Austria, Luxembourg, Finland, Ireland, Italy, Portugal: IP/99/279.

31 <sup>71</sup> IP/04/281 of 1 March 2004.

32 <sup>72</sup> MEMO/06/91 of 22 February 2006.

33 <sup>73</sup> In Belgium, Italy and Spain.

34 <sup>74</sup> IP/02/483 of 27 March 2002.

35 <sup>75</sup> Against all the mobile operators of Germany and of Italy: IP/99/298 of 4 May  
1999.

36 <sup>76</sup> IP/04/994 of 26 July 2004.

<sup>77</sup> IP/05/161 of 10 February 2005.

01 At the national level, more decisions have been taken than at the  
02 European level, although the interventions of the NCAs vary sig-  
03 nificantly across countries.<sup>78</sup> For instance, the French Competition  
04 Council has been extremely active, in particular in opening of the  
05 local access market to stimulate broadband development<sup>79</sup> and con-  
06 demning cartel in the mobile segment.<sup>80</sup> In general, most cases relate  
07 to exclusionary pricing practices.

08 **(2) *The remedies imposed*** In the majority of the cases, the  
09 Commission imposed behavioural remedies in the form of reducing  
10 of excessive price or ending a price squeeze. In some cases, the  
11 Commission went further and used *ex post* antitrust cases to speed  
12 up liberalization in the member states that were the most reluctant  
13 to open their markets.<sup>81</sup> No Member State has ever imposed a full  
14 structural separation of the incumbent, but the United Kingdom  
15 has recently in an unprecedented move imposed a quasi-structural  
16 separation of BT.<sup>82</sup>

### 18 **12.3.1.2 Institutional issues**

20 At European level, the *vertical relationship* between the Com-  
21 mission and the NCAs followed the approach set in the  
22

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24 <sup>78</sup> For a summary of some cases, see International Competition Network (2006,  
25 Appendix 1) and for a description of national price squeeze cases: Geradin and  
26 O'Donoghue (2005).

27 <sup>79</sup> Bourreau (2003). Competition Council Decision 00-MC-01 of 18 February 2002,  
28 *9Telecom/France Telecom I*, upheld by the Appeal Court of Paris decision in 30  
29 March 2000, and Competition Council Decision 04-D-18 of 13 April 2004, *9Tele-*  
30 *com/France Telecom II*, upheld by the Appeal Court of Paris in 11 January 2005;  
31 Competition Council Decision 05-D-59 of 7 November 2005, *9Telecom/France*  
32 *Telecom III*.

32 <sup>80</sup> Competition Council Decision 05-D-65 of 30 November 2005.

33 <sup>81</sup> For instance, the Commission closed the DT 1996 case on the conditions that  
34 the German government opened its telecommunications markets.

35 <sup>82</sup> Ofcom Final statements of 22 September 2005 on the strategic review of the  
36 telecommunications and undertakings in lieu of a reference under the Enterprise  
Act 2002.

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01 Cooperation Notice: cases were decided by the best-placed author-  
02 ity and the Commission took only cases with sufficient European  
03 interest.<sup>83</sup>

04 The *diagonal relationship* between the Commission and the NRAs  
05 was complementary and followed the approach described in the  
06 Access Notice: priority was given to the NRAs.<sup>84</sup> Thus, if the NRAs  
07 were able to intervene, these cases have been passed to them,<sup>85</sup>  
08 although the Commission maintains a control over the regulators.<sup>86</sup>  
09 If the NRAs were not able to act, the cases usually have been settled  
10 by the Commission or, more exceptionally, a formal decision was  
11 adopted.<sup>87</sup>

12 At the national level, the *transversal relationship* between  
13 the NCAs and the NRAs was also complementary. For instance, the  
14 Dutch NCA intervened in mobile termination regulation when the  
15 NRA's decision had been quashed by a national court for lack of  
16 jurisdiction.<sup>88</sup> However, there may also be a conflict between the  
17 approach of NRA and the one of the NCA. For instance, the Ital-  
18 ian NCA condemned Telecom Italia for a regulatory price squeeze  
19 case.<sup>89</sup>

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25 <sup>83</sup> Commission notice of 30 March 2004 on cooperation within the Network of  
26 Competition Authorities O.J. [2004] C 101/43.

27 <sup>84</sup> Commission Access Notice, paras 26–32.

28 <sup>85</sup> For instance, for cases for excessive fixed retention rates and fixed termination  
29 rates have been dealt by the NRAs and only closed by the Commission when  
30 prices decreased sufficiently.

31 <sup>86</sup> For instance in the decision *Deutsche Telekom*, the Commission condemned  
32 a regulated operator (that enjoyed some discretion within the regulatory limit  
33 to reduce the abusive practice) as the Commission disagreed with the national  
34 regulator. For a critique of this decision, Geradin (2004, pp. 1549–1552), Larouche  
(2006) and Petit (2005, pp. 194–195).

35 <sup>87</sup> Commission decision *Wanadoo*.

36 <sup>88</sup> OPTA and NMa press release 03–50 of 5 December 2003.

<sup>89</sup> AGCM decision of 16 November 2004, annulled in May 2005.

01 **12.3.2 Ex ante competition law: mergers and joint ventures**

02

03 **12.3.2.1 Substantive issues**

04

05 **(1) The type of cases notified** In the electronic communications  
06 sector, several cases have been notified and decided by the Commis-  
07 sion due to the reshaping of the industrial landscape in the aftermath  
08 of liberalization.<sup>90</sup> In the mid-1990s when telecom markets were pro-  
09 gressively opened to competition, national incumbents set up joint  
10 ventures to offer enhanced international services to multinationals  
11 (e.g., Atlas joint venture between France Telecom and Deutsche  
12 Telekom).<sup>91</sup>

13

14 At the turn of the twenty-first century when consolidation of ICT  
15 industries took place, WorldCom (renamed MCI and recently bought  
16 by Verizon) was the leader in the restructuring of the Internet market  
17 by acquiring many rivals companies (e.g., acquisition of MCI and  
18 then Sprint). Similarly, Vodafone was the leader of the restructuring  
19 of the mobile markets by acquiring many rivals (e.g., acquisition  
20 of Airtouch of the US and then Mannesmann of Germany). At the  
21 same time when convergence was taking place, Internet and telecom  
22 companies merge or form joint venture to offer fully converged  
23 services (e.g., merger between AOL and Time Warner and between  
24 Vivendi and Seagram).<sup>92</sup>

25

26 More recently, there has been a consolidation in the pay-TV indus-  
27 try (e.g., NewsCorp buying Telepiu to form Sky Italia).<sup>93</sup> Today,  
28 incumbents from Western Europe are buying smaller foreign oper-  
29 ators (e.g., Telefonica of Spain buying the English mobile operator  
30 O2), especially in Eastern Europe.

29

30

31 <sup>90</sup> For a description of those cases, see Garzaniti (2003, chapter 8), Le Blanc and  
32 Shelanski (2003), and de Stree (2004).

33 <sup>91</sup> FT and DT extend this joint venture with Sprint of the US in *Global One*. See  
34 also the *Concert* joint venture between BT and MCI, and the *Unisource* joint  
35 venture between Telia of Sweden, KPN of the Netherlands and Swiss Telecom.

36 <sup>92</sup> See also decision *Vodafone/Vizzavi/Canal+*.

<sup>93</sup> See also decision *Sogecable/ViaDigital*.

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01 However, except in the Nordic country,<sup>94</sup> there has been no full-  
02 fledged merger between incumbents because the customer demand is  
03 not yet Europeanized, the regulations vary significantly across coun-  
04 tries and the governments are reluctant to accept such consolidation  
05 for reasons of national patriotism.

06 **(2) *The remedies imposed*** The types of remedies imposed have  
07 been diverse. The Commission imposed structural remedies that  
08 stimulate infrastructure competition (e.g., cable divestiture) for the  
09 parties to lose their dominant position on the traditional markets and  
10 their ability to leverage and foreclose entry in emerging markets.<sup>95</sup>  
11 As the effects of these measures could only take place with time,  
12 they were complemented by behavioural remedies aiming at forcing  
13 access to key facilities (e.g., content, fixed telecom infrastructure,  
14 mobile infrastructure, technical services for pay-TV or interactive-  
15 TV services).

16 As illustrated in Table 12.5 in the Appendix, the Commission has  
17 been more severe (read interventionist) in the electronic communi-  
18 cations sector than in the economy as a whole because it blocked  
19 2.2 per cent of the operations (instead of 0.6 per cent on average)  
20 and imposed remedies in 8.4 per cent of the cases (instead of 7 per  
21 cent on average).

22 This is due to several reasons. The first reason was to prevent a  
23 dangerous circle of self-reinforcing market power between related  
24 markets, whereby parties leverage their power from established mar-  
25 kets (e.g., the local loop) to secure a dominant position on emerging  
26 markets (e.g., the digital interactive service) and, in turn, lever-  
27 age back from the emerging market to strengthen their power on  
28

29  
30  
31 <sup>94</sup> Merger between Telia of Sweden and Telenor of Norway later abandoned, and  
32 merger between Telia of Sweden and Sonera of Finland.

33 <sup>95</sup> Sometimes, such *ex ante* antitrust remedies have paved the way for the future  
34 regulation. For instance, compulsory access to local loop was imposed in 1999  
35 in the *Telia/Telenor* decision and taken over one year later by sector regulation:  
36 European regulation 2887/2000 of the European Parliament and of the Council of  
18 December 2000 on unbundled access to the local loop, O.J. [2000] L 336/4.

01 the established markets.<sup>96</sup> The second reason of the strict stance  
02 of the Commission was to support the liberalization program of  
03 the Commission. For instance, in the early joint ventures between  
04 incumbents to provide enhanced international services like Atlas, the  
05 member states concerned were encouraged to accelerate liberaliza-  
06 tion in order to make a clearing under conditions of the alliances  
07 possible. The dynamics of the process thus created a parallelism of  
08 interest in accelerating liberalization between incumbents (in order  
09 to have their alliances cleared), member states (in order to allow the  
10 development of the potential of their national markets) and the Com-  
11 mission (in order not to be obliged to block new services and new  
12 technologies).<sup>97</sup> The third reason of the strict stance of the Commis-  
13 sion was to ensure noneconomic policy objectives, such as pluralism  
14 in the media in the merger involving content related services like  
15 AOL/TimeWarner.<sup>98</sup>

16 Note, however, that sector regulation has been taken into account  
17 when deciding the appropriate remedies. Thus, the Commission  
18 imposed more lenient remedies or no remedy when the behaviours  
19 of the parties to a joint venture were under strict control of a sector-  
20 specific authority and there were less risk of abuse and leverage.<sup>99</sup>  
21  
22

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23 <sup>96</sup> This vicious circle is particularly worrying in ICT sector for three reasons  
24 at least. First, several markets are only emerging and their development should  
25 not be controlled by a particular company. Second, these markets are evolving  
26 very quickly and any anticompetitive behaviour could have rapid and irreversible  
27 effects. Third, most of the markets are characterized by network effects, that  
28 lead to path dependency with early developers (first-mover advantage) becoming  
29 dominant by capturing new growth (bandwagon affect) so inefficient solution may  
30 be adopted: see Monti (2000).

31 <sup>97</sup> Ungerer (2001) referring to the decisions Atlas and GlobalOne.

32 <sup>98</sup> Arino (2004).

33 <sup>99</sup> For instance, the Commission imposed less remedy in Concert joint venture  
34 between BT and MCI that were strictly controlled by the English and American  
35 NRA than in Atlas joint venture between FT and DT that was not controlled  
36 by NRA. Such approach is in line with the case-law: joined cases T-374/94,  
T-375/94, T-384/94, T-388/94 *European Night Services and Others v Commission*  
[1998] ECR II-3141, para 221. Note that such an approach is not followed in

### 12.3.2.2 Institutional issues

The *vertical relationship* between the Commission and the NCAs was weak because the role of the latter in controlling merger was much less important than the one of the Commission (and also compared to their role at controlling anticompetitive behaviours) as most major cases were of European dimension, hence were the exclusive competence of the Commission. However, some important cases were referred back to the NCAs, for example, the merger Sogecable/Via Digital<sup>100</sup> decided by the Spanish authority.

The *diagonal cooperation* between the Commission and the NRAs has also been less intense than under *ex post* antitrust because of the short deadlines to decide a merger case. However, the situation improved over time and can also be seen now as complementary as the Commission relied on the NRA to implement merger remedies<sup>101</sup> or has taken the market analysis of the NRA into account when deciding whether a merger would be anticompetitive.<sup>102</sup>

### 12.3.3 Appraisal of the application of antitrust in the electronic communications sector

Regarding the use of antitrust, its expansive role in the electronic communications sector has been criticized. Veljanovski (2001)

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sector regulation where the NRA should assess a dominant/SMP position without taking account of the regulation in place on the analysed operator for the obvious reason of alleviating a vicious circle of lifting regulation only because there was regulation: Commission decision of 20 February 2004, case FI/2003/24–26 (markets 4 and 6) and Commission decision of 17 May 2005, case DE/2005/144 (market 9).

<sup>100</sup> Commission decision of 14 August 2002, *Sogecable/Via Digital*, M. 2845, upheld in joined cases T-346/02 and T-347/02 *Cableuropa v Commission* [2003] ECR II-0000. This case was very similar to the *NewsCorp/Telepiu* merger.

<sup>101</sup> Decision *Newscorp/Telepiu*, para 259.

<sup>102</sup> Commission decision of 19 September 2003, *Vodafone/SinglePoint*, M. 3245, para 24.

01 argues that the merger approach has been too stringent because  
02 economic literature<sup>103</sup> shows that anticompetitive leverage is more  
03 rare than lawyers would think. Larouche (2000) argues that com-  
04 petition law has been stretched beyond its reasonable limits and  
05 the institutional and legitimacy settings of antitrust do not justify  
06 its quasiregulatory role.<sup>104</sup> More generally, American authors like  
07 Audretsch et al. (2001), Evans and Schmalensee (2001), Katz and  
08 Shelanski (2004), or Posner (2001) emphasize the dynamic charac-  
09 teristics of the industries and the necessary adaptation of antitrust  
10 policy.<sup>105</sup>

11 However, given the history of the sector, an interventionist stance  
12 of antitrust in the electronic communications sector might be justified  
13 on static grounds (because dominant position is pervasive in the  
14 sector) as well as on dynamic grounds (because these dominant  
15 positions are often the result of past legal protection and not of  
16 private investment decisions taken in a competitive environment  
17 and whose incentives should be preserved).<sup>106</sup> Moreover, in sectors  
18 where effective competition does not yet exist but is possible in  
19 the future, there may be a case for antitrust to actively promote  
20 entry of competitors that are equally efficient than the incumbents,  
21 or even less efficient competitors, for two related reasons: on a  
22 overall market perspective, it may pay in the long run to have many  
23 actors competing, and on a individual firm perspective, efficiency  
24 may increase over time as the customer bases and the operation  
25 scales increases.<sup>107</sup> Therefore, there may be an economic case for a  
26 ‘different antitrust’ in sector where dominant position due to previous  
27  
28

---

29 <sup>103</sup> Rey and Tirole (2003).

30 <sup>104</sup> Although the Court of First Instance has implicitly admitted this quasi-  
31 regulatory role in case T-87/05 *Energias de Portugal v Commission* [2005] ECR  
32 II-0000, para 91.

33 <sup>105</sup> This has been recently implicitly recognized by the Court of First Instance in  
34 case T-328/03 *O2 Germany v Commission* [2006] ECR II-0000, para 110.

35 <sup>106</sup> Fingleton (2006) and Motta and de Streel (2006, pp. 109–112).

36 <sup>107</sup> Conseil de la Concurrence français (2003, p. 72) and the Annex of ERG Com-  
mon Position on remedies.

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01 incumbency is prevalent. Yet, it should always be justified with  
02 sound economic reasoning (which was not always the case in the  
03 merger cases so far) and it should be strictly limited to the network  
04 industries that were developed under legal monopoly protection and  
05 not be extended to other sectors of the economy.<sup>108</sup>

06  
07  
08 **12.4 SECTOR REGULATION**

09  
10 **12.4.1 *Ex ante* sector regulation**

11  
12 **12.4.1.1 *Substantive issues***

13  
14 **(1) *The market segments regulated*** On the basis of the three crite-  
15 ria to select market susceptible to sector regulation (i.e., high perma-  
16 nent and nonstrategic entry barriers, no competitive dynamics behind  
17 these barriers and inefficiency of antitrust remedies to solve the com-  
18 petitive problems), the Commission has proposed to the NRAs to  
19 analyse eighteen markets (seven retail and eleven wholesale).<sup>109</sup> In  
20 general, the Commission identified mainly upstream access markets  
21 because there is no barrier (or only low barriers) to enter the retail  
22 markets when wholesale regulation is efficient.<sup>110</sup>

23 On the fixed voice segment, the Commission identified two  
24 retail access markets (for residential and business customers), four  
25 retail services markets (same segmentation residential/business;  
26 and segmentation between local/national and international ser-  
27 vices), and three wholesale markets (call origination, transit and  
28

29  
30 <sup>108</sup> Moreover, the argument for a more interventionist competition law is weaker  
31 when there is a strong sector regulation as in this case, the authorities may rely  
32 on sector regulation instead of antitrust to achieve efficiency on the market.

33 <sup>109</sup> Commission recommendation 2003/311 of 11 February 2003 on relevant prod-  
34 uct and service markets within the electronic communications sector susceptible  
35 to ex ante regulation, OJ [2003] L 114/45.

36 <sup>110</sup> In fact, the few retail markets identified have been so for historical but not  
economical reasons.

01 call termination)<sup>111</sup> adding up to the whole connection between two  
02 customers. On the fixed broadband data segment, the Commission  
03 identified two wholesale access markets: access at the local loop level  
04 and access at the bitstream level, which is somewhat further up in the  
05 network.<sup>112</sup> On leased lines segment, the Commission identified one  
06 retail market (the minimum set of leased lines which corresponds to  
07 five types of leased up to 2 Mbits),<sup>113</sup> and two wholesale markets (ter-  
08minating and trunk segments), which adds up to the whole connec-  
09tion between two customers. In the mobile segment, the Commission  
10 identified three wholesale markets: access and call origination as well  
11 as termination, which are the two extremes of the mobile network,<sup>114</sup>  
12 and international roaming, which presents specific economic prob-  
13lems.<sup>115</sup> In the broadcasting segment, the Commission identified only  
14 one wholesale market for broadcasting transmission.

15 In general, the NRAs have followed such market definitions,  
16 sometimes segmenting further the market defined by the Commission  
17 (in particular for the broadcasting market) and sometimes adding  
18 new markets (Table 12.3).<sup>116</sup>

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20  
21 <sup>111</sup> The termination market is defined on each individual network because the  
22 ‘calling-party pays’ principle creates an externality between the caller (who ulti-  
23 mately pays the termination charge but does not choose the terminating network)  
24 and the called party (who chooses such network but does not pay the charge).

25 <sup>112</sup> Local loop refers to the physical circuit connecting the network termination point  
26 at the subscriber’s premises to the main distribution frame (MDF) or equivalent  
27 facility in the fixed public network (article 2(e) of the Access Directive). Bitstream  
28 Access refers to the provision of transmission capacity between an end-user con-  
29 nected to a telephone connection and the point of handover to the new entrant  
30 (recommendation from the Commission of 26 April 2000 on unbundled access to  
31 the local loop, OJ [2000] C 272/55).

32 <sup>113</sup> Commission decision 2003/548 of 24 July 2003 on the minimum set of leased  
33 lines with harmonized characteristics and associated standards referred to in article  
34 18 of the Universal Service Directive, O.J. [2003] L 186/43.

35 <sup>114</sup> See note 110.

36 <sup>115</sup> See note 64.

<sup>116</sup> Communication from the Commission of 6 February 2006 on Market Reviews  
under the EU Regulatory Framework: Consolidating the internal market for elec-  
tronic communications, COM(2006) 28.

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Table 12.3 Markets susceptible to sector regulation

	Retail markets	Wholesale markets
<b>Fixed voice</b>	1. Access for residential 2. Access for nonresidential 3. Local and/or national services for residential 4. International services for residential 5. Local and/or national services for nonresidential 6. International services for nonresidential	8. Call origination 9. Call termination on individual public networks 10. Transit
<b>Fixed narrowband data</b>		Idem 8
<b>Fixed broadband data</b>		11. Unbundled access (including shared access) to metallic loops and subloops 12. Wholesale broadband access
<b>Fixed dedicated access</b>	7. Minimum set of leased lines	13. Terminating segments 14. Trunk segments
<b>Mobile voice</b>		15. Access and call origination 16. Call termination on individual mobile networks 17. International roaming
<b>Broadcasting</b>		18. Broadcasting transmission services

(2) *The remedies imposed* Although, the NRAs have the choice between a list of five remedies (transparency, nondiscrimination, accounting separation, compulsory access and price control) and the obligation to only choose the proportionate ones, they impose in general the full suite of them on all markets, and in particular price control at forward looking long-term incremental cost.<sup>117</sup> Most regulators apply the ladder of investment which consists of regulating

<sup>117</sup> *Ibidem.*

01 the different rungs of an imaginary investment ladder (i.e., retailing,  
02 IP Networks, backhaul, DSLAM, local loop) and only removing  
03 regulation of one rung when entrants have climbed that rung.<sup>118</sup>  
04 Thus, the policy aims not only to create a level-playing field but  
05 also to actively support entrants. As a consequence, the NRAs reg-  
06 ulate almost all markets of the long Commission list, with only few  
07 exceptions like some retail services markets and the wholesale fixed  
08 transit and mobile access that some NRAs decided not to impose  
09 any remedy (see Tables 12.6a–12.6c in the Appendix).

10

11

#### 12 **12.4.1.2 Institutional issues**

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14 The *horizontal relationships* between the NRAs have clearly been  
15 reinforced with the creation of the ERG, but are still insufficient to  
16 create a single market for electronic communications. In the *vertical*  
17 *relationship* between the Commission and the NRAs, the influence  
18 of the former has been considerable: it starts the SMP process by  
19 defining the markets to be analysed by the NRAs and usually such  
20 definitions are followed by NRAs and has already veto five draft  
21 decisions (without counting several draft decisions that have been  
22 withdrawn to alleviate such veto).<sup>119</sup>

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#### 26 **12.4.2 Appraisal of the application of sector regulation**

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28 After more nearly three years of implementation, the new sector reg-  
29 ulation which was more based on theoretical thinking than practical  
30 experience has not fully delivered the good governance principles it

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33 <sup>118</sup> Cave and Vogelsang (2003); Cave (2006); ERG Broadband market competition  
report of May 2005, ERG(05) 23.

34 <sup>119</sup> See Table 12.7 of the Appendix. In addition, the Commission gives substantives  
35 indications in the prenotification meetings held with the NRAs to discuss in  
36 advance any controversial issue.

01 pursued.<sup>120</sup> In particular, the principles of proportionality and legal  
02 certainty are no achieved. Indeed, there is an increase of regulation as  
03 more market segments are regulated and more operators are regulated  
04 on each segment. At this stage, I can not prove that regulators have  
05 intervened beyond the optimal level because that would require a  
06 clear and articulated definition of optimal regulation as well as a full  
07 cost-benefit that has not be done until now and is outside the scope  
08 of this paper.<sup>121</sup> However, it is a fact that the never-ending expansion  
09 of regulation does not match to the deregulatory rhetoric of the  
10 European and national legislators and regulators. Also the strategies  
11 of the regulatory actors are not sufficiently clear in particular for  
12 the emerging markets (do they want to push for infrastructure-based  
13 competition of service-based competition, do they want short-term  
14 competition or long term competition, do they want to do industrial  
15 policy or not).

16 One reason of such failure is the lack of clear objectives in the  
17 law and the inability or unwillingness of the regulators to arbitrate  
18 between conflicting priorities. The legislator tried to hide the ques-  
19 tion of objectives and escape those conflicts by aligning sector reg-  
20 ulation with antitrust methodologies. However, such methodologies  
21 do not evacuate the fundamental regulatory questions and worse,  
22 they add difficulties.<sup>122</sup> The main difficulty is that standard antitrust  
23

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24  
25 <sup>120</sup> The principles were: flexibility, transparency, technological neutrality, harmo-  
26 nization, proportionality, and legal certainty. For an overview of the state of  
27 implementation of the sector regulation: communication from the Commission of  
28 20 February 2006, European Electronic Communications Regulation and Markets  
29 2005 (11th Implementation Report), COM(2006) 68.

30 <sup>121</sup> In particular, some argue that the ladder of investment has had a positive  
31 effect on investment and long term competition: Cave (2006) and ERG Broadband  
32 market competition report of May 2005, ERG(05) 23 whereas other argue that it  
33 is not the case: Oldale and Padilla (2004) and Hausman and Sidak (2005).

34 <sup>122</sup> Note also that antitrust principles are insufficient to base sector regulation  
35 because they detect all kinds of market power and are not able to screen the  
36 subset among them – hard core market power – that justify regulation. Thus, mere  
antitrust principles should be completed by other elements that have nothing to  
do with antitrust principles, that is, the three selection criteria.

01 principles were developed for antitrust practice in stable industries  
02 and need adaptations to be applicable in the context of the sector  
03 regulation for dynamic markets. First, standard antitrust principles  
04 are mainly suited to horizontal markets but need to be substan-  
05 tially modified to deal with vertical chains of production (which  
06 is the main focus of sector regulation).<sup>123</sup> For instance, standard  
07 antitrust principles would not by themselves be capable of defining  
08 a derived non-merchant wholesale market<sup>124</sup> and there is risk that  
09 the different services making a production chain are choked up in  
10 numerous artificially narrow antitrust markets.<sup>125</sup> Second, standard  
11 antitrust principles are suited to stable industries where competition  
12 is mainly in price but need to be adapted to deal with innovation  
13 and the Schumpeterian creative destruction competition.<sup>126</sup> Third,  
14 standard antitrust principle are suited to one-sided markets but need  
15 to be adapted to deal with two-sided markets where there are strong  
16 interactions between each side of the markets.<sup>127</sup>

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20 <sup>123</sup> Larouche (2000, pp. 203–211) and Richards (2006, pp. 206–209).

21 <sup>124</sup> Although the Court of Justice admitted that the antitrust methodology may be  
22 used to define a hypothetical non-merchant wholesale market in case C-418/01  
23 *IMS Health v NDC Health* [2004] ECR I-0000, para 44.

24 <sup>125</sup> This will become more problematic as the industry moves towards new-  
25 generation networks. According to the International Telecommunications Union,  
26 a new-generation network is ‘a packet based architecture fostering the provision-  
27 ing of existing and new/emerging services through a loosely coupled, open and  
28 converged communications infrastructures’.

29 <sup>126</sup> Audrestch et al. (2001), Dobbs and Richards (2004), and Evans and  
30 Schmalensee (2001). For instance, some monopoly power defined with static  
31 method may in fact increase welfare when it is necessary to increase innova-  
32 tion and when it is constrained by the threat of other innovation and creative  
33 destruction.

34 <sup>127</sup> Gual (2003), Evans (2003), and Rochet and Tirole (2004). When markets are  
35 two-sided, regulators should not only look at the level of the price on each side  
36 of the market, but also at the structure of the price between the different sides. In  
other words, it may be efficient that one side is charged below whereas the other  
side is charged above costs (cf. a heterosexual disco where usually women pay  
less and men more than the cost of entry).

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01 In addition to this difficulty, there are several other drawbacks  
02 and risks with the alignment on antitrust principles. First, the use  
03 of a legal concept is always linked to the objective of the legal  
04 rule for which it is used. As the objectives of antitrust and sector  
05 regulation may differ (recall that the objective antitrust is the max-  
06 imization of long term consumer welfare, whereas the objectives  
07 of sector regulation may be broader), the interpretation of a same  
08 antitrust concept may also differ creating legal confusion and uncer-  
09 tainty.<sup>128</sup> Second, antitrust principles are complex and have been  
10 under significant reform recently, moving from a legalistic form-  
11 based approach towards a more economic effects-based approach.<sup>129</sup>  
12 Third, and linked to institutional issues, antitrust principles do not  
13 constrain the NRAs very much in their actions (as many NRAs adapt  
14 them quite flexibly) but they do constrain the Commission in its  
15 comment under the article 7 review of NRAs' draft decisions (as  
16 the Commission always looks at the impact of its comments on its  
17 pending and future antitrust cases).

18 Therefore, critics propose to base sector regulation on the concept  
19 of bottleneck.<sup>130</sup> Indeed, the first best might be to base sector reg-  
20 ulation on specific concept (like bottleneck) to alleviate confusion  
21 between antitrust and sector regulation objectives and to be simpler  
22  
23

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24 <sup>128</sup> See the different interpretations of price squeeze in antitrust law and in sector  
25 regulation proposed by Grout (2002). Similarly, the first president of the French  
26 Supreme Court argues that a similar legal antitrust concept may be interpreted  
27 differently depending of the objectives of the legal instruments for which it is  
28 used: Canivet (2006, p. 5).

29 <sup>129</sup> Communication from the Commission of 20 April 2004, A pro-active Compe-  
30 tition Policy for a Competitive Europe, COM(2004) 293.

31 <sup>130</sup> Larouche (2000, pp. 359–403), Richards (2006, p. 220), and Squire-Sanders  
32 and Analysys (1999, p. 147). The UK regulator Ofcom decided during its strategic  
33 review to base its equality of access regulation on enduring economic bottlenecks  
34 which are defined as 'the parts of the network where there are little prospects for  
35 effective and sustainable competition in the medium term'. It comprises whole-  
36 sale line rental; metallic path facility, IPStream and backhaul extension service:  
Ofcom final statements of 22 September 2005 on the strategic review of the  
telecommunications, at para 4.6.

01 to use. However, there is already an implicit notion of bottleneck in  
02 the current sector regulation during the market selection step<sup>131</sup> and  
03 the complementary use of antitrust concepts is probably a second  
04 best option in the European context because it ensures a more eco-  
05 nomic approach and some harmonization between NRAs. However,  
06 it is important that antitrust concepts do not evacuate the question of  
07 objectives as it is the case today and that their underlying economic  
08 theories are adapted to the dynamic characteristics of the sector.

09 A second reason for the regulatory failures is that the institutional  
10 design has not been sufficiently thought through by the European  
11 legislature. In general, regulatory authorities do not have incentive to  
12 deregulate because of the well-established problems of state bureau-  
13 cracy implying that authorities have a tendency to increase their  
14 activities<sup>132</sup> and the regulatory brakes of the current law (national  
15 appeal and Commission review) are not efficient enough. More criti-  
16 cally, NRAs do not have incentives to take into account the dynamic  
17 side of competition (investment, innovation) but only the static side  
18 (evolution of price, number of competitors) because the indicators on  
19 which they are evaluated are mainly static (level of price, concentra-  
20 tion index).<sup>133</sup> In other words, NRAs are performing relatively well  
21 with regard to their incentives, but such incentives are not aligned  
22 with the long-term welfare of the consumers.

23 Thus, there is a need to better adapt those incentives by evaluat-  
24 ing the NRAs on more dynamics indicators and by reinforcing the  
25 regulatory brakes.

27 <sup>131</sup> Recital 27 of the Framework Directive as interpreted by recitals 9–16 of the  
28 recommendation on relevant markets.

29 <sup>132</sup> The tendency to overregulate because of state bureaucracy may be counterbal-  
30 ance by a tendency to underregulate in the countries where NRAs are captured by  
31 the incumbents.

32 <sup>133</sup> See the yearly Commission implementation reports, available at [http://europa.eu.int/information\\_society/policy/ecommm/implementation\\_enforcement/index\\_en.htm](http://europa.eu.int/information_society/policy/ecommm/implementation_enforcement/index_en.htm)  
33 More dynamic indicators are currently being designed by the  
34 British NRA to evaluate the impact of the strategic review: Ofcom statement  
35 of 8 February 2006 on evaluating the impact of the strategic review of  
36 telecommunications.

## 12.5 OPTIMAL BALANCE BETWEEN RULES AND COORDINATION BETWEEN INSTITUTIONS

### 12.5.1 The optimal balance between antitrust and sector regulation

#### 12.5.1.1 Market failures in electronic communications

Public authorities should aim to maximize the welfare of their citizens and markets are supposed to be the best means to ensure such welfare maximization. Thus, governments should intervene only when the mere functioning of the markets does not deliver this objective.

Economists distinguish between three types of market failure.<sup>134</sup> (1) The first market failure is the presence of excessive market power (e.g., a monopoly operator) which may lead to excessive price or too little innovation. Excessive market power is caused by legal and economic entry barriers or by anticompetitive behaviours. The concept of economic entry barriers is controversial in the literature with two opposing views.<sup>135</sup> The narrow (Stiglerian) view limits the barriers to the absolute cost advantages of the incumbents (e.g., access to best outlet in town, or consumer switching costs) but excludes all entrants' costs that have also been borne by the incumbents (e.g., high fixed and sunk costs). The broad (Bainian) view extends the concept of barriers to all factors that limit entry and enable incumbents to get a supranormal profit, hence includes absolute cost advantages but also economies of scale and scope. (2) The second market failure is the presence of an externality (like network externality or tariffs-mediated externality) which may lead to underconsumption in case of positive externality and overconsumption in

<sup>134</sup> Here I follow the definition of the International Competition Network (2006, p. 4), which considers that market failure occurs when resources are misallocated or allocated inefficiently (i.e., this includes misallocation in both static and dynamic sense), resulting in loss value, wasted resources, or some nonoptimal outcome.

<sup>135</sup> McAfee et al. (2004).

01 case of negative externality.<sup>136</sup> (3) The third market failure is the  
02 presence of information asymmetries (e.g., the absence of knowledge  
03 of the price) which may lead to under- or overconsumption.

04 In telecommunications, the two first categories lead to the stan-  
05 dard distinction between (1) the one-way access (or access model)  
06 which concerns the provision of bottleneck inputs by an incumbent  
07 network provider to new entrants and (2) two-way access (or the  
08 interconnection model) which concerns reciprocal access between  
09 two networks that have to rely upon each other to terminate calls.<sup>137</sup>

10 In addition, each type of market failure may be structural and  
11 result from the supply and demand conditions of the market, or may  
12 be behavioural and artificially (albeit rationally) ‘manufactured’ by  
13 the firms, leading to the matrix shown in Table 12.4.<sup>138</sup> Since the  
14 decline of the structure–conduct–performance paradigm in indus-  
15 trial economics, it is now recognized that nonstrategic and strategic  
16 market failures are closely linked together and that structure influ-  
17 ences conduct as much as conduct influences structure. However,  
18 it remains possible (and useful when choosing between the differ-  
19 ent instruments of public intervention) to identify the causes of the  
20 nonefficient market results and to distinguish between structural and  
21 behavioural market failures.

### 22 23 ***12.5.1.2 Choice between competition law and sector regulation***

24  
25 To tackle these different market failures, public authorities dis-  
26 pose of several legal instruments (in particular competition law,  
27  
28

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29 <sup>136</sup> For instance, less than the optimal number of customers may decide to join a  
30 network if new customers are not compensated, when joining the network, for an  
31 increase in the welfare they create for the already existing customers. The ERG  
32 defines the network externality as ‘the effect which existing subscribers enjoy as  
33 additional subscribers join the network which is not taken into account when this  
34 decision is made’: ERG Common Position on remedies, p. 127.

34 <sup>137</sup> See Armstrong (2002), Laffont and Tirole (2000), and Vogelsang (2003).

35 <sup>138</sup> Several potential behavioural market failures have been identified by the ERG  
36 in its Revised Draft Common Position on remedies at Chapter 2.

Table 12.4 Market failure susceptible to public intervention.<sup>139</sup>

	Structural/nonstrategic	Behavioural/strategic
<b>Excessive market power</b>	<p><i>Cell 1</i></p> <ul style="list-style-type: none"> <li>– Bainain entry barriers: High and sunk fixed with uncertainty</li> <li>– Stiglerian entry barriers: Important absolute cost advantages (e.g., switching costs)</li> <li>– Legal barriers</li> <li>→ <i>One-way access (access model)</i></li> </ul>	<p><i>Cell 2</i></p> <ul style="list-style-type: none"> <li>– Reinforcement of dominance</li> <li>– Vertical leveraging</li> <li>– Horizontal leveraging</li> </ul>
<b>Externality</b>	<p><i>Cell 3</i></p> <ul style="list-style-type: none"> <li>– Network effects</li> <li>– Two-sided markets</li> <li>→ <i>Two-way access (interconnection model)</i></li> </ul>	<p><i>Cell 4</i></p> <ul style="list-style-type: none"> <li>– Strategic network effects (e.g., loyalty program or tariff mediated externality)</li> </ul>
<b>Information asymmetry</b>	<p><i>Cell 5</i></p>	<p><i>Cell 6</i></p>

sector regulation, consumer law) that they must combine in the most efficient way. Specifically, to find the appropriate balance between competition law and sector regulation, regulators should determine the main differences between both instruments, confront them with the market failures to be dealt with and accordingly decide which instrument is the most efficient in solving the market failure.

According to the present author,<sup>140</sup> the two principal and related substantive differences are that (1) sector regulation mainly deals

<sup>139</sup> This table is only a stylized and static view of the market reality that is more a starting point to raise the relevant questions than a checklist to provide definitive answers on the scope of public intervention. Telecommunications markets are intrinsically dynamic and a rationale based on static view may lead to inappropriate and overinclusive public intervention. For instance, a high level of market power does not always lead to long term inefficiencies justifying intervention.

<sup>140</sup> On the differences between sector regulation and antitrust law, see also Laffont and Tirole (2000, pp. 276–279), Katz (2004), and Temple Lang (2006). Many authors consider the main difference is that antitrust law aims at maintaining the level of competition whereas sector regulation aims at increasing the level of competition. According to the present author, the difference is not always verified in practice as some antitrust decisions (in particular merger decisions) and that has been endorsed the community courts.

01 with unsatisfactory market structures whereas competition law deals  
02 with unsatisfactory firms' behaviours, and (2) the burden of proof  
03 for sector regulation to intervene on the selected markets<sup>141</sup> is lower  
04 than in the case of antitrust law. The main institutional difference  
05 is that (3) sector regulation is only applied by national authorities,  
06 whereas antitrust law is applied by European authorities as well (the  
07 Commission).

08 Because of the *first* difference (related to structure and  
09 behaviours), it is efficient that sector regulation deals with structural  
10 market failures and competition law deals with behavioural ones.  
11 Because of the *second* difference (related to the burden of proof), it  
12 is efficient that the factor used to select markets for regulation is set  
13 at a very high level because once a market area is selected, interven-  
14 tion is relatively easy. In other words, the regulation should focus  
15 on market where the risks of type I errors (false condemnation) are  
16 low and the risks of type II errors (false acquittal) are high.<sup>142</sup> This  
17 is especially important because the costs of type I errors are large in  
18 dynamic markets.<sup>143</sup> Taking both arguments together, any possible  
19 regulation should be limited to cells 1 and 3 of Table 12.4, that is, struc-  
20 tural market failures due to excessive market power and externalities.

21 Because of the third difference (related to institutional design),  
22 it might be justified that antitrust law applies in addition to sector  
23 regulation when NRAs have not performed their tasks adequately.<sup>144</sup>  
24  
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26 <sup>141</sup> The burden of proof for sector regulation to intervene is high when all steps of  
27 Table 12.1 are considered, but is low when steps 1 and 2 are passed.

28 <sup>142</sup> I link here the burden of proof to intervene with the risks and the costs of type  
29 I and type II errors, following the tradition of the Chicago School recently revived  
30 by *inter alia* Evans and Padilla (2004).

31 <sup>143</sup> Hausman (1997) valued the delay of the introduction of voice messaging  
32 services from late 1970s until 1988 at US\$ 1270 million per year by 1994, and  
33 the delay of the introduction of mobile service at US\$ 100 000 million, large  
34 compared with the 1995 US global telecoms revenues of \$180 000 million/year.

35 <sup>144</sup> That was the case in the decision *Deutsche Telekom*. However, it is a better  
36 institutional design that regulatory decisions are controlled by judicial bodies (a  
national court or ultimately the European Court of Justice) instead of an antitrust  
authority: Larouche (2005, p. 175) and Petit (2005, p. 198).

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01 The question is then whether those optimal rules are followed.  
02 The practice under article 82 EC is in line with the rules as the Com-  
03 mission and the NCAs passed the case to the NRAs when possible  
04 and only decided the case when the regulators could not intervene or  
05 were intervening unsatisfactorily. The practice of the merger regu-  
06 lation also respects the rules as under the previous rigid 1998 sector  
07 regulation (where the possibility to impose regulation was limited)<sup>145</sup>  
08 the Commission imposed many obligations to complement NRA,  
09 whereas under the current 2003 sector regulation (which is more  
10 flexible to impose regulation) the Commission imposes less merger  
11 remedies.

12  
13  
14 **12.5.2 The optimal institutional coordination**

15  
16 An optimal coordination between the many institutions involved in  
17 the regulation of the electronic communications is primordial given  
18 the overlapping jurisdictions between several authorities, hence the  
19 risks of forum shopping by complainants, increased regulatory costs,  
20 or conflicting decisions.<sup>146</sup>

21 First, the mechanisms for *horizontal coordination* between the  
22 NCAs of the twenty-five member states(i.e., the European Com-  
23 petition Network and the important role of the Commission *as*  
24 *primus inter partes*) are sufficient given their already strong Euro-  
25 pean attitude. However, the mechanisms for horizontal coordination  
26 among the NRAs of the twenty-five member states(i.e., ERG) are  
27 insufficient because they are much less Europeanized than their  
28 antitrust counterparts.<sup>147</sup> Thus, coordination mechanisms should be

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31 <sup>145</sup> On this regulatory framework, see Garzaniti (2000), and Larouche (2000).

32 <sup>146</sup> On the need for coordination see: Larouche (2005, pp. 166–170), and Petit  
(2005, pp. 182–187).

33 <sup>147</sup> This is partly due to the fact that most NCAs have been created after that  
34 the Commission has played a substantial role in applying and modelling the  
35 competition law, whereas NRAs have been created before that the Commission  
36 play an active role in modelling the sector regulation.

01 reinforced, possibly with the creation of a European regulatory  
02 authority.

03 Second, the mechanisms for *vertical coordination* between the  
04 Commission and the NCA (i.e., possibility of decess of the Com-  
05 mission and infringement procedures) are sufficient. However, the  
06 mechanisms for coordination between the Commission and the  
07 NRAs (i.e., Commission review and infringement procedure) are  
08 insufficient because they are weaker than those antitrust coordina-  
09 tion mechanisms and yet NRAs are less Europeanized. Thus, they  
10 should be strengthened to achieve an internal market for electronic  
11 communications.

12 Third, the mechanisms for *transversal coordination* between the  
13 NCA and the NRA of a specific country need to be reinforced  
14 in most of the member states. There is no optimal model as such  
15 relationships depend very much on the institutional characteristics of  
16 each country,<sup>148</sup> but improvements may be achieved by integrating  
17 the NRA inside the NCA (as done in New Zealand) or by having a  
18 clearer division of tasks between authorities.<sup>149</sup>

19 Fourth, the mechanisms for *diagonal coordination* between the  
20 Commission and the NRA of each member state need to be clarified,  
21 possibly by a better division of tasks between authorities.

## 22 23 12.6 CONCLUSION

24  
25 To conclude,

26 Antitrust authorities are justified to intervene more strictly in elec-  
27 tronic communications sector (or more generally network industries),  
28 but their interventions should always be based on sound economic  
29 rationale and the same extensive approach should not permeate other  
30 sectors of the economy.

31  
32  
33 <sup>148</sup> International Competition Networks (2006, pp. 26–29).

34 <sup>149</sup> Larouche (2005, p 176) proposes, on the basis of the experience so far, that the  
35 Commission and the NCAs would be in charge of the assessment of dominance,  
36 whereas the NRAs would be in charge of the choice of remedies.

01 Sector regulation is justified to be aligned on antitrust principles  
02 because of the institutional structure of the European Union, but it  
03 is only a second best, and alignment of concepts should not lead to  
04 an alignment of objectives. Indeed, the antitrust principles should  
05 neither be mystified (*Même la plus belle fille du monde ne peut*  
06 *donner que ce qu'elle a*) nor demonized. These are like economic  
07 glasses to be put by a public authority, no more, no less. They  
08 do not evacuate the fundamental regulatory questions to be solved  
09 (what type of competition the regulator is aiming for? what is the  
10 timeframe of regulatory intervention?) and do not pre-empt on the  
11 objectives to be followed.

12 Sector regulation and competition law are converging but some  
13 important divergences remain, in particular regarding the burden of  
14 proof and the institutions in charge. Such divergences should deter-  
15 mine the scope of sector regulation which should only be applied  
16 when more efficient than antitrust, that is, when costs and the risks  
17 of type I errors are small and the costs and the risks of type II errors  
18 are large.

19 Sector regulation should respect good governance principles: flex-  
20 ibility, objectivity, transparency, harmonization, proportionality (in  
21 particular regulatory creep should be alleviated) and legal certainty.  
22 NRAs should be cautious not to automatically extend a regulatory  
23 approach suited for infrastructures laid down under legal monopoly  
24 conditions to new Schumpeterian infrastructures and should be less  
25 hypocritical about their actions (and not invoke the mantra of dereg-  
26 ulatory rhetoric when they are increasing regulation for good or for  
27 wrong/poor reasons).

28 The institutional design should be better taken into account when  
29 establishing the rules<sup>150</sup> and in particular the transversal coordination  
30 between regulatory authorities with overlapping competences should  
31 be developed.

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33  
34  
35  
36 <sup>150</sup> See in general Sapir (2004).

## APPENDIX

Table 12.5 Statistics of merger cases

	All cases			Electronic communications cases <sup>151</sup>		
	Total	With remedies	Prohibition	Total	With remedies	Prohibition
1990	12	0	0	0	0	0
1991	63	6	1	1	0	0
1992	60	7	0	3	0	0
1993	58	2	0	3	0	0
1994	95	4	1	6	0	1
1995	110	6	2	14	0	2
1996	131	3	3	12	1	0
1997	172	9	1	15	1	0
1998	235	16	2	26	2	2
1999	292	27	1	28	5	0
2000	345	40	2	56	9	1
2001	335	23	5	43	2	0
2002	279	15	0	17	1	0
2003	212	17	0	9	2	0
2004	249	16	1	13	0	0
2005	313	15	0	29	0	0
<b>TOTAL</b>	<b>2661</b>	<b>206</b>	<b>19</b>	<b>275</b>	<b>23</b>	<b>6</b>
	<b>100%</b>	<b>7.0%</b>	<b>0.6%</b>	<b>9.3%</b>	<b>8.4%</b>	<b>2.2%</b>

Source: European Commission.

<sup>151</sup> NACE code I.64.20 (telecommunications) and O.92.20 (radio and television activities).

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Table 12.6a List of *ex ante* decisions with remedies, under Merger Regulation and article 81 EC (as of April 2006)

Case	Date	No.	Legal basis (*)	Publication (**)	Cat***
<i>Eirpage</i>	18 Oct. 1991	32.737	81.3 EC	O.J. [1991] L 306/23	2
<i>BT/MCI</i>	27 July 1994	34.857	81.3 EC	O.J. [1994] L 223/36	1
<i>Atlas</i>	17 July 1996	35.337	81.3 EC	O.J. [1996] L 239/23	1
<i>Phoenix/Global One</i>	17 July 1996	35.617	81.3 EC	O.J. [1996] L 239/57	1
<i>RTL/Veronica/Endemol II</i>	17 July 1996	M. 553	8.2 MR	O.J. [1996] L 294/14	3
<i>BT/MCI (II)</i>	14 May 1997	M. 856	8.2 MR	O.J. [1997] L 336/1	1
<i>Unisource Obligations repealed in Unisource (II)</i>	29 Oct. 1997	35.830	81.3 EC	O.J. [1997] L 318/1	1
<i>Uniworl</i>	29 Dec. 2000	36.841		O.J. [2001] L 52/30	
<i>WorldCom/MCI</i>	29 Oct. 1997	35.738	81.3 EC	O.J. [1997] L 318/24	1
<i>NC/Canal+/CDPQ/ BankAmerica</i>	8 July 1998	M. 1069	8.2 MR	O.J. [1999] L 116/1	1
<i>BT/AT&amp;T</i>	3 Dec. 1998	M. 1327	6.2 MR		
<i>TPS</i>	30 March 1999	JV. 15	8.2 MR		1
<b>Upheld in Metropole</b>	3 March 1999	36.237	81.3 EC	O.J. [1999] L 90/6	3
<i>Cégétel+4</i>	<b>18 Sept. 2001</b>	<b>T-112/99</b>		<b>ECR [2001] II-2459</b>	
<i>Vodafone/AirTouch</i>	20 May 1999	36.592	81.3 EC	O.J. [1999] L 218/14	1
<i>AT&amp;T/MediaOne</i>	21 May 1999	M. 1430	6.2 MR		2
<i>Télécom Développement</i>	23 July 1999	M. 1551	6.2 MR		1
<i>BiB/Open</i>	27 July 1999	36.581	81 EC	O.J. [1999] L 218/24	1
<i>Telia/Telenor</i>	15 Sept. 1999	36.539	81.3 EC	O.J. [1999] L 312/1	3
<i>Orange/Mannesmann</i>	13 Oct. 1999	M. 1439	8.2 MR	O.J. [2001] L 40/1	1
<i>TelekomAustria/Libro</i>	20 Dec. 1999	M. 1760	6.2 MR		2
<i>BSkyB/KirchPayTV</i>	28 Feb. 2000	M. 1747	6.2 MR		1
<b>Upheld in ARD</b>	21 March 2000	JV. 37	6.2 MR		
<i>BT/Esat</i>	<b>30 Sept. 2003</b>	<b>T-158/00</b>		<b>ECR [2003] II-XXX</b>	3
<i>EADS</i>	27 March 2000	M. 1838	6.2 MR		1
<i>Vodafone/Mannesmann</i>	11 April 2000	M. 1745	6.2 MR		
<i>Vodafone/Vizzavi/Canal+</i>	12 April 2000	M. 1795	6.2 MR		2
<i>FranceTelecom/Orange</i>	20 July 2000	JV. 48	6.2 MR		3
<i>AOL/TimeWarner</i>	11 Aug. 2000	M. 2016	6.2 MR		2
<i>Vivendi/Canal+/Seagram</i>	11 Oct. 2000	M. 1845	8.2 MR	O.J. [2001] L 268/28	3
<i>YLE/TDF/Digita</i>	13 Oct. 2000	M. 2050	6.2 MR		3
<i>Pirelli/Telecom Italia</i>	21 June 2001	M. 2300	6.2 MR		3
<i>Modification remedies</i>	20 Sept. 2001	M. 2574	6.2 MR	IP/02/1183	1
<i>Telia/Sonera</i>	5 Aug. 2002				
<i>NewsCorp/Telepiù</i>	10 July 2002	M. 2803	6.2 MR		1
<i>DaimlerChrysler/DT</i>	2 April 2003	M. 2876	8.2 MR	O.J. [2004] L 110/73	3
<i>UK Network sharing</i>	30 April 2003	M. 2903	8.2 MR	O.J. [2003] L 300/62	3
<i>Network Sharing</i>	30 April 2003	38.370	81.3 EC	O.J. [2003] L 200/59	2
<i>Rahmenvertrag</i>	16 July 2003	38.369	81.3 EC	O.J. [2004] L 75/32	2

01 Table 12.6a (Continued)

	<b>Partly annulled in O2</b>	<b>2 May 2006</b>	<b>T-328/03</b>	<b>ECR [2006] II-XXX</b>	
04	<b>Germany</b>				
04	<i>Telenor/Canal+</i>	29 Dec. 2003	38.287	81.3 EC	3
05	<i>Telefonica/O2</i>	10 Jan. 2006	M. 4035	6.2 MR	2
06	<i>T-Mobile/tele.ring</i>	26 April 2006	M. 3916	8.2 MR	2

08 Table 12.6b List of ex ante decisions – prohibition

10	<b>Case</b>	<b>Date</b>	<b>No.</b>	<b>Legal basis</b>	<b>Publication</b>	<b>Cat</b>
12	<i>MSG Media Service</i>	9 Nov. 1994	M. 469	8.3 MR	O.J. [1994] L 364/1	3
13	<i>Nordic Satellite Distribution</i>	19 July 1995	M. 490	8.3 MR	O.J. [1996] L 53/20	3
14	<i>RTL/Veronica/Endemol (I)</i>	20 Sept. 1995	M. 553	8.3 MR	O.J. [1996] L 134/32	3
15	<b>Upheld in appeal</b>	<b>28 April 1999</b>	<b>T-221/95</b>		<b>ECR [1999] II-1299</b>	
16	<b>Endemol</b>					
17	<i>Bertelsmann/Kirch/Premiere</i>	27 May 1998	M. 993	8.3 MR	O.J. [1999] L 53/1	3
18	<b>Appeal removed</b>		<b>T-123/98</b>			
19	<i>Deutsche Telekom/BetaResearch</i>	27 May 1998	M. 1027	8.3 MR	O.J. [1999] L 53/31	3
20	<i>MCIWorldCom/Sprint</i>	28 June 2000	M. 1741	8.3 MR	O.J. [2003] L 300/1	1
21	<b>Annulled in MCI</b>	<b>28 Sept. 2004</b>	<b>T-310/00</b>		<b>ECR [2004] II-XXX</b>	
22	<b>WorldCom</b>					

24 Table 12.6c List of ex post decisions (article 82 EC)

26	<b>Case</b>	<b>Date</b>	<b>No.</b>	<b>Legal basis</b>	<b>Publication</b>	<b>Cat</b>
28	<i>British Telecom</i>	10 Dec. 1982	29.877	82 EC	O.J. [1982] L 360/36	1
29	<b>Upheld in appeal</b>	<b>20 March 1985</b>	<b>41/83</b>		<b>ECR [1985] 873</b>	
30	<i>Deutsche Telekom</i>	21 May 2003	37.451	82 EC	O.J. [2003] L 263/9	1
31	<b>Appeal pending</b>		<b>T-271/03</b>			
31	<i>Wanadoo</i>	16 July 2003	38.233	82 EC		1
32	<b>Appeal pending</b>		<b>T-340/03</b>			

33 (\*) 6.2 MR: Merger Regulation, remedies in phase I; 8.2 MR: Merger Regulation, remedies in phase II; 81.3 EC: EC Treaty, individual exemption.

34 (\*\*) If no mention, the decision is published on the web site of DG Competition.

35 (\*\*\*) Category 1: Fixed (including Internet or cable) or fixed and mobile services; category 2: Mobile services; category 3: Content-related services.

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01 Table 12.7 SMP analysis in the twenty-five member states (as of April 2006)

	A	B	C	D	D	E	E	E	F	F	H	I	I	L	L	M	N	P	P	S	S	S	C	U	
	T	E	Y	E	K	E	L	S	I	R	U	E	T	T	U	T	L	L	T	E	I	K	Z	K	
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23 **Legend**

24	Regulation
25	No regulation
26	SMP designation, but remedies not yet decided
27	Not yet decided

**V: Commission veto**

28 **Statistics:** phase I without comments: 33 per cent; phase I with comment: 65 per cent; phase II  
 29 accepted: 0.6 per cent; phase II vetoed: 1.5 per cent.

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