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# Applying EC competition law to alliances in the telecommunications sector

**Melpomeni Styliadou**

**Ensuring the emergence of competition in the telecommunications sector is not an easy task. Liberalization should not be undermined by the anticompetitive behaviour of some of the biggest players. On the other hand, innovative services at low prices can only be achieved through economies of scale and scope. The paper analyses the positions taken by the EC Commission with regard to these issues and discusses: (1) Why some strategic alliances were permitted when others were prohibited? Have 'media' alliances received a stricter treatment than alliances confined to 'pure telecom' alliances? Why? (2) Do the positions adopted by the Commission in these decisions reflect a pure implementation of anti-trust rules or that industrial policy considerations have prevailed? © 1997 Elsevier Science Ltd.**

The author may be contacted at Rowe & Maw, Square de Meeûs 35, 1000 Brussels (Tel: +32 2 502 55 17; Fax: +32 2 502 54 21).

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## Introduction

The political decision to liberalize telecommunications is clearly based on the assumption that market forces will be more successful than any regulator in lowering prices and improving the quality of telecommunication services. However, deregulatory measures alone are not likely to ensure the emergence of these forces. Further positive measures, either by the application of antitrust rules or the imposition of additional regulations, will be essential.

The nature of the telecommunications business is such that successful penetration by new entrants, and their subsequent survival, depends to a very large extent on harmonious cooperation with the incumbent operator who at the same time is their main competitor.

Furthermore, the globalization of international business together with the convergence of multimedia, information technology and telecommunications services creates two major trends in the market:

- Traditional TOs, successors to the former PTTs, feel threatened by the ongoing liberalization and react by forming international alliances that permit them to recuperate the loss of national profits by penetrating new markets in other parts of the world.
- Other economic operators not necessarily affiliated to the traditional telecommunications industry, see important market opportunities and try to benefit from them. Their usual line of action is to form a joint venture with another undertaking, normally from a non European country, with some telecommunications experience.

All these alliances, joint ventures, traditional telecommunications operators and equipment manufacturers struggle to survive in a rapidly evolving environment, the main feature of which is the high degree of interdependence among the various competitors and in particular with the incumbent national operator in each country.

The obvious question that arises is the role of the regulator in this battle. Liberalization implies the political desire to see a multitude of operators emerging in each market, so that consumers are given the chance to choose among a wide range of alternative solutions. However, ensuring this emergence is difficult; on the one hand the biggest players struggle to keep their market shares, and on the other rapid technological evolutions lead to the globalization of the markets and the subsequent possibility for telecom operators to compete beyond their traditional national markets, at a world level.

Liberalization should not be undermined by the anticompetitive behaviour of some of the biggest players. On the other hand, innovative services at low prices can only be achieved through economies of scale and scope. Clearly regulators are asked to take some difficult decisions.

## Strategic alliances

### *The facts*

Major telecom alliances in Europe can be divided into two main categories:

(a) Alliances between telecom operators and non telecom companies. This is a rather broad category which can be further divided into two subcategories:
  (i) Alliances intended to permit telecom operators from one country to benefit from the forthcoming liberalization of voice telephony and telecommunications infrastructure in another country. In this case telecom operators have normally opted for a domestic partner, capable of providing to the venture either a strong financial basis (a bank) or an existing network (energy companies).
  (ii) Alliances intended to permit telecom operators to benefit from market opportunities created by new technologies and the convergence between telecommunications and the media industry. The partners in this case have come mainly from the media business.

(b) Alliances between telecom operators. The main objective of these alliances is the provision of advanced telecommunication services to corporate clients. Arguably this is likely to be the most profitable segment of the telecommunications markets. At the same time, this is also the segment in which most competition is likely to emerge.

### *The law*

Under EC law, strategic alliances between big corporations are likely to either fall within the scope of the Merger Regulation[1] or be caught by Article 85 of the Treaty.[2]

*Article 85.* Article 85 of the Treaty of Rome prohibits agreements or concerted practices involving more than one party and having as an effect the restriction of competition in the relevant market and an effect on inter-state trade. However, it also empowers the Commission to grant an exemption to those agreements or concerted practices whose economic benefits outweigh their restrictive effects.

[1]Council Regulation (EEC) No 4064/89 of 21 December 1989 OJ L395, 30.12.1989.
[2]However, it should be noted that transactions of purely national character or of lesser importance may fall under the jurisdiction of the national competition authority.

Alliances described under (b) are likely to fall within the scope of Article 85. These alliances consist in the creation of a joint venture between two or more competitors, who decide to join forces to enter the market in advanced telecommunication services. Arguably the economic strength of these operators together with their knowledge of the markets would permit them to enter these markets alone.

Furthermore, the parent companies of these joint ventures remain independent competitors on neighbouring markets. The joint venture may thus serve as a cooperation vehicle, enabling its parents to co-ordinate their activities in the markets where they remain competitors. As a result, the establishment of the alliance is likely to reduce the level of actual and potential competition in a number of markets.

As already mentioned, agreements restricting competition may still be granted an exemption by the Commission. The decision to grant an exemption relies on the following criteria:

- The agreement improves the production or the distribution of goods or promotes technical and economic progress in the immediate interest of consumers.
- The restrictions imposed are necessary for the attainment of these objectives.
- The restrictions of the agreement do not result in the elimination of competition in the relevant market.

*The Merger Regulation.* The Merger Regulation enables the Commission to monitor all mergers and acquisitions above certain thresholds, irrespective of whether the companies involved are actual or potential competitors. The regulation empowers the Commission to prohibit those which are likely to create or strengthen a dominant position and to stifle competition in the market.

Apart from mergers and acquisitions the Merger Regulation also applies to so called 'concentrative' joint ventures. These are ventures, jointly controlled by the parents, who do not have as an object or effect the coordination of the parents' behaviour in the markets where they remain independent. The establishment of these joint ventures is only likely to distort competition if it leads to the creation or strengthening of the dominant position of either the parents or the joint venture itself.

In the telecom sector the Merger Regulation is mainly applicable to joint ventures between telecom and non-telecom companies, described under (a) above. A telecom company and a bank or an electricity company may not use their joint venture as a vehicle for coordination of their activities in the telecom and banking sectors respectively.

The Merger Regulation may also be applicable if two telecom companies establish a telecom joint venture in a geographic area where neither of them has any operations. This was the case for a joint venture established by Tele-Danmark, British Telecom and Telenor AS[3] to offer voice and data telecommunication services throughout Sweden. The possibilities for this joint venture to serve as a vehicle for the coordination of its parents' activities were minimal.

Although it may appear surprising at first glance, the establishment of a joint venture between companies operating in different economic sectors often creates or strengthens the dominant position of either the parents or the joint venture itself. This is particularly the case if the parents and the joint venture operate in vertical markets.

[3]Case No IV/M. 570—TBT/BT/Tele Danmark/Telenor, adopted by the Commission 24 April 1995.

For example, a satellite operator and a programme producer may reinforce their dominance in their respective markets if they establish a joint venture which provides satellite TV. This is likely to happen if:

(i) The programme producer grants exclusivity for its most popular programmes to the joint venture. This is likely to make the joint venture a rather popular satellite TV provider.
(ii) The joint venture buys all its requirements for satellite capacity from its parents (the satellite operator).

The immediate consequences are likely to be:

(i) Other programme producers will be keen to have their programmes distributed by the joint venture in order to benefit from its popularity. As a result, the satellite operator is likely to increase its business significantly and thus reinforce its dominance (since it is the exclusive supplier of satellite capacity to the joint venture).
(ii) The joint venture is likely to favour its parent, the programme producer, by providing better time slots or other beneficial terms which will increase its popularity and reinforce its dominance.

## Alliances examined under Article 85

The Commission has examined a number of alliances between telecom companies under Article 85. Most of these have been notified by the parties in order to obtain an exemption. However last year the Commission started own-initiative investigations on joint ventures providing online services and consortia intending to provide satellite mobile services. Unfortunately, very little information is publicly available on the exact scope of these alliances or the views reached by the Commission and therefore they can only be briefly discussed.

The present paper will mainly focus on alliances formed between telecom operators and having as their object joint entry into the market of telecommunication services for multinational corporate clients. Until now, there have been three ventures which fall within this category: BT–MCI, France Telecom–Deutsche Telekom and US Sprint and finally the Unisource and Uniworld joint ventures formed firstly by PTT Netherlands, PTT Switzerland, Telia and Telefonica and secondly by Unisource and AT&T.

The Commission has already granted an exemption to the BT–MCI alliance and the alliance between France Telecom–Deutsche Telekom and US Sprint. Rumours have it that the Unisource–Uniworld deals are also likely to be exempted subject to a number of conditions of both political and legal nature. However, given the very limited amount of information publicly available on this alliance, it is not possible to carry out any legal analysis.

Despite a certain number of similarities, these alliances are quite different from each other.

### *British Telecom–MCI (Concert)*[4]

The BT–MCI joint venture was established in order to address the market of "value added and enhanced services to large multinational corporations". The joint venture would only address the international needs of these customers. The intra-national needs would be met by the parent companies. The two parents undertook the obligation to license to their

[4]Commission decision 94/579/EC, OJ L 223/36 27.8.94.

joint venture all technical information and intellectual property rights needed to carry out its activities and to withdraw themselves from the provision of similar services. However, the joint venture was prevented from having any direct contacts with clients. The services of the joint venture were to be distributed in the Americas exclusively by MCI and in the rest of the world exclusively by BT.

In addition to the joint venture agreement, the parties also agreed not to enter each other's territory. As a result, both BT and MCI would lose a substantial number of rights if they decided to start or continue any business in competition with the core business of the other party in that other party's territory.

The Commission considered that the joint venture restricted competition since both parties were capable, at least to a certain extent, of entering this market alone. Furthermore, as a result of the loss of rights provision, competition was also restricted in the market of core telecommunication services where the possibilities for the parties to compete with each other were even higher.

However, the Commission decided to grant an exemption for these restrictions for 5 years. It justified its decision with the following arguments:

- There is an increasing demand by big multinationals for new "enhanced global and seamless telecommunication services".
- Telecommunication services provided over several networks with different switching systems rarely give the impression of being seamless. Truly seamless communications are more likely to be achieved if there is only one switching system involved. In the case of global communication services, this is possible if the provider of these services only leases transmission capacity from the local operators all over the world, to which it adds its own switching systems and software.
- The provision of seamless global telecommunication services to big multinationals involves tremendous investment, very complex organization and some rather sophisticated know-how and technical capabilities. The scale and complexity of the venture is likely to be beyond the technical and financial capabilities of most telecom companies. The international character of the business adds further difficulties. Traditionally TOs (especially Europeans) have no or very little experience of doing business abroad.
- The market for cross-border 'enhanced and value added services to big multinationals' is a global one. Competition in this market would come from companies like AT&T Worldsource (Worldpartners) and Eunetcom (the first joint venture of France Telecom and Deutsche Telekom), from major TOs, from computer and data processing companies (like IBM, DEC and EDS) and from information service companies (like GEIS and CompuServe).
- The 'loss of rights provision' was justified as being indispensable for establishing a certain level of confidence between the parties and for permitting them to cross-license some of their most valuable software.

The Commission analysis of the markets seems sound. The nature of the business together with the needs and size of the potential customers suggest the existence of a global market. A considerable number of major players are likely to provide effective competition to the BT–MCI joint venture. Hence the exemption of the joint venture agreement appears to be an obvious decision.

However, the arguments justifying the exemption of the 'loss of rights' clause are open to criticism. The parties had agreed to cross-license each other the necessary technology for the provision of 'enhanced and value added services' to intranational customers. Arguably this exchange presupposes a certain level of mutual confidence which can only be achieved if all threats of potential competition in the market related to this technology have been eliminated. However, no exchange of technology had been contemplated for the provision of 'core telecommunication services'. So why was it 'indispensable' to prevent each other from competing in the core telecommunications business area?

The answer to this question is likely to be based more on political than on legal grounds. This alliance was an excellent opportunity for a European TO, an old monopolist, to work closely with a telecom company used to operating in a highly competitive environment and to learn from its experience. BT would be able to explore new markets and technologies in a relatively safe way. Through this venture, BT ceased being the old PTT of the UK and started becoming a major international player in the telecommunications business.

Another interesting point in this decision is the Commission's readiness to accept that the regulatory frameworks in both the USA and the UK provided sufficient safeguards against the possibility of cross-subsidization and/or discrimination in the terms and conditions for access to the MCI and BT networks respectively.

In particular in the UK, at the time of the decision, BT's share of the voice telephony market amounted to 90%. Its share in the transmission capacity market was similar, if not bigger. As a result, there was a real risk that BT would discriminate in favour of the joint venture or would subsidize its activities by revenues originating in the markets where it had a dominant position. The Commission, however, considered that the regulatory constraints enforced by Oftel were sufficient to deter BT from any attempt to discriminate or to cross-subsidize.

### *France Telecom–Deutsche Telekom–US Sprint*

The alliance between FT, DT and US Sprint involves two joint ventures: *Atlas* (or Number One as it has become commercially known), a joint venture created by FT and DT and *Phoenix*, established by all three partners jointly at the time of writing this paper. The Commission's formal decisions, granting an exemption to both joint ventures had not been published yet. However, the reasoning underlying these decisions had been made known in an earlier notice, published in December 1995. In this notice the Commission had already made known its intention to grant an exemption to these joint ventures subject to a number of conditions, of both legal and political nature. The positions and analysis contained in the December Notice have indeed been maintained in the final decisions.

The scope of the Atlas/Phoenix alliance appears broader than that of the BT–MCI alliance. For reasons of clarity, we will examine these two ventures separately:

*Atlas.*[5] The Atlas venture is intended to address the market for value added services to corporate users both Europe-wide and nationally. The

[5]Commission Decision (96/546/EC), OJ L 239/23 dated 19 September 1996. Commission Notice 95/C 337/02 published OJ C337 15 December 1995.

Commission considered in its Decision that the markets relevant to this joint venture were:

(a) the market for advanced telecommunication services suitable for big multinationals; and
(b) the market for standardized low-level packet switched data communication services, which are also of interest to SMEs or smaller companies who cannot afford to lease a dedicated circuit.

Clearly the Atlas package of services differs from the BT–MCI package. Atlas intends to provide both intranational and European but not global services. Furthermore, the nature of the services to be provided suggests that it will target both multinational companies and smaller corporations.

Another major difference between Atlas and the BT–MCI venture is the degree of liberalization in the home markets of the parent companies. The UK and US regulatory environments are clearly more liberal than the French and German ones. The Commission was particularly concerned by the lack of competition in the infrastructure market in these two countries, as a result of which all competitors to Atlas would have no choice but to lease capacity or to interconnect with the Atlas parents.

Under the original agreement, the parties undertook the obligation to transfer to the joint venture their national public switched data networks (Transpac in France and Datex P in Germany). However, further to the Commission's intervention this clause had to be deleted. Hence the Transpac France and Datex P subsidiaries will remain independent entities, providing public X.25 packet-switched network services within France and Germany respectively.

The reasoning underlying the decision to grant an exemption has been along the lines of the following:

- by combining their technology and expertise the parties are likely to provide a better quality product than they could provide individually;
- the markets to be addressed by the joint venture are relatively new. For the moment, the parents do not hold particularly strong positions there;
- the parents will be deterred from cross-subsidizing the joint venture and providing it with more favourable terms for access to their network by the conditions laid down in the Commission Notice. This will be monitored by the Commission services themselves.

The markets targeted by Atlas are national and European. In some the position of the parents is quite strong. According to the Commission Notice, the aggregate market share of DT and FT in the French VPN[6] market is 93%, and their share in the French market for end-to-end services is not less than 60%.

However, the biggest regulatory concern in relation to this alliance is the risk of discrimination and cross-subsidization. Both parents enjoy exclusive rights for the provision of voice telephony and infrastructure in two of the strongest and wealthiest European countries. This would mean that all Atlas competitors would be obliged to lease capacity and negotiate interconnection agreements with the Atlas parents. The risk of discrimination could not be more obvious.

In reply, the Commission announced that the deal could not be exempted unless alternative infrastructure was liberalized in both

[6]It is noteworthy that VPN services represent in terms of value nearly 50% of the estimated size of the advance corporate telecommunications services market (paragraph 15 of the Commission Notice on Atlas (95/C 337/02)).

Germany and France. The French and German governments readily undertook the commitment to achieve this before July 1996.

However, even if alternative infrastructure is liberalized, the risks of discrimination and cross-subsidization are not eliminated. FT and DT control both the public voice telephony and public data networks of their home countries. All Atlas competitors will still need to negotiate the terms for interconnection to these networks with the Atlas parents. Among other things, this will also provide the parents with an invaluable amount of confidential information on the technology and marketing strategies of these companies.

In the Commission Decision on Atlas, the French and German governments undertook the commitment to enforce regulations designed to address any risks of discrimination. However the state ownership of both DT and FT significantly reduces the credibility of these statements. Ironically, in the case of both France and Germany, the ultimate boss of both the operator and the regulatory authority is the same person, the Minister of Telecommunications.

*Phoenix.*[7] The Phoenix venture targets the markets for global value added services to corporate users, traveller services and the so called carrier's carrier services.

These markets are all of a global nature. As a result, the risk of eliminating competition at a horizontal level is not significant. The number and size of carriers all over the world providing similar or identical services creates the reasonable expectation that a sufficient level of competition will be maintained.

However, at a vertical level the Phoenix joint venture is likely to create similar concerns to Atlas. The risk of DT and FT discriminating in favour of their joint venture or using profits generated in the voice telephony market in order to subsidize it, would be no less significant if their alliance was confined to the creation of Phoenix.

### *Own initiative investigations*

*Online services.* The Commission last year launched an in-depth investigation into the online joint ventures, starting with 'Europe Online'. This joint venture was established by four of Europe's largest publishing groups (Burda, Matra-Hachetter, the Pearson Group and Germany's press group, Springer–Verlag) in cooperation with two telecom providers (Meigher Communications and an AT&T subsidiary, Interchange Online Network).

A second investigation concerned America Online, a joint venture involving Bertelsmann, AOL and Deutsche Telekom.

Although no formal decision has been adopted in either of these cases, the Commission's interest has reportedly[8] focused on three main points:

- Will other online service providers have access to the publications controlled by the partners?
- Will other publications not belonging to the partners of the joint venture have access to its subscribers at conditions similar to those enjoyed by the partners' publications?
- Are there any other anti-competitive agreements likely to stifle the development of online services?

*Global mobile satellite systems.* The Commission also started last year an in-depth examination of the strategic alliances designed to offer mobile

[7]Commission Decision (96/547/EC) OJ L 239/57 dated 19 September 1996. Commission Notice 95/C 337/3 published OJ C337 15 December 1995.
[8]Commission press release dated 19 September 95.

satellite telecommunication services on a worldwide basis. It has publicly announced[9] that its main concern here is to safeguard competition in the downstream markets, namely local service provision, distribution and equipment supply.

The Commission has so far only expressed an initially favourable view with regard to two of the systems examined, Inmarsat-P and Iridium.[10] No formal position has been taken on the other satellite alliances (Iridium, Globalstar, Odyssey).

## Alliances examined under the Merger Regulation

The Commission has examined a number of alliances involving telecommunications companies under the Merger Regulation. Those cases presenting the most interesting legal issues were related to pay TV. Interestingly they were both prohibited.

### *MSG media*[11]

This case concerned the setting up of a joint venture by Deutsche Telekom, Bertelsmann AG and Taurus Beteiligungs GmbH, intended to provide digital pay TV services. The Commission considered that such provision involved, in reality, three distinct activities:

(a) *Technical and administrative services*: these services form the basis on which pay TV can actually be provided. They include the installation of decoders, the elaboration of encryption systems and handling of conditional access, subscriber management in respect of TV customers and the settlement of accounts with programme suppliers.
(b) *Pay TV*: several TV programmes are compiled into a 'package', made available to the public for payment.
(c) *Cable TV networks*: this network is used for distribution of TV channels. Pay TV can also be distributed through satellites. However, customers who are already plugged into a cable TV network are not likely to want to invest in another type of transmission.

The Commission considered that as a result of this joint venture, competition was likely to be eliminated in Germany in all of these markets. The decision was justified on the following grounds:

*(a) Technical and administrative services.* The undertakings most likely to penetrate the market for back-up facilities for the provision of digital pay TV are cable operators or pay TV providers. The only pay TV (analogue) provider in Germany is Premiere, a joint venture created by Bertelsmann and Kirch. On the other hand, Deutsche Telekom is the owner of the broadband cable network and controls thereby the main means of transmission providing the return channel required for interactive digital television.

Through Premier, Bertelsmann and Kirch already have an established customer base for pay TV. Furthermore, Kirch is the leading German supplier of feature films and entertainment programmes for television. As a result, MSG will probably benefit from economies of scale (subscriber base and number of programmes handled). On the other hand, Telekom's participation in the joint venture allows MSG to provide pay TV suppliers with the necessary user contracts for Telekom's broadband cable networks.

[9] XXVth Report on competition policy (1995), par. 59.
[10] Commission Notice 95/C 304/06 dated 15 November 95 and Commission Decision (97/39/EC) OJ L 16/87 dated 18 January 1997.
[11] Commission Decision 94/922/EC OJ L 364/1 31 December 94.

In light of the above, the Commission considered that the joint venture was likely to obtain a durable dominant position in Germany.

*(b) Digital pay TV.* Since Kirch is a leading programme producer, MSG could offer attractive packages of pay TV programmes more easily than potential competitors.

Furthermore, MSG's potentially strong position as operator of a digital infrastructure for pay TV would mean that potential pay TV suppliers may buy the underlying services from their main competitor. The Commission considered that this created a serious risk of MSG discriminating in favour of its parents.

*(c) Cable TV.* The successful entry of a cable TV operator depends on the popularity of the programmes it distributes. As a result of the joint venture, Deutsche Telekom would benefit from privileged access to the Bertelsmann and Kirch programmes. As mentioned before, the Commission considered Kirch and Bertelsmann to be the leading programme producers in Germany. Therefore potential competitors to Deutsche Telekom would be deterred from entering the market if the most popular programme producers were allied with their major competitor.

### *Nordic satellites*[12]

In this case, Norsk Telekom AS (NT), Tele Danmark A/S and Industriforvaltinigs AB Kinnevik (Kinnevik) notified to the Commission the creation of a joint venture under the name Nordic Satellite Distribution (NSD). The object of the venture was to provide transponder capacity, and transmit and distribute satellite TV channels to the Nordic market.

Kinnevik is a Swedish private group of companies with activities in several sectors including television broadcasting and the distribution of satellite TV. Kinnevik owns the most popular TV channels in the Nordic countries. Tele Danmark was at the time the monopolist cable TV owner in Denmark (cable TV was not yet liberalized). Norsk Telekom owns through its parent, Telenor AS, a large cable network in Norway. Telenor is also an important satellite operator.

The main activities of the joint venture were:

- negotiating agreements with programme providers;
- creating a package of programmes suitable for the Nordic countries; and
- distributing the package via satellite to direct-to-home and cable TV markets.

Satellite TV programmes are received by the end customers in three ways: (a) by small dishes installed in each household (direct to home households), (b) through cable TV operators, or (c) through SMATV operators. In the first case the satellite operator negotiates directly with the end customer. In the other two, the satellite operator enters into an agreement with the cable operator or the SMATV operator who then retransmits the TV signal to the end customers.

The Commission considered that the operations of the joint venture would affect three separate markets:

(a) *The provision of satellite transponder capacity*: the popularity of Kinnevik programmes would mean that most households would turn their dishes towards the NSD satellites. Furthermore, other producers would want their programmes distributed by NSD in

[12]Commission Decision 96/177/EC, OJ L 53/20 2 March 96.

order to have them included in the same package as the Kinnevik channels, and to benefit from the relation between NSD and the major cable TV companies in Norway and Denmark. Hence, no business opportunities would be left for potential competitors.

(b) *Distribution of pay-TV to direct-to-home households*: as NSG would be the distributor of the very popular Kinnevik channels, the possibility of other distributors developing packages of programmes equally as popular appeared remote.

Furthermore, by controlling the satellite transmission market, NSG would be able to discriminate against programmes distributed by competing undertakings and so oblige programme producers to prefer the NSG distribution services.

(c) *Operation of cable TV networks*: NSG would be in a strong negotiating position towards cable operators since it would provide the Kinnevik programmes. Given its own interests in the cable TV market (all three parents have interests in a cable operator), NSG would have a strong incentive to discriminate in favour of the cable companies owned by the parents.

## Conclusion

At first glance, the Commission appears to have taken a strikingly different approach in the cases examined under Article 85 and those examined under the Merger Regulation. In the first case, it has appeared rather lenient; in the second it has adopted a more draconian attitude. Are the rules laid down by Article 85 and the Merger Regulation different or is this simply a sign of inconsistency? The answer to both questions is probably negative.

Both Article 85 and the Merger Regulation seek the same objective and serve the same policy, namely the safeguarding of competition in the EC. However, Article 85 and Merger Regulation cases present some important differences, starting with the markets of the contemplated joint ventures. In the first cases, the joint ventures would provide telecommunication services; in the second, pay TV.

Telecommunication services is an increasingly global market with reportedly huge business opportunities. There is a considerable number of big players all over the world trying to take advantage of the opportunities created by the recent liberalization and the latest technologies. The customers, mainly big multinationals, have the means and experience to identify among all these competitors those who will best respond to their needs. Competition is therefore likely to become increasingly fierce.

The growth possibilities in pay TV services on the other hand seem to be limited by linguistic and cultural barriers. Markets therefore remain national or regional. Furthermore the growth potential is not spectacular, since most customers are households, willing to pay only a limited amount of money for the service in question. On the other hand the entry cost is relatively high since installation of the necessary infrastructure for the provision of the service requires substantial investment.

However, despite their important differences, both telecom and pay TV joint ventures present strong elements of vertical integration, in particular in relation to their parents' operations. For telecom ventures, the parents are the providers of the telecom infrastructure and a series of services indispensable for the operations of the venture or of any other entity operating in the same market with it. In the pay TV venture, the parents were either important programme producers (Bertelsmann/Kirch in the case of MSG and Kinnevik in the Nordic Satellite case) or cable operators (Deutsche Telekom).

In the first case the Commission indicated that vertical integration was a potential source of problems but concluded that conditions imposed by regulatory means would suffice for addressing the problem. In the media ventures, on the other hand, the Commission considered that the parties' vertical integration created serious risks of anticompetitive behaviour, which no regulatory condition could successfully deter.

The blatant difference in the treatment of vertical integration in these two types of cases may be partially justified by the different nature of the market involved. The alleged huge growth potential of the telecom market is likely to attract big players who have the means and the knowlege to deal with anticompetitive behaviour. On the other hand, the more limited growth potential in the pay TV market is likely to deter potential competitors from fighting fiercely against anticompetitive practices.

Another important element, likely to underlie the Commission's decisions in the media cases, is the notion of pluralism. Dominance of a company in a market may prevent the market from full growth and therefore damage a community's economic interests; dominance in the media sector may also create serious political problems and be detrimental to democracy.

The Commission's sensitivity to the need to safeguard access to information has also been proved in the online cases. Again, the Commission's interest in the cases arose mainly out of its concern to ensure that all publications would have access to the online service and that there would be no exclusivity arrangement between the publications controlled by the parents and their online ventures.

The extent to which the Commission was correct in its assessments is difficult to judge, since it mainly depends on whether the markets will evolve as predicted. It can safely be said that the establishment of the media joint ventures was indeed likely to lead to the creation of a dominant position. It is much more difficult to agree with the Commission that all of the potential problems arising out of the vertical relationship between the telecom ventures and their parents will be adequately addressed through regulatory conditions.