Chapter 1 EC Practice of Defining Markets in the Media Sector

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A  Defining Relevant Markets at EC Level – The General Approach

I. General Remarks

Market definition plays a central role in EC competition law. The Court of Justice of the European Communities has stressed the importance of delineating the relevant market on numerous occasions. According to the Commission’s Notice on the Definition of Relevant Market for the Purposes of Community Competition Law the main function of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. More precisely, the objective of market definition is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behaviour and of preventing them from behaving independently of effective competitive pressure.

Market definition comes into play when market power is relevant and, in particular, where market shares are used to determine market power. Under Article 82 EC the question whether an undertaking has abused a dominant position can only be answered after the relevant market has been identified. Market definition is also needed to determine whether an agreement, a decision or concerted practices have as their object or effect the prevention, restriction or distortion of competition within the common market (Article 81 EC). Likewise, under Article 87 EC, the Commission has to define markets when looking into whether an aid granted by a Member State or through State resources distorts or threatens to distort competition. In secondary Community law, the Merger Regulation requires competition lawyers to identify the markets affected by a concentration. Despite the importance of market

1 This study like the previous study performed by Bird & Bird analyses the market definition practice in the media sector at EC level. The specific value of the present chapter lies in its review of the latest decisional practice of the European Commission (in particular of the decision in Newscorp/Telepiù and the UEFA Champions league decision) and the latest judgements delivered by the European Court of First Instance (ARD/Commission and Cableuropa). In addition, we also analysed in detail the market definitions used under the new regulatory framework for the electronic communications sector and their impact on market analysis under general competition law. In this context, we furthermore examined the uprising of the concept of interdependent markets in general and sector-specific competition law and its implications for market definition in the media sector.


4 1997 Notice on Market Definition (supra note 3), para. 2. See also Draft Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2002] OJ C 331/18, para. 6, hereafter referred to as “Draft Notice on the Appraisal of Horizontal Mergers”.


6 Apart from the Merger Regulation some other pieces of secondary Community legislation require market definition. Block exemptions, for instance, are not available to parties to agreements where the parties’ market share exceeds a certain threshold, see e.g. Article 3 Commission Regulation 2790/1999/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and
definition neither primary nor secondary Community law provide for a concept of how to define relevant markets. It has been left for the Community Courts and above all for the Commission to develop such a concept. The first part of Section A deals with the criteria which have been developed by the Commission when defining relevant markets (II).

Generally speaking, one could consider the task of defining markets to be the same no matter whether one has to identify a specific market under Article 81 EC, Article 82 EC or Article 87 EC or under the provisions of the Merger Regulation. Nevertheless, there are some differences in the way markets are defined under the different provisions of the EC Treaty and the Merger Regulation. These differences mainly stem from the fact that each of the provisions serves a different purpose and market definition is, thus, carried out corresponding to the various rationales of these provisions. However, as will be seen later these particularities of market definition in the various proceedings of EC competition law do not justify a separate analysis of the Commission’s market definition approach under every provision. Without suggesting that all these provisions operate in an identical manner and according to identical standards, it can be said that the different procedures do not result in completely different concepts of market definition. At the end of the day, apart from Article 87 EC all these provisions reflect a concern about the abuse or potential abuse of market power. The purpose of market definition is to identify the competitive constraints faced by firms, no matter what provision of Competition law is applied. Therefore, the Commission and the Courts will, generally, use the same criteria when defining markets.

Nevertheless, the particularities of each type of procedure might affect the outcome of market definition. Also, depending on the purpose of the provision applied the Commission will put more emphasis on one or the other criterion. This matter is addressed in Paragraph 12 of the Commission’s 1997 Notice on Market Definition:

“The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.”

Having analysed the criteria used by the Commission and the Community Courts when defining markets, a brief account of the particularities of market definition under the various provisions of EC competition law will be given (III.). Since the Commission’s decisional
practice under Article 87 EC in relation to market definition differs in some aspects from its
practice in cartel law this topic will be discussed separately (IV.).

II. A Critical Account of the Commission’s Approach to Market Definition in General
EC Competition Law

In 1997, the Commission published its Notice on the Definition of Relevant Market for the
Purposes of Community Competition Law which – apart from the Commission’s decisional
practice – serves as the main source for an analysis of the Commission’s approach to market
definition issues. The Notice itself claims to clarify the approach that the Commission has
historically taken when defining markets and also intends to improve transparency in the
development and application of EC competition law. Furthermore, the Notice has been
considered as signalling “a substantial improvement on the methods which have often been
used in the past” since it endorses a “more economic based approach” towards market
definition.

1. Brief Note on the Legal Status of the Notice

The paramount importance of the 1997 Notice on Market Definition in this respect
automatically gives rise to the question of its legal status. In addition to the legal instruments
explicitly mentioned in Article 249 EC, a numerous amount of other, untyped instruments
can be found in EC Community law, among those guidelines, communications or notices
issued by the Commission. These instruments are meant to structure the use of discretion by
the Commission or to clarify the Commission’s approach in respect of the interpretation of a
certain legal term thereby reducing legal uncertainty. They are often described as Community ‘soft law’ in order to express that they – with few exceptions have not direct
legal effect. As a rule, the Commission’s interpretation published in notices is neither legally
binding for the Community nor the national courts nor does it directly provide for individual
rights or duties. Therefore, a notice generally cannot be challenged directly with an action
for annulment (Article 230 EC).

12 See 1997 Notice on Market Definition (supra note 3), para. 1.
13 See 1997 Notice on Market Definition (supra note 3), paras. 4 and 5.
15 See A. Jones/B. Sufrin, EC Competition Law, at p. 41; see also W. Bishop, “Editorial: The Modernisation of
DG IV”, [1997] ECLR 481. See also P. Craig/ G. de Búrca, EU Law, at p. 1000.
17 For an account of the rather vague term ‘soft law’ see H. A. Cosma/R. Whish, “Soft Law in the Field of EU
Competition Policy”, [2003] EBLR 25 (27 et seq). See also F. Snyder, “Soft Law and Institutional Practice in
the European Community”, in: Martin (ed.), The Construction of Europe, p. 198 et seq.
18 Notices, guidelines or communications can, however, can have direct legal effects where they have a legal
basis. For this and other exceptions see H. Adam, Die Mitteilungen der Kommission: Verwaltungsvorschriften des Europäischen Gemeinschaftsrechts?, at p. 118.
19 J. Gundel (supra note 16), at p. 100. See also H. A. Cosma/R. Whish (supra note 17), at 52.
20 See J. Gundel (supra note 16), at p. 95.
21 See J. Gundel (supra note 16), at p. 95.
Notices, guidelines and communications, however, can be self-binding on the Commission in certain circumstances. For instance, the Court has constantly held, that the Commission can be bound by the guidelines and notices that it issues in the area of supervision of state aid where they do not depart from the rules in the Treaty and are accepted by the Member States\textsuperscript{22}. The CFI also ruled that the Commission may not depart from the rules which it has imposed on itself regarding access to the file in competition cases\textsuperscript{21a}. One could argue that this case law is limited to certain fields of Community competition law. In any case, it needs to be acknowledged that the less concrete the statements made in a notice are, the harder it will be to assign it any self-binding effect. As will be seen later, the 1997 Notice on Market Definition – despite trying to reduce legal uncertainty – leaves a lot of discretion to the Commission when defining markets under the competition rules of the Treaty. It can, therefore, be concluded with Whish that the Commission 1997 Notice on Market Definition does not have the force of law and ought not to be treated as a legislative instrument in the strict sense\textsuperscript{23}.

2. Criteria and Tests Used to Delineate Markets

When assessing the competitive constraints an undertaking under investigation faces, the Commission will consider the product\textsuperscript{24} and the geographic dimension of the relevant market. The product market dimension tries to determine the effective competitive constraints on those products produced by the parties under investigation. The relevant geographic market, on the other hand, is defined with reference to the competitive constraints that firms located in one region pose for those firms located in the same region as the firm or firms under investigation\textsuperscript{25}.

a) The Relevant Product Market

As outlined before market definition usually distinguishes between the product and the geographic market. The 1997 Notice on Market Definition\textsuperscript{26} as well as the Commission’s decisional practice\textsuperscript{27} define the relevant product market as follows:

\begin{itemize}
\item CFI, Case T-7/89, SA Hercules Chemicals NV v Commission, [1991] ECR II-1711, para. 53; T-65/89, BPB Industries plc and British Gypsum Ltd. V. Commission, [1993] ECR II-389, para. 29. It should be noted, however, that today the right to access to the Commission’s file is not the result of an obligation which the Commission has imposed on itself but must be seen as the consequence of fundamental rights of the defence, see C. D. Ehlermann/B.J. Dribjer, “Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality ”, [1996] ECLR 375 (382).
\item See R. Whish (supra note 6), at p. 31.
\item It should be noted that in the course of this study – where not stated otherwise – the term product market will be used as a synonym for product and service markets.
\item S. Bishop/M. Walker, The Economics of EC Competition Law, para. 4.18.
\item 1997 Notice on Market Definition (supra note 3), para. 7; Form CO relating to the notification of a concentration pursuant to regulation (EEC) No 4064/89, annexed to Commission Regulation 447/98/EC, [1998] OJ L 61/11, Section 6. 1.; Form A/B, annexed to Commission Regulation 3385/94/EC on the form, content and other details of applications and notifications provided for in Council Regulation No 17, [1994] OJ L 377/28 Section 6. The definition is also used in other pieces of Community legislation, such as Form TR annexed to Commission Regulation 2843/98/EC on the form, content and other details of applications
\end{itemize}
“A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”.

The definition plainly illustrates that interchangeability or substitutability of a given product with other products by the consumer constitutes the central criterion in any definition of the relevant product market. Besides demand substitutability the Commission will also take into account supply substitutability and potential competition when considering the constraints an undertaking faces. Of these three possible competitive constraints the Commission will focus on demand side substitution since this kind of substitution constitutes the most immediate and effective disciplinary force on the suppliers of a product.

\textit{aa. Demand Side Substitution}

The analysis of demand substitution needs to specify the range of products which are regarded as being interchangeable by the consumer. As can be seen from the definition of the relevant product market, three factors will be mainly considered when appraising the substitutability of a product from a consumer’s point of view: the product’s price, its characteristics and its intended use.

\textit{aaa. Price – The Hypothetical Monopolist Test}\n
The price of a product is an important factor in evaluating whether products are substitutes. The 1997 Notice on Market Definition, therefore, acknowledges that – for operational and practical purposes – the exercise of market definition focuses on prices. If similar products sell at widely differing prices in the same geographic area, they are unlikely to be close substitutes. Conversely, price parallelism may indicate that the products in question belong to the same market. However, care must be exercised when using price similarities or differences as evidence. For instance, other than where products are perfectly homogenous,
one would not conclude that products which sell at the same price belong to the same market.33

The Commission’s decisional practice and the 1997 Notice on Market Definition go further in the use of price as a criterion in market definition. A more elaborated way to measure the degree of substitutability between products using a product’s price is the cross price elasticity of demand.34 This test appraises the ratio of the change in quantity demanded of another product to a change in the price of the product in question.35 If a small increase in prices would cause consumers to switch to alternatives, these substitutes must be included in the relevant product market.36 The Commission also makes use of other tests relating to the price of products. These tests are based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence.37

Another of these tests, which seems to be favoured above all in the 1997 Notice on Market Definition, is the so-called SSNIP38 or hypothetical monopolist test.39 The test is based on the concept of cross price elasticity.40 However, instead of analysing the cross price elasticity of products, the hypothetical monopolist test assesses the own price elasticity of a product of the parties under investigation.41 When applied correctly the test will reveal whether a firm would profit from a small but permanent increase of the price for its products or services.42 The hypothetical monopolist test is a two-pronged test. Firstly, it needs to be established whether the parties’ customers would switch to readily available substitutes in response to a permanent price increase in the range 5% to 10% in the products and areas being considered while the prices of other products are held constant.43 Secondly, one has to analyse how the switching of

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33 See S. Baker/L. Wu (supra note 9), p. 278; see also D. Hall, in: P. M. Roth (ed.) (supra note 11), para. 6-106.
34 1997 Notice on Market Definition (supra note 2), para. 39. This concept was developed by J. S. Bain, Industrial Organization, at pp. 6 and 224.
36 The issue whether cross price elasticity is appropriate for the purposes of analysing the competitive constraint faced by a firm, however, is not addressed by the 1997 Notice on Market Definition, see S. Bishop/M. Walker (supra note 25), para. 3.12.
37 1997 Notice on Market Definition (supra note 2), para. 39.
38 SSNIP means Small but significant non-transitory increase in price.
41 This subtle difference is acknowledged by the 1997 Notice on Market Definition (supra note 2), para. 39 footnote 5, but is sometimes overlooked by some commentators, see e.g. A. Jones/B. Sufrin (supra note 15), at pp. 44 et seq.
42 Subsequently, the term product or products will be used as an equivalent for the term services as far as there are no methodological differences between the definition of product or service markets.
43 1997 Notice on Market Definition (supra note 3), para. 17. To be precise, one would also have to take into account whether consumers would refrain from buying the product or any of its substitutes.
customers to other products would affect the profits of the party under investigation. If it turns out that substitution is enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This will be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. Thus, a market is defined as being the smallest set of products and geographical areas meeting the hypothetical monopolist test. Remarkably, the test can be employed to identify the relevant product as well as the geographic market taking into consideration the constraints posed by both demand as well as supply side substitution.

Not least because of its universal applicability the test is at first glance designed to become an essential if not indispensable tool of market definition at EC level possibly rendering meaningless almost all other tests formerly used in market definition. The use of the hypothetical monopolist test could also considerably improve the quality of the Commission’s decisional practice in the field of market definition and – by enhancing the predictability of Commission decisions – increase legal certainty. However, the flaws of the hypothetical monopolist test have prevented it from becoming the crucial element in Commission decisions dealing with market definition.

(1) “Cellophane Fallacy”

First of all, the test will fail to deliver convincing results in situations prone to the so-called “cellophane fallacy”: in industries characterised by market power the prevailing price is usually higher than the competitive price. In such markets, when applying the hypothetical monopolist test to the prevailing price, both the product and geographic markets may be larger than if the competitive price were used. As a result, the overall market may be substantially larger.

The 1997 Notice on Market Definition shows that the Commission is aware of the fact that the hypothetical monopolist test has a margin for errors. The Commission stated that the “fact that the prevailing price might already have been substantially increased will be taken into account” without further elaborating on how this could be done.

It has been asserted, however, that to solve the problem, the Commission – like antitrust authorities in the United States –, has opted for the use of competitive prices instead of

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44 1997 Notice on Market Definition (supra note 3), para. 17.
45 See D. Hildebrand (supra note 29), at p. 328; see also Europe Economics, Market Definition in the Media Sector, para. A1.26: “[T]he hypothetical monopolist test seeks to bring together evidence on demand-and supply-side substitutability into a single framework for defining the relevant market.”
46 Cf. e.g. A. Jones/B. Sufrin (supra note 15), at p. 45 who argue, that all other criteria named in paras. 25-52 of the 1997 Notice on Market Definition are (merely) used to examine how consumers would react to a hypothetical price rise.
47 The “cellophane fallacy” is named after a case which was dealt with by the U.S. Supreme Court in 1956, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).
50 See R. Whish (supra note 6), at p. 28.
prevailing prices with respect to the abuse of a dominant position and merger cases. This line of reasoning, though, appears not to comply with the approach taken lately by the Commission in its Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services. The Guidelines set out the principles for use by national regulatory authorities in the analysis of markets and effective competition under the new regulatory framework for electronic communications networks and services. There, the Commission admits that “cellophane fallacy” constitutes a drawback of the application of the hypothetical monopolist test. The Commission presents national regulatory authorities (NRA) with the following solution:

“Determining whether the prevailing price is set above the competitive level is admittedly one of the most difficult aspects of the SSNIP test. NRAs faced with such difficulties could rely on other criteria for assessing demand and supply substitution such as functionality of services, technical characteristics, etc. Clearly, if evidence exist to show that in the past a firm has engaged in anti-competitive behaviour (price-fixing) or has enjoyed market power, then this may serve as an indication that its prices are not under competitive constraint and accordingly are set above the competitive level.”

From the above it becomes apparent that the Commission intends not use the hypothetical monopolist test where prices appear to be supra competitive. Instead of trying to save the test by using competitive rather than prevailing prices the Commission wants to employ other criteria to assess demand and supply substitution. Thereby, the test becomes useless at least in cases dealing with the abuse of a dominant position. This demonstrates that the hypothetical monopolist test cannot possibly develop into an indispensable tool of market definition at EC level.

Whether the Commission takes the same approach under general EC competition law as expressed in the Guidelines is not clear. On the one hand, the Commission made its clarifying statement in relation to market definition under the sector-specific framework for electronic communication markets. The Guidelines themselves maintain that they do not purport to explain how the competition rules apply in the electronic communications sector, but focus

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51 In US competition law “cellophane fallacy” is addressed by the US Horizontal Merger Guidelines. The Guidelines state that the FTC and the DoJ “will use prevailing prices [...] unless premerger circumstances are strongly suggestive of coordinated interaction, in which case the [FTC and the DoJ] will use a price more reflective of the competitive price”, see 1992 Horizontal Merger Guidelines (supra note 39), § 1.11. On the contrary, in the UK according to the Guideline on Market Definition the Director General of Fair Trading would look not only at market definition but at other evidence of market power and the undertaking’s conduct, see Office of Fair Trading, OFT Guideline 413, Market Definition, para. 5.14.

52 See P. Crocioni (supra note 40), p. 359, who, at the same time, criticalises the concept of competitive prices as being not very well defined and facing considerable implementation problems.


55 Cf. A. Jones/B. Sufrin (supra note 15), at p. 47. In EC merger control, however, “cellophane fallacy” is not likely to occur since the Merger Regulation is aimed at preventing the creation of additional market power. By using the hypothetical monopolist test, however, it is still possible to predict whether the parties to a concentration are likely to increase prices, see S. Baker/L. Wu (supra note 9), p. 276.

56 Cf. R. Whish (supra note 6), at pp. 28 et seq.
only on issues related to market definition under Article 14 Framework Directive 2002/21/EC. On the other hand, “cellophane fallacy” can occur in any other sector and all industries covered by general competition law. Therefore, the approach taken in the Guidelines on Market Analysis and the Assessment of Significant Market Power must also apply to market definition under general EC competition law.

(2) Missing or Incomplete Data

More detrimental to a frequent use of the hypothetical monopolist test, however, is the fact that the test can only be applied where detailed data on the sector and the products under investigation is available. The information being relevant for the test varies significantly from one sector to another. The 1997 Notice on Market Definition, therefore, rightly stresses that tests which might be suitable in one industry may be wholly inappropriate in another. A situation where the hypothetical monopolist test can only be used with some difficulty is that of new products and services being placed on a “market”. In its British Interactive Broadcasting decision, the Commission had to deal with a joint venture which should provide digital interactive television services to consumers in the United Kingdom. Given the fact that, at that time, digital interactive television services were not available throughout the United Kingdom, past data did not exist to evaluate the likely response of customers to a hypothetical small, non-transitory change in relative prices of the joint venture’s services. Hence, the Commission also had to employ additional criteria in evaluating demand substitutability.

(3) The Hypothetical Monopolist Test in Practice

The above account on the main imperfections of the hypothetical monopolist test demonstrates that the test cannot be possibly used as the sole criterion in defining markets. Nevertheless, where sufficient data on the product considered is available and where there are no signs of supra competitive prices in Article 82 EC cases the test could still play an...
important role. In fact, however, considering the vast number of competition cases dealt with by the Commission since the 1997 Notice on Market Definition was published, the test has been used relatively rarely. Because of this it seems the Commission regards the test as just one instrument amongst others to define relevant markets. This attitude is exemplified by the decision in Virgin/British Airways where the Commission, in essence, held that it is not obliged to use the test when defining markets simply because the test was mentioned in the 1997 Notice on Market Definition. In its view, the test only "serves to explain the concept of the relevant market".

The rather careful use of the hypothetical monopolist test under general EC competition law, however, did not prevent the Commission from relying on the test when it comes to market definition under the sector-specific framework for electronic communication markets. The Commission’s Guidelines on Market Analysis and the Assessment of Significant Market Power highlight the importance of the test by stating that “to complete the market-definition analysis, a national regulatory authority, in addition to considering products or services whose objective characteristics, prices and intended use make them sufficiently interchangeable, should also examine, where necessary, the prevailing conditions of demand and supply substitution by applying the hypothetical monopolist test".

Whether this “revival” of the test in sector-specific legislation will also lead to the hypothetical monopolist test being used more often under general competition law, remains to be seen. The very special characteristics of the electronic communication markets, however, might suggest that this will not be the case. It will be remembered that in many areas of the electronic communications sector prices and tariffs are imposed by national regulatory authorities. A reason for applying the test more frequently to the Community’s electronic communication markets might be that “cellophane fallacy” is less likely to occur in these markets. In its Guidelines, the Commission, thus, holds that if a service or product is offered at a regulated, cost based price, then such price is presumed to be set at what would otherwise be a competitive level and should, therefore, be taken as the starting point for applying the hypothetical monopolist test. Since the price of the product and especially the hypothetical

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67 The 1997 Notice on Market Definition (supra note 2), para. 15, emphasises that the test is “one way” of determining demand substitution. Also, the definitions of the relevant product and geographic market do not relate directly to the hypothetical monopolist test.

68 Commission, Commission Decision, 2000/74/EC, Virgin/British Airways (Case IV/D-2/34.780), [2000] OJ L 30/1. This demonstrates that the Commission is also of the opinion that it is not bound by the 1997 Notice on Market Definition, see supra Chapter 1, paras. 1.164-166 et seq.


70 Notably, according to the 1992 US Horizontal Merger Guidelines (supra note 39), § 1.0, the test is not to be applied where a firm is “subject to price regulation”.
monopolist test will not be used as a – let alone the sole – criterion by the Commission, the criteria and tests which are used as an alternative to or complementing the hypothetical monopolist test in delineating the relevant markets need to be outlined71.

No straight answer can be given to the question of how the criteria described below are going to be applied where the hypothetical monopolist test cannot be used. The Commission’s 1997 Notice on Market Definition gives only few hints as to how the different factors will be relevant to define markets. It is clear that not every single case requires to obtain evidence and assess each of these factors. The criteria used in the Notice can, therefore, not make up for a list of factors which will be simply ticked off by the Commission. Often the evidence provided by a subset of these factors will be sufficient to reach a conclusion72. It can also be derived from the Notice that the Commission regards some criteria to be more important than others73. However, it is not apparent how the criteria and tests interact and how the Commission will, for instance, handle the situation where two of the criteria deliver contradicting results. At the end of the day, it will be left to the Commission to decide this issue on a case by case basis.

bbb. Product Characteristics

As indicated by the 1997 Notice on Market Definition, the starting point of each assessment of demand side substitution is the physical characteristics of a given product. Products which have the same characteristics may be possible substitutes74. In this connection, a product’s functional characteristics are usually more important than its appearance or physical or chemical make-up75. However, functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well76. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics. The product’s characteristics will, therefore, only mark a first step in market definition and the Commission emphasises that it will take into account other factors as well77.

ccc. Intended Use

In determining demand side substitutability the Commission will also take into consideration the intended use of a product78. It is thought that if a product is needed for a specific purpose,

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71 See the critique of S. Bishop/M. Walker (supra note 25), para. 4.47 who hold that “[a]lthough the Commission’s Notice implicitly adopts the hypothetical monopolist test, its approach still tends to be focused on […] demand-side factors, rather than directly on empirical evidence relevant to the hypothetical monopolist test.”
72 1997 Notice on Market Definition (supra note 2), para. 52.
73 See e.g. 1997 Notice on Market Definition (supra note 2), para. 36 (product characteristics and intended use) and para. 38 (substitution in the recent past).
74 See 1997 Notice on Market Definition (supra note 3), para. 36.
76 1997 Notice on Market Definition (supra note 3), para. 36.
77 1997 Notice on Market Definition (supra note 3), para. 36.
78 1997 Notice on Market Definition (supra note 3), para. 36.
that product will be within the same market only as other products which satisfy the same need. Having recourse to a product’s intended use may lead to markets being defined more narrowly or more widely than the inherent characteristics would suggest. Because of that, different markets may be distinguished for the same product used in different applications. On the other hand, products with different intended uses might still be qualified as being part of the same market. Sometimes, for instance, the Commission will group together into one product market products with different (end-) uses because the suppliers of these products tend to offer the whole range of products to the same set of customers.

Just as the characteristics of a product its intended use may also help to establish a basis for a further analysis of the relevant market. Moreover, both criteria will be used in the application of the hypothetical monopolist test in order to reveal possible substitutes to which consumers would switch in case of a small but significant price increase.

Views of Competitors and Consumers

The 1997 Notice on Market Definition explicitly states that the analysis of a product’s characteristics and its intended use is insufficient to show whether two products are demand substitutes. Therefore, the Commission will also take into account other criteria such as the views of the main customers and competitors of the companies under investigation. This information can be specially helpful to learn the views of competitors and customers on the boundaries of the product market as well as most of the factual information it requires to reach a conclusion on the scope of the market in cases under the Merger Regulation. Furthermore, the views of customers are of particular value when applying the hypothetical monopolist test in order to find out what would happen if relative prices for the candidate

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79 See R. Whish (supra note 6), at p. 32.
80 See L. Ritter/W. D. Braun/F. Rawlinson (supra note 10), at p. 27.
83 See, for instance, Commission Decision, 98/526/EC, Hoffmann La Roche/Boehringer Mannheim (Case IV/M.950), [1998] OJ L 234/14, para. 10; Commission Decision, Case IV/M.2517, 9 August 2002, Bristol Myers Squibb/Du Pont, para. 10. See also 1997 Notice on Market Definition (supra note 2), para. 36. The Commission usually refers to this “basis” as an “operational” market definition.
84 See Europe Economics (supra note 45), para. A1.52.
85 1997 Notice on Market Definition (supra note 2), para. 36. The Commission, thereby, reacts to criticism that the evidence it used in the past in the market definition process did not go beyond the simplistic and often subjective analysis of product attributes and uses, see S. Baker/L. Wu (supra note 9), p. 280.
86 1997 Notice on Market Definition (supra note 3), para. 40. See also Bird&Bird, Market Definition in the Media Sector, para. 75.
87 R. Whish (supra note 6), at p. 31. See also S. Baker/L. Wu (supra note 9), p. 279, who point out that the interest of customers and competitors can differ significantly when it comes to the assessment of mergers. It should also be noted, that there lies the risk of a circular conclusion in the use of the views of “competitors” since the Commission needs to predefine markets to identify potential competitors and may overlook actual (hidden) competitors of the undertaking under investigation.
products were to increase by a small amount. However, the views of competitors and consumers should only be taken into account where they are backed by factual evidence.

Consumer preferences and the motivation of the consumer are regarded as yet another important criterion in market definition when it comes to consumer goods. Despite the existence of substitutes at similar prices, consumer loyalty can limit substitution away from one product concerned following a price rise. The preferences of consumers may be influenced according to the brands used for the same product or by other factors like the alleged “characteristics” of a product such as “purity and health” in the case of mineral water. Since it may be difficult to gather the direct views of end consumers about substitute products the Commission will rely on marketing studies that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions. This studies will be used to determine consumer usage and purchasing patterns and the views of retailers thereon in order to establish whether an economically significant proportion of consumers consider two products as substitutable.

In the past, the Commission has on occasion distinguished between different customer groups in the “original equipment” and in the “aftermarket”, where the channels and cost for distribution were different for the two markets. According to the 1997 Notice on Market Definition, the existence of different and specific categories of customers and price discrimination will be considered if any such group of consumers is clearly identifiable at the moment of the sale and trade among customers or arbitrage by third parties is not feasible. The analysis of different customer groups or segments will normally be used to narrow the definition of the relevant product market. It therefore appears that it is appraised at a later stage, when a (wider) possible relevant product market has already been identified.

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89 1997 Notice on Market Definition (supra note 3), para. 40.
90 1997 Notice on Market Definition (supra note 2), para. 41. In Community competition law, preferences of customers and consumers may serve a purpose beyond that of defining the relevant market, see B. Dubow (supra note 88), p. 142.
91 1997 Notice on Market Definition (supra note 2), para. 41. See also Commission Decision, 94/893/EC, Procter&Gamble/Schickedanz (Case IV/M.430), [1994] OJ L 354/33, paras. 43 et seq., where the Commission pondered whether branded products and store own label products belonged to the same market or different relevant markets.
93 1997 Notice on Market Definition (supra note 2), para. 41. However, if commissioned by one or more of the merging parties or in the course of an infringement procedure such evidence will be treated with utmost care.
94 See e.g. Commission Decision, Case IV/M.937, 22 September 1997, Lear/Keiper, para. 2; Commission Decision, Case IV/M.818, 2 December 1996, Cardo/Thyssen, paras. 19 et seq. See also D. Hall, in: P. M. Roth (ed.) (supra note 11), para. 6-100.
95 1997 Notice on Market Definition (supra note 2), para. 43.
96 See Bird&Bird (supra note 86), para. 75.
Apart from these main criteria the Commission has found some other criteria which can be applied where the specific characteristics of the case allow to do so. For instance, to delineate markets the Commission will consider evidence relating to recent past events or shocks in the market that offer actual examples of substitution between two products (past substitution). When available, this sort of information will normally be fundamental for market definition. Moreover, in cases where the structure of supply and demand for a product differs depending on whether its newly purchased or replaced, the Commission might conclude that there are two separate markets for one identical product. Finally, the Commission will also try to find out whether barriers or obstacles exist which prevent customers to switch demand between products prima facie belonging to the same product market.

bb. Supply Side Substitution

In most cases, the relevant market will be delineated by referring to demand side substitutability and to the criteria and tests described above. Nevertheless, the fact that suppliers are able to switch production to the relevant products can have a considerable disciplinary effect on the competitive behaviour of the companies producing products which are demand substitutable. Therefore, the Commission will take into consideration the constraints posed by supply side substitutability whenever these effects “are equivalent to those of demand substitution in terms of effectiveness and immediacy”. According to the 1997 Notice on Market Definition this will only be the case if two conditions are met: Suppliers need to be able to switch production capacity to production of the products concerned, firstly, in the short term and, secondly, without incurring significant additional costs or risks. Supply side substitutability can then be used to broaden the relevant product market delineated through the assessment of demand side substitutability. Equally as when assessing demand side substitutability the Commission can use a set of criteria when determining whether or not and to what degree suppliers pose a constraint on the producer.

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97 See 1997 Notice on Market Definition (supra note 2), para. 38.
98 See e.g. R. Whish (supra note 6), at p. 22.
99 See 1997 Notice on Market Definition (supra note 2), para. 42. Such barriers might be, for instance, raised by the need for specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers.
100 See J. Briones Alonso (supra note 30), p. 205.
101 1997 Notice on Market Definition (supra note 2), para. 20. The Commission’s Notice on the application of the competition rules to access agreements in the telecommunications sector, [1998] OJ C 265/2, hereafter referred to as the “1998 Access Notice”, para. 41, indicates that “supply side substitutability may in appropriate circumstances be used as a complementary element to define markets” [emphasis added]. It is thought, however, that the Commission is unlikely to stress that supply side substitutability exists or does not exist unless the presence or absence of demand side substitutability is also clear, see R. Fowler/J. Skilbeck, in: P. M. Roth (supra note 11), para. 9-012.
102 Supply side substitutability is particularly appropriate for assessing the validity of narrow markets, in which the market definition may be as specific as a suppliers branded products made to a particular technical specification, see D. Hildebrand (supra note 29), at p. 290.
under investigation. However, the 1997 Notice on Market Definition gives only few indications as to which criteria might be used here.

aaa. Criteria Used to Assess Supply Side Substitution

In fact, the only criterion addressed by the 1997 Notice on Market Definition which appears to be particularly relevant in terms of supply is the “existence of barriers and costs associated with switching demand to potential substitutes”. Although this factor is also used to examine the potential of demand side substitution, it can, nevertheless, also tell something about the opportunities of potential producers to compete with the actual producers in a given market.

Supply side substitutability will, moreover, play a role where companies market a wide range of qualities or grades of one product. In these circumstances, the different qualities can be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. Finally, it goes without saying that supply side substitutability is of major importance when it comes to the assessment of procurement and purchasing markets.

bbb. Supply Side Substitutability vs. Potential Competition

In the past, there has been some debate going on about whether potential competition should be taken into consideration at the stage of market definition. Just as supply side substitution potential competition addresses the competitive constraints posed by new suppliers entering a market. It is clear that the borderline between supply substitutability and potential competition is not easy to draw.

As indicated by the 1997 Notice on Market Definition, the distinction between the two is generally regarded as arising from the nature of the costs involved in switching production from one output to another, and the time required to carry out the switch.

Where the same capital resources can be used in the production of various outputs and the switch can take place “in the short term” and at low risk, these outputs might be regarded as supply-side substitutes. If, on the other hand, significant resources and risks are

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103 In the view of S. Bishop/M. Walker (supra note 25), para. 4.59, many of the factors used to assess demand side substitution are only of limited use in determining whether or not potential substitution is great enough to imply wider markets.

104 See Bird&Bird (supra note 86), para. 80.

105 See e.g. Commission Decision, Case COMP/M.2926, 16 September 2002, EQT/H&R/Dragoco, paras. 17 et seq.

106 1997 Notice on Market Definition (supra note 2), para. 21.

107 Bird&Bird (supra note 86), para. 79.

108 The 1998 Access Notice (supra note 101), para. 41 even assumes that, in practice, supply side substitutability cannot be clearly distinguished from potential competition.


111 “In the short term” means “such a period that does not entail a significant adjustment of existing tangible and intangible assets”, see 1997 Notice on Market Definition (supra note 2), para. 20 footnote 4. This prerequisite is not fulfilled where it would take suppliers over three to four years to adapt their production, see Commission Decision, 91/619/EEC, Aerospatiale-Alenia/\textit{de Havilland} (Case IV/M.053), [1991] OJ L 334/42, para. 14.
sunk costs) are required to switch production, then it is most appropriate to view the possibility of the switch as potential competition. The 1997 Notice on Market Definition plainly states that potential competition from other sources (than demand-side and supply-side substitutability) is generally taken into account only once the relevant market has been defined, when the degree of market power is being analysed in the light of competitive restraints. Despite this it has been asserted that the Commission would, nevertheless, regard potential competition a criterion to be taken into account at the stage of market definition. This view is mainly based on the fact that potential competition is mentioned in documents relating to notifications under EC competition law (Form A/B and Form CO) and the Commission Regulation 240/96/EC on technology transfer agreements.

In general, many of the considerations leading to the delineation of the relevant market may also be of importance for the competitive assessment of mergers, the existence of a dominant position or the competition concerns relating to agreements and concerted practices in the framework of Article 81 EC. In both cases the question of which competitive constraints an undertaking faces is at the focal point of the assessment. Because of these similarities it is commonly understood that from a general viewpoint it does not matter whether all supply side responses are taken into account at the stage of market definition or at a later stage of interpreting the market share. Provided the competitive constraints posed by potential supply side responses of firms are taken into account at some stage it should not matter precisely when.

Notwithstanding this case for a combined analysis of potential competition and supply side substitutability the Commission seems not to have changed the view taken initially in the 1997 Notice on Market Definition. In its Guidelines on Market Analysis and the Assessment of Significant Market Power, the Commission, recently, took the opportunity to comment on this issue. The last sentence of paragraph 38 of the Guidelines reads:

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113 See Commission Decision, 1999/641/EC, Enso/Stora (Case IV/M.1225), [1999] OJ L 254/9, para. 40. See also R. Fowler/J. Skilbeck, in: P. M. Roth (supra note 11), para. 9-012. The Commission also holds that in cases where supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, the effects of supply-side substitutability and other forms of potential competition would be examined at a later stage, see 1997 Notice on Market Definition (supra note 2), para. 23.
114 See Bird&Bird (supra note 86), para. 101.
115 See Form A/B (supra note 26), Section 10; Form CO (supra note 26), Section 5.4. The fact that notifying parties are required to submit information on potential competitors, however, does not give any indication as to at which stage of the competition analysis this information could become relevant.
118 In some circumstances, though, the analysis of the constraints posed by supply side substitution at the stage of market definition becomes inevitable, see R. Whish (supra note 6), at pp. 27 et seq.
119 See S. Bishop/M. Walker (supra note 25), para. 4.58; R. Whish (supra note 6), at pp. 27 et seq. In the words of J. Vickers, “Competition Economics and Policy”, [2003] ECLR 95 (100) commenting on the reform of the Merger Regulation: “The strength or weakness of that competitive constraint is the same whether it is labelled as supply substitutability (and hence “in the market”) or as potential competition from “outside the market”. See also infra note 123.
“The existence of potential competition should thus be examined for the purpose of assessing whether a market is effectively competitive within the meaning of the framework Directive, that is whether there exist undertakings with SMP.”

The Commission, here, simply reiterates the approach taken in the 1997 Notice on Market Definition and adjusts it to the sector-specific framework of the electronic communications sector. Under the Framework Directive 2002/21/EC, the concept of effective competition is equated with the concept of significant market power\(^{21}\). As indicated by the Commission, potential competition should, therefore, be assessed at the stage of effective competition (i.e. the assessment of significant market power or the assessment of dominance respectively\(^{122}\)). However, in considering the particularities of the electronic communications the Commission pronounces:

“Distinguishing between supply-side substitution and potential competition in electronic communications markets may be more complicated than in other markets given the dynamic character of the former. What matters, however, is that potential entry from other suppliers is taken into consideration at some stage of the relevant market analysis, that is, either at the initial market definition stage or at the subsequent stage of the assessment of market power (SMP).”

Given the fact that the Guidelines set out the principles for use by national regulatory authorities in the analysis of markets and effective competition under the new regulatory framework for electronic communications networks and services the Commission seems to have adopted a flexible, non-dogmatic approach to how national regulatory authorities should approach the issue at question. Nevertheless, with a view to paragraph 38 of the Guidelines the Commission upheld the approach followed in the 1997 Notice on Market Definition. It seems, therefore, that it will continue to distinguish between supply side substitutability and potential competition and to assess the two criteria at different stages of the competition analysis\(^{123}\).

\(\text{cc. The Degree of Substitutability}\)

The question of which level of substitutability is needed to conclude that products are substitutable arises inevitably when defining markets without using the hypothetical monopolist test. The 1997 Notice on Market Definition remains silent on this question. Although the Commission’s decisional practice in the past might have suggested otherwise\(^{124}\), complete substitutability cannot be required\(^{125}\). Unless products are totally homogeneous there

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\(^{120}\) Commission Guidelines (supra note 53), paras. 34 et seq.


\(^{123}\) More reasons why at least supply side substitutability should be assessed at the market definition stage – especially where the application of competition rules depends on market share thresholds – are given by S. Bishop/M. Walker (supra note 25), para. 4.58.


\(^{125}\) See D. Hall, in: P. M. Roth (ed.) (supra note 11), para. 6-098.
will be no perfect substitutes. The exact degree of substitutability, however, cannot be determined in advance. Instead, it appears, the Commission will decide this issue on a case by case basis.

b) Geographic Dimension of the Market

It is also necessary, when delineating markets to identify the relevant geographic market. Compared with other jurisdictions the geographic dimension of the relevant market plays a rather important role in market definition in EC law. Theoretically, the relevant geographic market can be everything from global, community-wide, trans-national or national to regional or local. The 1997 Notice on Market Definition defines the relevant geographic market as follows:

“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area”.

The Commission will first take a preliminary view of the scope of the geographic market on the basis of factors such as differing market shares and price differences at national and Community level. Secondly, this working hypothesis will be checked against certain demand side and supply side factors which by and large are very similar to the ones used in the assessment of the relevant product market. Again, the test whether the parties’ customers would switch their orders to companies located elsewhere in the short term and at a negligible cost in reply to changes in relative prices should be part of this analysis. In the course of delineating the relevant geographic market, special attention is paid to impediments or obstacles which might serve to isolate markets. The following examples of evidence which might be used in defining the relevant geographic market are specified by the 1997 Notice on Market Definition. Most of these factors relate to the competitive constraints posed by demand side substitution.

aa. Basic Demand Characteristics

The scope of the geographic market may be determined by national preferences or preferences for national brands, language, culture and life style, and the need for a local presence. Consumer and retailer preferences are regarded as having a strong potential to limit the

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126 A. Jones/B. Sufrin (supra note 15), at p. 43.
127 For a decision where the degree of substitutability was not enough to pose a sufficient competitive constraint on the producer under investigation see, for instance, Commission Decision, 89/22/EEC, British Plasterboard (Case IV/31.900), [1989] OJ L 10/50, paras. 118 and 143.
129 1997 Notice on Market Definition (supra note 3), para. 8. This definition is also used in Article 9 (7) Merger Regulation, see CFI, Case T-246/02 etc., Cableuropa a.o. v. Commission, [2003] ECR-II [Judgement of 30 September 2003, not yet published], para. 115.
130 1997 Notice on Market Definition (supra note 3), para. 28.
131 See S. Bishop/M. Walker (supra note 25), para. 4.60.
132 1997 Notice on Market Definition (supra note 3), para. 29. The Commission, at this point, does not give any indication as to whether this theoretical experiment will – as suggested by R. Whish (supra note 6), at p. 38 – include the hypothetical monopolist test or will merely try to establish cross price elasticities of the products in question.
geographic scope of competition. Therefore, in the case of consumer products the Commission tends to consider the geographic market generally to be national133.

\textit{bb. Views of Customers and Competitors}

As when delineating the relevant product market, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market134.

\textit{cc. Current Geographic Pattern of Purchases}

Customers’ current geographic pattern of purchases can be useful evidence when customers purchase or procure their supplies from companies located anywhere in the Community on similar terms135. If this is the case the geographic market will usually be considered to be Community-wide136.

\textit{dd. Trade Flows/Pattern of Shipments}

Information on trade flows and pattern of shipments might be used alternatively, when the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns. The Commission regards this information as useful but not as conclusive in itself137. The level of imports of a certain product, for instance, can be used as evidence to support the notion that the market in question is bigger than merely national138.

\textit{ee. Barriers and Switching Costs Associated to Divert Orders to Companies Located in Other Areas.}

Factors likely to raise barriers thereby limiting the geographic scope of the relevant market are high transport costs or transport restrictions. The Commission considers the effects of transport costs by comparing them to the value of the products in question. While the 1997 Notice on Market Definition remains rather vague as to how this criterion is applied, the Commission, in its decision concerning the merger \textit{Pilkington-Techint/SIV}, adopted a more sophisticated approach by classifying transport costs in relation to distance and the price of the product as “prohibitive/expensive” (above 7.5 per cent of selling price over 1000 km), “neither high nor low” and “relatively low” (3 to 4 per cent of selling price over 1000 km)139.


134 1997 Notice on Market Definition (supra note 2), para. 47.

135 1997 Notice on Market Definition (supra note 2), para. 48.


137 1997 Notice on Market Definition (supra note 2), para. 49.


ff. Market Integration

When defining the geographic market, the Commission will also take into account the continuing process of market integration. In some sectors, the Community has made some considerable progress in the past few years by harmonising Member States laws and removing legislative barriers in order to create Community wide markets. In these sectors past evidence regarding prices, market shares or trade patterns will be treated rather cautiously. Furthermore, in cases concerning concentrations and joint ventures, the future impact of market integration leading to wider geographic markets might be anticipated in the process of market definition.

III. Different Provisions – Different Market Definition?

1. Particularities of Article 82 EC Proceedings and Rulings

Following the so-called concept of dominance under Article 82 EC, economic power of an undertaking can only exist in relation to a particular market. Under Article 82 EC dominance can only be assessed in relation to the relevant market(s), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.

In anti-cartel proceedings, and particularly in proceedings under Article 82 EC (against the alleged abuse of a dominant position), narrow market definitions, which tend to indicate that the undertakings under investigation control a significant portion of the marketplace upon which they operate, enhance the efficient enforcement of the competition rules. Moreover, the investigative procedure, which is not limited as to time, affords officials the opportunity to undertake a much more detailed market analysis than is usually possible in merger cases, with the result that the market definitions arrived at may be considerably more precise.

Another unique feature of Article 82 EC proceedings – especially in comparison with its approach in proceedings under the Merger Regulation – is that the Commission, looking into an infringement of Article 82 EC, usually puts more emphasis on the abusive conduct in question than on market definition. Under Article 82 EC the Commission, for instances, often defines the relevant geographic market by reference to the area in which the abuse takes effect. In general, it can be said that the narrower the definition of the product market the easier it is to conclude that an undertaking has the requisite of dominance for the purposes of Article 82 EC. Therefore, many Article 82 EC cases will see the undertakings involved pushing for wide market definitions.

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140 1997 Notice on Market Definition (supra note 2), para. 32.
141 1997 Notice on Market Definition (supra note 2), para. 32. It must not be forgotten, however, that in some areas the real level of integration still differs considerably from the level of integration sought by Community legislation, see C. Canenbley (supra note 128), at pp. 308 et seq. See also Bird&Bird (supra note 86), para. 102.
144 For further references see R. Fowler/J. Skilbeck, in: P. M. Roth (supra note 11), para. 9-030.
145 See P. Craig/ G. de Búrca, EU Law, at p. 994.
2. Particularities of Article 81 EC Proceedings and Rulings

The question of whether market definition also forms an indispensable part of Article 81 EC proceedings has been dealt with by the Court of First Instance in Volkswagen AG v. Commission\(^{146}\). According to the 1997 Notice on Market Definition markets may need to be defined in the application of Article 81 EC, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 81 (3) lit b. EC for an exemption is met\(^{147}\). In the view of the Court of First Instance, the reason for defining the relevant market when applying Article 81 EC is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market. Thus, there is an obligation on the Commission to define the market in a decision applying Article 81 EC where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market\(^{148}\). Consequently, the lack of a proper market definition and analysis can only lead to the annulment of the contested decision as a whole\(^{149}\).

It also seems to be noteworthy that the fact that undertakings have to notify an agreement to the Commission\(^ {150}\) has influenced the way markets were defined in Article 81 EC proceedings. Article 2 (1) Commission Regulation 3385/94/EC\(^ {151}\) in conjunction with Form A/B\(^ {152}\) required the undertaking or individual submitting the notification to define the relevant market(s) that are likely to be affected by the agreement in question. In Article 81 EC proceedings the Commission usually relied on the analysis carried out by the submitting parties as a starting point before including its own analysis as well as comments from third parties\(^ {153}\).

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\(^{147}\) 1997 Notice on Market Definition (supra note 3), para. 11.


\(^{150}\) See Articles 2, 4 (1) and 5 (1) Regulation No. 17. First regulation implementing Articles 81 and 82 of the Treaty, [1962] OJ Sp. Ed. No. 204/62, p. 87. However, the new Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1, which enters into force by 1 May 2004 does not stipulate an obligation to submit notifications in relation to Article 81 EC anymore.


\(^{152}\) See Sections 6.1, 6.2, 11.1 and 11.2 of Form A/B (supra note 26).

\(^{153}\) See Bird&Bird (supra note 86), para. 121.
3. **Particularities of Proceedings and Decisions under the Merger Regulation**

The substantive test under Article 2 Merger Regulation is whether the concentration “creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it”. Regarding the application of this provision, a proper definition of the relevant market is a necessary precondition for the assessment of the effects on competition of the concentration. Merger cases constitute the vast majority of competition cases dealing with market definition. As already mentioned above, in contrast to Article 82 EC and Article 81 EC proceedings, in merger cases the future developments of a market as well as of its neighbouring markets need to be taken into account. This will usually require the Commission to particularly put emphasis on criteria like time horizon and – relating to the relevant geographic market – to pay particular attention to the continuing process of market integration. As in Article 81 EC proceedings the way relevant markets are defined under the Merger Regulation may be influenced by the market definitions submitted by the parties notifying a concentration according to Section 6 of Form CO in conjunction with Article 4 (1) Merger Regulation.

Market definition under the Merger Regulation is also shaped by the fact that in some merger cases the Commission does not need to make a detailed analysis of the markets nor choose between possible alternatives because it can decide to give clearance to the concentration, even on the assumption that the narrowest possible market definition will not raise any competition problems. This will be, for instance, the case in many first phase decisions (Article 6 (1) lit. b Merger Regulation) which are taken under the pressure of the time constraints of the Merger Regulation. Here, the Commission may often decide to rely on the market definitions used in previous case law or leave the decision on the relevant market open. On the other hand, cases dealing with concentrations raising serious doubts as to its compatibility with the common market (phase two decisions, Article 8 (2) or (3) Merger Regulation) will be dealt with by the Commission more thoroughly and, thus, constitute a more reliable source for analysing the approach to market definition. Then again, cases dealt with under the new simplified procedure (Article 7 (5) Merger Regulation), where the Commission adopts a short form clearance of concentrations not raising competition concerns, usually contain no market definitions at all.

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155 See 1997 Notice on Market Definition (supra note 3), para. 32.

156 Form CO (supra note 26).

157 D.G. Goyder (supra note 7), at p. 396. See also 1997 Notice on Market Definition (supra note 2), para. 27.

158 Being aware of the fact that all its decisions will be made publicly available and of the importance of its findings for future cases, the Commission will also be wary of any “unnecessary” remarks concerning market definition, see H. Löffler, *Kommentar zur europäischen Fusionskontrollverordnung*, Article 2 Merger Regulation, para. 15.

159 See Bird&Bird (supra note 86), paras. 123 et seq.

Unlike the other provision’s of general EC competition law, there is no coherent approach on market definition under Article 87 EC. According to the 1997 Notice on Market Definition, in State aid cases, the focus of assessment is the aid recipient and the industry concerned rather than the identification of competitive constraints faced by the aid recipient. The Commission, therefore, believes that the market definition approach outlined in the Notice can only serve as a basis for the assessment when questions of market definition are raised in particular state aid cases.\footnote{See 1997 Notice on Market Definition (supra note 2), para. 1 footnote 1.}

Article 87 (1) EC stipulates that any aid granted by a Member State or through State resources in any form whatsoever \textit{which distorts or threatens to distort competition} by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

An aid distorts or threatens to distort competition where it alters actually or potentially the conditions of competition between undertakings. This is the case where the state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade.\footnote{See e.g. ECJ, Case 730/79, Philip Morris Holland BV v. Commission, [1980] ECR 2671, para. 11.} To determine the effects on the competitive relationships between undertakings, the product and the geographic scope of the markets these undertakings are active on, need to be analysed.\footnote{See Ch. Koenig/J. Kühling/N. Ritter, \textit{EG-Beihilfenrecht}, 2002, at p. 83; Ch. Koenig, in: Ch. Koenig/W.-H. Roth/W. Schön (eds.), \textit{Aktuelle Fragen des EG-Beihilfenrechts}, at p. 9.} However, contrary to EC antitrust law, where market definition generally serves to detect the market power of certain undertakings, the analysis under Article 87 EC solely aims at identifying the effects of the aid under investigation and the possible distortions of competition.\footnote{See J. Fingleton/F. Ruane/V. Ryan, \textit{A Study of Market Definition in Practice in State Aid Cases in the EU}, 1998, at p. 10; Ch. Koenig/J.-D. Braun/R. Pfromm, „Beihilfenrechtliche Probleme des EG-Emissionsrechtehandels“, [2003] ZWeR 1 (19 et seq.) [To be published in June 2003].}

\textbf{a) The Approach of the Community Courts}

Although the Court of Justice, in some of its earlier decisions,\footnote{See e.g. ECJ, Case 730/79, Philip Morris Holland BV v. Commission, [1980] ECR 2671, para. 10 et seq.} seemed to adopt a rather lax approach towards whether the Commission under Article 87 EC was required to define the relevant markets, recent decisions suggest that – in the view of the Community Courts – market definition can amount to an essential part of state aid cases. For instance, in \textit{Bremer Vulkan v. Commission}, the Court of Justice held that where the Commission did not provide any information whatsoever as to the situation on the market in question, or the market shares or position on the market of the undertakings under investigation, the decision must be annulled for infringement of essential procedural requirements (Article 253 EC).\footnote{ECJ, Joined Cases C-329/93, C-62/95, C-63/95, \textit{Germany v. Commission}, [1996] ECR I-5151, paras. 53 et seq. See also Opinion of Advocate General Alber, Case C-351/98, \textit{Spain v. Commission}, paras. 78 et seq.} In \textit{SIDE v. Commission}, the Court of First Instance annulled the Commission’s decision because the...
Commission had failed to reveal the true impact of the aid on competition by defining and assessing the relevant markets\(^{167}\).

b) The Commission’s Approach

The Commission’s approach to market definition under Article 87 EC is rather inconsistent\(^{168}\). The intensity with which the issue of market definition is addressed by the Commission’s decisional practice varies considerably. While in some cases the precise scope of the relevant markets has been left open\(^{169}\), market definition occupies a more or less important role in some others\(^{170}\). However, even in cases where the Commission touches upon the issue of market definition, the analysis is usually focused on whether the undertaking in question actually faces any competition at all\(^{171}\).

In effect, the market definition analysis under Article 87 EC suffers from the fact that the burden on the Commission to proof a distortion of competition is not very high. The Commission must simply establish that an aid threatens to distort competition, the distortion does not have to be actual\(^{172}\). Furthermore, the prohibition in Article 87 EC applies to any aid which distorts or threatens to distort competition, irrespective of the amount of the aid or the size of the undertaking, in so far as it affects trade between Member States\(^{173}\).

Although the weight of market definition under Article 87 EC is significantly lower than under the antitrust provisions of the Treaty, the methodology of defining markets should, in theory, be similar. The starting point of the analysis, therefore, has to be the concept of substitutability\(^{174}\).

Having regard to the 1997 Notice on Market Definition, the same view seems to be taken by the Commission\(^{175}\). Furthermore, the 1998 Multisectoral Framework on regional aid for large investment projects\(^{176}\) explicitly refers to the concept of substitutability. Section 7.6 of the framework states that “the relevant product market(s) for determining market share comprises

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\(^{175}\) See 1997 Notice on Market Definition (supra note 2), para. 1 footnote 1.

the products envisaged by the investment project and, where appropriate, its substitutes considered by the consumer (by reason of the products’ characteristics, their prices and their intended use) or by the producer (through flexibility of the production installations)”177.

However, the Commission hardly refers to criteria such as products characteristics, price and intended use to delineate relevant markets in its state aid decisions178. As a rule, in most of its state aid decisions, the Commission simply establishes the category of products manufactured by the recipient of the aid or a certain industry the recipient belongs to as the relevant market without giving any reasons why the relevant product market should not be broader or narrower179. All further considerations usually relate to the conditions of competition on the relevant market rather than to its boundaries180.

One counter example is the Commission decision in *Infineon Technologies*, a case involving investment aid to a manufacturer of semiconductors within the scope of the multisectoral framework for regional aid to large investment projects181. Here, the Commission used demand side as well as supply side considerations to determine the scope of the relevant market comprising the production of DRAM, a semiconductor memory to be used in PCs and low-cost manufacturing182. Whether *Infineon Technologies* constituted a turning point in the Commission’s approach to market definition under Article 87 EC remains to be seen.

**B Defining Markets in the Media Sector**

Having outlined the Commission’s general approach to market definition under EC competition law, the following part of this study will focus on the definitions adopted by the Commission with regard to media markets. Roughly, the media sector can be divided into five subsectors, the TV broadcasting, the radio, the music, print media and the Internet sector.

**I. Particularities of the Media Sector**

The particularities of the media sector compared with other sectors are best described by the Commission’s words in *Vivendi/Canal+/Seagram*:

“The structure of the media industry is multidimensional and complex. Indeed, different players

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177 See also Community Guidelines on State aid for rescuing and restructuring firms in difficulty, [1999] OJ 288/2, para. 36 footnote 20 which refer to the definition of the relevant market as upheld by the Multisectoral Framework on regional aid for large investment projects.

178 Unsurprisingly, none of the Commission decisions quotes the 1997 Notice on Market Definition.


180 This, in particular, applies to all decision relating to state aid for rescuing and restructuring firms in difficulty, see e.g. Commission Decision, 2000/732/EC, Korn Fahrzeuge und Technik, [2000] OJ L295/21, paras. 48 et seq. See also T. Lübbig/A. Martin-Ehlers, *Beihilfenrecht der EU*, at para. 134.


such as content providers, right holders, content distributors, operate in the value chain from the production of content such as films, pay-TV programming, and music, to its delivery via theatres, pay-TV channels or Internet ‘portals’\textsuperscript{183}

Indeed the media sector is characterised by a number of distinctive features, complex supply chains involving a number of stages of production being only one of them\textsuperscript{184}. It seems also noteworthy, that many of the markets across the media sector have experienced, and continue to experience, rapid change. The aspect of change is also closely related to the phenomenon of convergence\textsuperscript{185}, or the coming together of media, telecommunications and information technologies into unified platforms and networks\textsuperscript{186}. On the other hand, in some sectors of the media industry, consumption becomes fragmented involving special-interest offers with smaller number of copies and ranges. As will be seen in the following, all these features more or less impinge on the way markets in the media sector are defined.

II. Relevant Markets in the Media Sector

1. TV-Broadcasting

a) Retail and Advertising Markets

The main distinction in the TV broadcasting sector is drawn between pay and free TV. The market for pay TV and the market for (free) TV advertising have been recognised as constituting separate relevant product markets in a considerable number of the Commission’s decisions\textsuperscript{187}. There is a relevant product market where pay TV broadcasters compete for subscribers and a market where free TV broadcasters compete for advertising revenues. The latter market is commonly referred to by the Commission as the free TV market but should more precisely be named the market for TV advertising\textsuperscript{188}.


\textsuperscript{184} See Europe Economics (supra note 45), para. 2.1.19.

\textsuperscript{185} For a brief account of the phenomenon of convergence see infra Chapter 1, 1.192-192.

\textsuperscript{186} See Europe Economics (supra note 45), para. 2.1.24.


Whether there is also a viewer market for free TV as there is a subscriber market in pay TV is less clear. So far, the Commission has been reluctant to define such a free TV market in particular because of the fact that there is no (direct) trading relationship between free TV broadcasters and their viewers. The lack of any trade relationship allows the argument to be made that there is no market in the strict economic sense. However, as shown above the concept of the relevant market is based upon the notion that consumers regard certain products as interchangeable with each other. Accordingly, relevant product markets can be delineated independently of whether, and in which form, the consumer pays a consideration for what he receives.

In RTL 7, the Commission provided another reason why a viewer market need not to be defined. The Commission argued that the competition aspects of such a possible free TV viewers market were to be taken into account when assessing the market for TV advertising. Obviously viewer shares of television programmes affect the market position of a television company in the television advertising market. Normally, the more successful a company is with respect to viewer shares, the more successful it is in the television advertising market. Therefore, the Commission decided to leave open whether the viewer market constitutes a distinct relevant product market, since the viewer shares will be taken into account in any event in the assessment of the company’s position in the advertising market. This methodology is somehow atypical for the Commission’s approach to market definition, because it tends to blend the different stages of the competition analysis, market definition and the assessment of market power. Furthermore, it is submitted that to assess TV advertisement markets does not constitute a suitable tool to also address the competition problems of TV viewer markets which – unlike the advertisement sector – become more and more segmented.

Having said this, the arguments put forward by the Commission to justify its decision not to define a viewer market appear unconvincing. It has been assumed that the Commission reluctance in this respect constitutes an act of self-restraint. Exercising an independent competitive assessment of a general viewer market, where market shares coincide with audience shares, might lead to conflicts between national media concentration laws on the...

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190 See e.g. Commission Decision, Case IV/M.878, 14 February 1997, RTL 7, para. 7.
192 Since it is actually used to assess the competitive constraints between products and services on price, it could be arguable whether the hypothetical monopolist test is suited for market definition where products and services are offered for free. However, the analysis of Europe Economics has revealed that the test can indeed be adapted to such situations, see Europe Economics (supra note 45), para. 2.4.21.
194 The high degree of interdependency in demand between consumer markets and advertiser markets in the media sector is also highlighted by Europe Economics (supra note 45), para. 2.4.3.
195 See Commission Decision, Case IV/M.878, 14 February 1997, RTL 7, para. 7. The same line of reasoning was adopted with regard to free access radio markets, see infra Chapter 1, para. 1.129a-129.
194a See K.E. Schmidt (supra note 193), 477.
one hand and the application of the Merger Regulation\textsuperscript{196}. The Commission’s approach of not assessing a possible viewer market might be rooted in granting the Member States a certain room to play within an area that the latter regard to be part of a cultural policy forming one of their classical competencies\textsuperscript{197}. Indeed it is possible that there might arise conflicts between national media-specific regulation – the main purpose of which is to secure freedom of expression and information and media pluralism – and EC competition law not least because to safeguard media pluralism is not a primary goal of EC competition law\textsuperscript{198}.

However, it cannot be seen how these conflicts should be avoided by not defining a viewer market at EC level. In any event, the Commission holds audience shares to be an essential factor for determining the market position in the TV advertising market\textsuperscript{199}. Therefore, although the market share in TV advertising markets is generally calculated by means of measuring of advertising revenue, the Commission will use audience shares as a secondary measure\textsuperscript{200}. The outcome of the assessment of the TV advertising market will, therefore, in the vast majority of cases not differ significantly from the outcome of an assessment of a potential viewers market\textsuperscript{201}.

\textit{bb. Pay TV Market}

The Commission identified several differences which it believed justify to treat pay TV as a market separate from free TV markets. These differences mainly arise from the different trading relationships in the provision of pay TV and free TV. In the case of advertising-financed private television and public television financed through fees and partly through advertising, a trading relationship exists between the programme supplier and the advertising industry. In the case of pay TV, however, there is a trading relationship between the programme supplier and the viewer as subscriber\textsuperscript{202}. These different trading relationships result in different conditions of competition for the two types of television. In the case of advertising-financed television the audience share and the advertising rates are considered by the Commission to be the key parameters. In the case of pay TV, however, the key factors are “the shaping of programmes to meet the interests of the target groups of viewers and the level of subscriptions charged”\textsuperscript{203}. The trading relationships also bring about different forms of

\textsuperscript{196} See A. Bartosch, in: Ch. Koenig/ A. Bartosch/ J.-D. Braun (supra note 121), at p. 228.


\textsuperscript{200} See also Commission Decision, Case IV/M.779, 7 October 1996, Bertelsmann/CLT, para. 20; Commission Decision, Case IV/M.1574, 3 August 1999, Kirch/Mediaset, para. 11.

\textsuperscript{201} For instance, in Kirch/Media Set the Commission calculated the market shares on the TV advertising market solely on the basis of the broadcaster’s audience shares, see Commission Decision, Case IV/M.1574, 3 August 1999, para. 19.


funding: While pay TV is primarily financed by subscription fees, free access television is financed by public authorities, by fees and/or by advertising revenue. The above differences appear to be the most important criteria in the definition of markets in TV broadcasting. Yet, two of the Commission’s earlier decisions also point to the use of differences in the characteristics of pay TV and free access TV. In the merger cases *Kirch/Richemont/Telepiù* and *ABC/Generale des Eaux/Canal+/W.H. Smith TV*, the Commission emphasised that pay TV offers a more specialised programme-mix (comprising e.g. live coverage of sport events or first television screenings of recent films) in order to meet the requirements of a target audience. Notably, however, the question of whether pay TV constitutes a separate market was left open in these cases.

In *Bertelsmann/Kirch/Premiere*, the Commission also used differences in price to support its definition of pay TV as a separate market. According to a survey, pay TV subscribers devote on average 90 % of their daily viewing time to free TV and 10 % to pay TV. The Commission concluded that the fact that subscribers, despite comparatively little use, are prepared to pay considerable sums for pay TV indicates that the latter is a clearly distinguishable product with specific extra utility.

In *NewsCorp/Telepiù*, a recent phase two merger decision, the Commission highlighted a number of other elements that militate in favour of a distinction between the pay-TV and the free-TV markets. Theses differences are the hardware required for the consumption of pay-TV as opposed to free-TV, the distinct functionalities of pay TV through the use of digital technology, and the fact that premium content such as films and sport events can often only be offered by pay TV operators. Astonishingly, in this decision, the characteristics of pay TV services – as well as the views of the main actors in the market – became a more important criterion in defining a separate pay TV market. Different trading relationships, on the other hand, appeared to constitute merely one criterion amongst others.

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206 See Commission Decision, 1999/153/EC, *Bertelsmann/Kirch/Premiere* (Case IV/M.993), [1999] OJ L 53/1, para. 18; see also Commission Decision, Case COMP/JV.37, 21 March 2000, *BSkyB/Kirch Pay TV*, para. 24. These figures, however, should be treated with care since they seem to reflect a particularity of the German market at that time. Latest figures from the UK show that the amount of time being devoted by viewers to free TV after signing up for UK pay TV operator Sky digital falls by 26 to 84 % depending on the genre, see O. Gibson, “Digital Viewers Shun TV Religion”, *The Guardian*, 1 May 2003. This article can be downloaded from the Guardian’s website at http://media.guardian.co.uk/broadcast/story/0,7493,946813,00.html.

207 Pay TV requires the use of a so called set-top box.

208 Through the use of digital technology, pay TV operators are, for instance, able to offer so called Electronic Programme Guides (EPGs). Another unique feature of digital television is interactivity which enables viewers to format their viewing at their convenience, see Commission Decision, Case COMP/M.2876, 2 April 2003, *NewsCorp/Telepiù*, para. 36.


210 The Commission only referred to them as being a criterion in previous Commission decisions, see Commission Decision, Case COMP/M.2876, 2 April 2003, *NewsCorp/Telepiù*, para. 41.
Therefore, the main criteria used by the Commission in defining markets for TV broadcasting are the trading relationships involved, the different conditions of competition, the price of the services and the characteristics of the two types of television. The crucial criterion, however, is trading relationships while the other criteria only seem to complement the Commission’s assessment. The Commission has been criticised for not examining the differences between pay TV and free TV in terms of demand and supply substitutability from the point of view of the consumer. However, it is clear that this method of defining TV markets has been ruled out after the Commission chose to not define a free TV viewer market. Whether the Commission’s decision in NewsCorp/Telepiù constitutes the beginning of the end of the use of trading relationships in market definition in the television sector remains an open question.

cc. Market for TV Advertising

The Commission has consistently distinguished the market for TV advertising where broadcasters compete for advertising revenues from advertising through other media such as print media. From the demand side point of view of the advertising industry, television advertising has different characteristics from other media, and is more expensive. The consumers targeted through the various types of advertising as well as the technique employed and the prices in terms of targeted consumers differ considerably.

The market for TV advertising could be further subdivided into separate markets for advertising in particular programmes. In CLT/Disney/Super RTL, the Commission examined whether there is a separate market for advertising in children-oriented programmes. The Commission noted that such a market could emerge but did not exist at the time of the decision.

In the face of the established distinction between pay TV which is funded through subscription fees and free TV being funded through advertising revenues, the market for TV advertising usually comprises only advertising on free TV. However, where pay TV would be financed from advertising as well as from subscription fees (mixed funding) the market could also include advertising on pay TV channels.

dd. Global Market for Free TV and Pay TV Viewers?

The example of the market for TV advertising demonstrates that there is a tendency of convergence between the different market definitions in the TV broadcasting sector. Whether this tendency could also lead to the adoption of a viewers market where pay TV as well free TV broadcasters compete for viewer shares remains to be seen. It is noteworthy, that the Commission has been ready to acknowledge the competitive interdependencies between free

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TV and pay TV\textsuperscript{217}. First of all, it has repeatedly held that some substitutability exists between pay TV and free TV, since the value of the former depends directly on the alternative viewing possibilities\textsuperscript{218}. The special relationship between the two types of television was particularly stressed in \textit{MSG Media Services}. Using the views of the parties on the past development of pay TV in some of the EC Member States, the Commission found that the roll-out of pay TV depends largely on the quality and quantity of free TV\textsuperscript{219}. The different success of pay TV in Germany on the one hand, and in France and the UK on the other was, in the Commission opinion, down to the different quality of free TV\textsuperscript{220}. The Commission also made clear that it expects the relationship between the two television markets to grow stronger in the future as digitalisation continues to spread\textsuperscript{221}. However, at present, the possible future development of the two types of television is not enough to justify the conclusion that pay TV and free TV are part of the same viewer market\textsuperscript{222}. At the end of the day, the Commission will not be able to assess the competitive interdependencies between pay and free TV without abandoning trading relationships as the criterion of market definition in the TV broadcasting sector.

In \textit{Newscorp/Telepiù}, the Commission was recently again called upon to rule on the issue of whether pay TV and free TV belonged to the same market. The Commission having extensively analysed the market conditions prevailing in Italy and the views of the parties and the main actors in the market, came to the conclusion that this is still not the case\textsuperscript{223}. The Commission emphasised, however, that the continuing digitalisation of free TV – in particular through the introduction of digital terrestrial television – could lead to the distinction between the two markets becoming increasingly blurred in the future. Basically, some of the differences between free TV and pay TV – the different hardware requirements and the distinct functionalities – could cease to exist\textsuperscript{224}.

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\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{218} See Commission Decision, Case IV/M.410, 2 August 1994, \textit{Kirch/Richemont/Telepiù}, para. 16.
\item \textsuperscript{219} Commission Decision, 94/922/EC, \textit{MSG Media Service}, [1994] OJ L 364/1, paras. 32 and 48. These interdependencies were also stressed in one of the most recent rulings of the CFI, T-158/00, \textit{ARD v. Commission}, [2003] ECR II [Judgement of 30 September 2003, not yet published], para. 81. The Court explained the competitive relationship between the two markets by pointing to the fact that free TV broadcasters would loose viewers where pay TV operators gained subscribers.
\item \textsuperscript{220} In 1994, only 2 % of all German households owning a TV had subscribed to German pay TV channel “Premiere”. In France and the UK the percentage of households having subscribed to a pay TV channel counted for 16 % and 15 % respectively, see Commission Decision, 94/922/EC, \textit{MSG Media Service}, [1994] OJ L 364/1, para. 48. See also Institut de l’audiovisuel et des télécommunications en europe, Development of Digital TV in Europe, Austria 1999, at pp. 19 et seq.
\item \textsuperscript{222} Whether the interdependence between the market for pay TV and the market for free TV advertising can still be appreciated at another stage of the competition analysis depends on whether the two markets are regarded as being closely related, see infra Chapter 1, paras. \textsuperscript{1.208} et seq.
\item \textsuperscript{223} Commission Decision, Case COMP/M.2876, 2 April 2003, \textit{Newscorp/Telepiù}, para. 47.
\item \textsuperscript{224} See Commission Decision, Case COMP/M.2876, 2 April 2003, \textit{Newscorp/Telepiù}, paras 34 et seq.
\end{enumerate}
\end{footnotesize}
ee. Distinct Markets for Pay TV Services

aaa. Distinct Markets for Broadcasting According to the Technical Means of Distribution

It has been considered whether the (downstream) retail *market for pay TV* can be further subdivided according to the different technical means of distribution, i.e. the distribution via cable networks or via satellite or terrestrial frequencies. This question is without any doubt closely related to the question whether the operation of TV cable networks constitutes a separate (upstream) product market. In *MSG Media Services*, a phase two merger decision relating to the German market, the Commission held that the *operation of TV cable networks* indeed constitutes a separate relevant market. It based its decision on the fact that from the demand side point of view of the TV supplier, the transmission of his programmes by cable is not interchangeable with satellite transmission. More importantly, television via cable and satellite are not interchangeable from the consumers’ point of view since they face considerable obstacles when switching from cable to satellite or vice versa, inter alia because of the costs involved (“lock-in effect”).

In *British Interactive Broadcasting* and *TPS I*, the Commission found that in the UK and in France the pay television market comprises the three methods of transmission (terrestrial, satellite and cable) and that there was no justification, either, for distinguishing between pay-television markets on the basis of their mode of transmission. In *British Interactive Broadcasting*, historical data showed this to be the case in the UK in respect of pay-television delivered by satellite and cable. The Commission also noted that from end-user behaviour it was clear that the services are considered as substitutes. The price and the composition of cable and satellite pay-television services was broadly similar. Furthermore, it appeared that the fact that satellite customers may have purchased a satellite set-top box or a satellite dish did not create such a significant lock-in effect that switching between satellite and cable services was unlikely.

A similar reasoning led the Commission to the same conclusion in *TPS I*. In France, pay TV services can be delivered via terrestrial transmission, by satellite or by cable. In the view of

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the Commission, the fact that the penetration of satellite in cabled areas was low or very low proved that, where cable pay TV exists, it was a substitute for satellite pay TV, with consumers preferring the convenience of cable connection to the formalities usually involved in the installation of a satellite dish\textsuperscript{230}.

Similarly, in *Telia/Telenor*, the Commission contemplated whether it was appropriate to delineate upstream markets for the buying of rights to distribute content as well as downstream markets for the provision of television content according to the means of transmission\textsuperscript{229a}. With regard to the downstream market the Commission saw the alleged distinction between cable and satellite becoming less relevant in a new digital environment. It argued that both cable and satellite TV would be distributed via individual contracts direct with viewers in the near future. Second, it was also clear that customers would assess the new digital offerings by their ability to supply an attractive and broad range of services. The costs for switching between satellite and cable TV were not even mentioned by the Commission.

As in *MSG Media Services* the decision in *Telia/Telenor* also dealt with the market upstream of the retail market for the provision of TV services. However, while in *MSG Media Services* broadcasters were acting as buyers of transmission services on the respective market, the wholesale market in *Telia/Telenor* saw distributors of TV signals buying rights to content from TV broadcasters\textsuperscript{229b}. Because, in *Telia/Telenor*, broadcasters and distributors “swapped sides” the Commission was required to delineate the wholesale market from the (demand side) point of view of the distributors. Nevertheless, the question of whether cable and satellite TV could be regarded as competing distribution channels remained an issue when determining supply side substitutability\textsuperscript{229c}. Although no definite answer to this question was given, the Commission concluded that there were a number of aspects which indicated that a certain degree of substitutability could exist between transmission of TV signals via cable and satellite TV.

With a view to *MSG Media Services*, the Commission’s approach in *British Interactive Broadcasting*, *TPS I* and *Telia/Telenor* appears to constitute a U-turn. Although one cannot claim that *TPS I* and *British Interactive Broadcasting* overturned the market definition adopted in *MSG Media Services*\textsuperscript{231}, the decisions seem to contradict each other in terms of how much importance is attached to the impact of switching costs. The “contradictory” findings, however, can be explained by the fact that the decisions relate to different

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\textsuperscript{229a} Commission Decision, 2001/98/EC, *Telia/Telenor* (Case IV/M.1439), [2001] OJ L 40/1, paras. 269 et seq.

\textsuperscript{229b} This matter will be discussed in greater detail further below, see infra Chapter 1, paras 1.206a et seq.


\textsuperscript{231} That would imply that both decisions relate to the same markets. However, the product market in *MSG Media Services* concerned the market for cable networks while the Commission, in *TPS I* and *British Interactive Broadcasting*, ruled on the existence of a market for pay TV via cable. While the first concerns the provision of television infrastructure the latter relates to the provision of a television service. See also A. Font Galarza, “The British Interactive Broadcasting Decision and the Application of Competition Rules to the New Digital Interactive Television Services”, [1999] 3 Competition Policy Newsletter 7 (11). This distinction, however, is not entirely observed by Bird&Bird (supra note 86), para. 208 and by K. Coates and L. McCallum (supra note 217), at para. 11.368. No different view can be taken with regard to the decision in *Telia/Telenor*. As explained above (See supra Chapter 1, para. 1.83b.) both, *Telia/Telenor* and *MSG Media Services*, relate to wholesale markets upstream of the retail market for the provision of TV content. However, theses wholesale markets have reverse demand and supply sides.
geographic markets\textsuperscript{232}. Furthermore, almost five years of technological progress had passed when the Commission issued its decision in \textit{TPS I} and \textit{British Interactive Broadcasting}.

From the above it becomes apparent that switching costs can play a central role in delineating pay TV markets\textsuperscript{233}. However, the criterion becomes less important with technological progress and declining prices for the hardware required to receive pay television. At the same time, price and composition of pay TV services become more dominant criteria in the market definition process.

\begin{itemize}
  \item[bbb.] Separate Markets for Analogue and Digital Pay TV
  \end{itemize}

In similar vein, the Commission dealt with the question of whether analogue and digital pay TV make up for separate relevant markets. One of the key differences between analogue and digital television is the increased bandwidth available in the case of digital pay TV and – following from this – a greater diversity of the programmes offered\textsuperscript{234}. Although the Commission, in the past, has used the content of programmes as a criterion to delineate markets\textsuperscript{235} it refused to do so in the case of analogue and digital pay TV. In the Commission’s view, the pay TV market cannot be subdivided into analogue and digital pay TV as digital pay TV is only a further development of analogue pay TV\textsuperscript{236}. Particularly the expected evolution of pay TV services and the fact that analogue services will be gradually replaced and finally completely superseded by digital services do not justify to treat analogue and digital pay TV as separate markets\textsuperscript{237}.

\begin{itemize}
  \item[ccc.] Different Markets for the Different Types of Pay TV Services
  \end{itemize}

Until today no distinct markets have been found to exists with regard to the different types of pay TV services\textsuperscript{238}. In \textit{MSG Media Services} the Commission held that, at that time, different pay TV services such as pay-per-channel, pay-per-view and near-video-on-demand belonged

\textsuperscript{232} The fact that the conditions of competition in broadcasting markets vary due to different percentage of house holds connected to cable TV networks was stressed in Commission Decision, 94/922/EC, \textit{MSG Media Service}, [1994] OJ L 364/1, para. 53. See also A. Font Galarza (supra note 231), at p. 11.


\textsuperscript{238} See e.g. Commission Decision, Case COMP/M.2876, 2 April 2003, \textit{Newscorp/Telepiù}, para. 43. See also Bird&Bird (supra note 86), para. 213.
to the same market since their characteristics did not significantly differ from the basic-tier pay TV channels\textsuperscript{239}. This reasoning might not apply to video-on-demand services, where customers can pick a programme of their choice from an “electronic video store”. However, since video-on-demand was not to be introduced by pay TV operators within the next five years for technical reasons, the Commission saw no need to further elaborate on the question whether video-on-demand services constitute a separate relevant market.

In \textit{Universal Studio Networks/De Facto 829 (Ntl)/Studio Channel Limited}, the results of the Commission’s market investigation pointed towards there being separate markets for the provision of “pay-per-view” films and/or channels at retail level\textsuperscript{240}. These considerations were mainly founded on the fact that consumers choose to purchase a given film for an additional fee while this is not the case with basic-tier films on a per film basis or basic-tier channels on a per channel basis\textsuperscript{241}. Again, since pay-per-view services were not yet well-developed it was not necessary to determine this point for the purposes of the case under investigation.

\textbf{ff. Market for Digital Interactive Television Services}

The digitalisation of television gives operators the opportunity to introduce a variety of additional new services commonly referred to as digital interactive television services. Digital interactive television services usually comprise services like home banking, home shopping, holiday and travel services, downloading of games, learning online, a limited collection of so-called walled garden Internet sites, e-mail and public services\textsuperscript{242}. However, these services will not be provided by operators of digital interactive television but by third party suppliers of goods and services\textsuperscript{243}. Operators of digital interactive television merely make available the “platform” through which these suppliers can promote and sell their goods and services\textsuperscript{244}.

The Commission, having to deal with the compatibility of the joint venture British Interactive Broadcasting/Open with regard to Article 81 EC, and the investing of BSkyB in Kirch Pay TV in a phase one decision under the Merger Regulation, came to the conclusion that digital interactive television services form a separate relevant product market\textsuperscript{245}. In view of this definition of the relevant market one could wonder which market the Commission precisely

\textsuperscript{240} See Commission Decision, Case IV/M.2211, 20 December 2000, Universal Studio Networks/De Facto 829 (Ntl)/Studio Channel Limited, para. 17. The question whether there are separate markets for the provision of pay TV channels at wholesale level will be dealt with further below, see infra Chapter 1, para. 1.1184-1185.
\textsuperscript{241} As possible substitutes the Commission identified video-rentals and near-video-on-demand services (alone or in conjunction with products such as digital personal video recorders).
\textsuperscript{242} See Commission Decision, 1999/781/EC, British Interactive Broadcasting/Open (Case IV/36.539), [1999] OJ L 312/1, para. 11; Commission Decision, Case COMP/JV.37, 21 March 2000, BSkyB/Kirch Pay TV, para. 30. In Germany, however, the launch of digital interactive television services has been hampered by the failure to implement a common application programming interface (API). APIs are the software interfaces between applications, made available by broadcasters or service providers, and the resources in the enhanced digital television equipment for digital television and radio services (Article 2 lit. p Framework Directive). For an account of the access issue involved with API see also infra Chapter 1, paras. 1.1941-1944 et seq.
\textsuperscript{243} The Commission, in British Interactive Broadcasting referred to these suppliers in accordance with the term used by the parties of the joint venture as “content providers”.
\textsuperscript{244} For example, in the UK, Sky Digital’s interactive platform Sky Active includes services like e-mail or banking offered by companies such as yahoo and HSBC.
meant. Theoretically, there are two markets which could be classified as the “market for digital interactive television services”: The upstream market for access of third party suppliers to digital interactive television platforms and the retail market for the provision of digital interactive services to consumers. However, given the Commission’s wording in paragraph 31 of the decision in British Interactive Broadcasting and paragraph 14 of the decision in BSkyB/Kirch Pay TV (“[…] in defining the upstream market of the supply of digital interactive television services by service providers to content providers”) it is safe to assume that the term “market for digital interactive television services” stands for the upstream access market.

The Commission based its decision to delineate a separate market for digital interactive television services on a thorough analysis of demand side substitutability of the services under investigation. In this respect, the market definition adopted in British Interactive Broadcasting and BSkyB/Kirch Pay TV is fully in line with the approach specified by the 1997 Notice on Market Definition.

It is interesting to note, though, that the Commission chose to define the upstream market for access to the digital interactive services platform by assessing retail-demand substitutability i.e. the demand which stems from the end-user. However, as the Commission itself noted, with regard to access to the digital interactive television service platform, the primary source of demand, and income, stems from suppliers who wish to offer goods and services to consumers through digital interactive television. Consequently, it appears, in assessing whether there is a relevant market for access to the digital interactive television services platform one should primarily take into account the demand from suppliers requiring access to the digital interactive television platform.

The Commission, however, argued that demand from the suppliers of goods and services for access to the digital interactive television services platform is likely to be determined by how popular the platform and all the services it carries is with final consumers. It goes without saying that the more customers a digital interactive services platform has, the more attractive the platform becomes for suppliers. Ultimately, the demand for digital interactive television services is determined by the consumer and the market for access to digital interactive television services platforms, therefore, needs to be delineated by assessing retail-demand side substitutability. In the words of the Commission:

para. 40. The latter decision was upheld by the CFI, T-158/00, ARD v. Commission, [2003] ECR II [Judgement of 30 September 2003, not yet published]. See also Commission Decision, 94/922/EC, MSG Media Service, [1994] OJ L 364/1, para. 38. As in these cases the services were not being offered separately to consumer but as a package, and as it was the broad nature of the package that was particularly attractive to potential consumers, the Commission regarded all the different services as belonging to one and the same product market, see A. Bartosch, in: Ch. Koenig/ A. Bartosch/ J.-D. Braun (supra note 121), at p. 236.

246 See Commission Decision, Case COMP/JV.37, 21 March 2000, BSkyB/Kirch Pay TV, para. 31. In the UK, Sky digital does not charge its subscribers for the use of most of its services, see http://www1.sky.com/skyactive/faqs/.


248 Conversely the attractiveness of the “platform” to final consumers will be determined by the range and types of services they can find on it.

“It is therefore the retail-demand substitutability for digital interactive television services which is determinant in defining the upstream market of the supply of digital interactive television services by service providers, such as BiB (British Interactive Broadcasting), to content providers.”

Essentially, this approach to market definition let the Commission catch two birds with one stone. Assessing demand substitutability on the downstream retail market for digital interactive television services allowed the Commission to delineate this market as well as, incidentally, the upstream market for access to the digital interactive television services platform.

In assessing retail-demand substitutability, the Commission, first referred to the hypothetical monopolist test. It explained the difficulties which arise when applying the test to emerging markets, because past data did not exist to evaluate the likely response of customers to a hypothetical small, non-transitory change in relative prices of the digital interactive television services to be offered in the future. The Commission, therefore, highlighted that demand substitutability can also be assessed by comparing the characteristics of products or services in order to determine whether they are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services. The Commission, in analysing the competitive constraints faced by digital interactive services from other products and services, concentrated on the substitutability (partly or wholly) of services offered by digital interactive television with high street retailing and with the services and products available via personal computers. Notably, services which appear to be closer substitutes such as catalogue shopping, telephone banking or (analogue) TV shopping were completely disregarded.

Considering the different characteristics of retailing services offered via digital interactive television on the one hand and high street retailing on the other, the Commission regarded the two as being markedly different. The range of products or services that is likely to be offered online by retailers is thought to be “very different from that available in high-street shops”. Furthermore, a price differential between goods or services purchased in the high street and those obtained via a package of digital interactive television services was almost certainly expected. The Commission also highlighted the economies of scope in the provision of a package of digital interactive services, not only comprising retailing services but also e-mail, downloading of computer games, limited Internet access and information services since the infrastructure required for each of the individual services is the same. Thus, the market for digital interactive television services was found to be separate from that for the traditional retailing of goods and services in high streets.

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250 Commission Decision, 1999/781/EC, British Interactive Broadcasting/Open (Case IV/36.539), [1999] OJ L 312/1, para. 13. Commission Decision, Case COMP/JV.37, 21 March 2000, BSkyB/Kirch Pay TV, para. 30. See also supra Chapter 1, para. 1.201. As will soon be seen, however, the Commission did not completely refrain from applying the hypothetical monopolist test. See infra Chapter 1, para. 1.96.


253 In the view of the Commission, perishable goods, such as food, or bulky goods where storage and delivery charges would be high will not be offered through digital interactive television services.

The demand-substitutability test and differences in the characteristics of interactive services available via television sets and via personal computers led the Commission to assume that they are separate relevant markets. The Commission, in applying the first prong of the hypothetical monopolist test held that a small permanent increase in the price of services available via television would not direct the customers of digital interactive television services to switch to interactive services offered via personal computers. The provision of digital interactive television services was, therefore, unlikely to be constrained by the existence of services accessible through personal computers. This assertion was based on the following pieces of evidence: Television sets are ubiquitous in Germany as well as in the UK. At the time of the decisions, however, far fewer households had a personal computer or even a modem to access interactive services via the Internet. It also seemed unlikely that consumers would switch between interactive services offered via television sets and services offered via PC because of the relatively high cost of personal computers. The Commission also found that retailers were likely to target different customers using different brands belonging to the same group of companies when providing digital interactive services available via television sets and personal computers.

Finally, the market for digital interactive television services is separate from the market for pay TV due to the different characteristics of pay TV services and digital interactive television services. The many interdependencies between the two services, however, let the Commission regard the market for digital interactive television services as being “separate from but linked and complementary to pay TV”.

To sum up, in distinguishing a separate relevant market for access to digital interactive television services the Commission mainly used the characteristics of the products and services in question, switching costs and price as criteria. The hypothetical monopolist test is only applied to test whether the operators of digital interactive television services are constraint by digital interactive services offered via PC and not with regard to high street

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256 See supra Chapter 1, para. 1.131-13.
257 See also Bird&Bird (supra note 86), para. 220.
260 See Commission Decision, 1999/781/EC, British Interactive Broadcasting/Open (Case IV/36.539), [1999] OJ L 312/1, para. 23. The distinguishing element here was the fact that pay TV services are largely entertainment related, whereas digital interactive television services are largely transactional or informational. E. J. Carter (supra note 211), p. 104 assumes that by describing pay TV as largely entertainment related the Commission has widened the “gulf between pay TV and free TV” since “any plurality role played by pay TV must be regarded as at best secondary, if at all”.
261 The main link is the fact that pay TV is regarded as a driver for digital interactive television services, see Commission Decision, Case COMP/JV.37, 21 March 2000, BSkyB/Kirch Pay TV, para. 40. This assumption is confirmed by latest figures relating to digital interactive television services in the UK. According to Sky digital, 92 % of its customers are using Sky active, the pay TV operators digital interactive services platform, see http://www1.sky.com/skyactive/homepage/index.html.
262 Commission Decision, Case COMP/JV.37, 21 March 2000, BSkyB/Kirch Pay TV, paras. 40 and 78. See also Commission Decision, COMP/JV.47, 16 May 2000, Canal+/Largardère/Liberty Media, para. 38. For the implications of a finding that two markets are closely related see infra Chapter 1, paras. 1.2081-208 et seq.
What is striking when comparing the methodology used to define the digital interactive television services market with the methodology employed to delineate the markets for pay TV and free TV is the weight the Commission put on the existence or non-existence of trading relationships. The Commission incidentally found that a retail market for digital interactive television services existed, although there was no trading relationship between the operator of the digital interactive television services platform and the consumer. Conversely, the different trading relationships in free TV and pay TV were the determinant factor in distinguishing the two markets.

b) Upstream Wholesale Markets for Content

Having described the retail markets for the provision of television broadcasting to viewers used by the Commission in its decisional practice, the question remains how the Commission defines the relevant wholesale upstream markets for the content to be broadcasted. The entering of new players due to liberalisation of the broadcasting sector along with the enormous increase in capacity through developments such as satellite transmission lead to a massive increase in the demand for content in the past decade. The price for content increased significantly. The selling of content to broadcasters is also influenced by the roll-out of pay TV services since the viability of such services depends wholly on the ability to attract viewers by offering specialised content, in particular first TV viewing of premium film and sport.

aa. Markets for Acquisition of Broadcasting Rights

The acquisition of TV rights and licences to broadcast, in particular of films or sport events has been held to constitute a separate relevant product market. However, the Commission did not make much effort to delineate such a broad market as it became soon clear that the market was further segmented. More specific markets have been considered by the Commission following a step-by-step approach although, in many cases, the exact definition of the relevant markets has been left open.

aaa. Market for Acquisition of Rights to Broadcast Sporting Events

In a first step, the Commission dealt with the question whether there are distinct markets for the acquisition of rights to broadcast films on the one hand and the acquisition of rights to

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263 The evidential value of such an selective use of the hypothetical monopolist test seems doubtful since the test was actually developed to be applied in respect of all possible substitutes of a product.

264 See supra Chapter 1, para. 1.691-69.


broadcast sporting events on the other hand. The Commission, in *Bertelsmann/CLT*, held that this could be the case due to the different characteristics of film and sport programmes but did not answer the question. In the Commission’s view, sport programmes covering widely popular sports or major international events are often able to achieve high audience ratings and are generally considered to be particularly suited to carrying advertisements, as reflected by the amount of sponsorship involved. Furthermore, it is thought that TV rights for sport events must be acquired in advance of the event. Lastly, the attractiveness of TV rights to broadcast sporting events may change considerably depending on the actual participation and success of teams or participants appealing to national or regional audiences.

It is arguable whether the Commission would adopt the same reasoning in a case where the above market definition was determinant. The meticulous analysis undertaken by Carter reveals that the “specific” features of sport events mentioned by the Commission do not itself distinguish sport content from other popular content, such as, for instance, blockbuster movies. Instead, it is suggested that the differences between film and sport content could be established by referring to the nature of the content itself. While, for instance, the right to broadcast a film can be characterised as more or less a durable “good”, the right to show a sporting event is, in contrast a perishable “good”. Moreover, the analysis of a possible market for the acquisition of sports broadcasting rights requires to clearly identify from whose point of view demand substitutability is to be considered, an issue which the Commission in *Bertelsmann/CLT* neglected.

(1) Markets for the Rights to Broadcast Certain Major Sporting Events

Considering the rapidly growing economic importance of sport events and their broadcasting in the past few years it does not come as a surprise that the Commission was forced to further elaborate on the issue of market definition in the acquisition of sport broadcasting rights. In *Eurovision*, an Article 81 EC case, the European Broadcasting Union (EBU) sought for negative clearance or for exemption pursuant to Article 81(3) EC in respect of its internal rules and regulations governing the acquisition of television rights to sporting events, the exchange of sports programmes within the framework of Eurovision and contractual access to such programmes for third parties. In considering the markets which could be affected by the EBU’s rules and regulations the Commission saw “a strong likelihood that there are separate

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272 See E. J. Carter (supra note 211), pp. 111 et seq.

273 In the analysis of the boundaries of the market for the acquisition of sports broadcasting rights demand side substitutability could be determined from the view of the broadcaster wishing to buy the rights. It could as well be assessed, however, from the view of sport fans whose demands the broadcasters are trying to satisfy or from the point of view of the advertiser. It is clear that the special structure of demand and supply in TV broadcasting markets combined with the particularities of sports broadcasting have to be adequately reflected by the market definition process. See also E. J. Carter (supra note 211), pp. 114 et seq.


markets for the acquisition of some major sporting events, most of them international”\(^\text{276}\). Such sporting events are, for example, the Summer Olympics, the Winter Olympics, the Wimbledon Finals and the Football World Cup. Although the Commission did not give a definitive answer as to whether there are separate markets for the acquisition of major sporting events, its analysis went, nevertheless, further than simply referring to the particular characteristics of sports programmes.

The Commission noted that the attraction of sports programmes and the level of competition for the television rights varies according to the type of sport and the type of event. In contrast to minority sports, mass sports like football, tennis or motor-racing generally attract large audiences, the preferences varying from country to country\(^\text{277}\). This applies in particular to international events which tend to be more attractive for the audience in a given country than national ones, provided the national team or a national champion is involved. Furthermore, the Commission noticed a considerable increase in the prices of rights to broadcast major sporting events, in particular with regard to the Olympic Games or the Football World Cup\(^\text{278}\). Remarkably, the Commission, similarly as in the case of the market for digital interactive services\(^\text{279}\), also took into account retail-demand substitutability to determine the wholesale market for the acquisition of sports broadcasting rights. The fact that data on the behaviour of viewers was available let the Commission assess demand elasticity between major sporting events. For at least some sporting events such as the Summer Olympics, the Winter Olympics, the Wimbledon Finals and the Football World Cup\(^\text{280}\) viewing behaviour did not appear to be influenced by the coincidence of other major sporting events being broadcasted simultaneously, or nearly simultaneously\(^\text{281}\). The Commission concluded that such sporting events appeared to be largely independent of whatever other major sports are broadcasted at a similar time and that, therefore, broadcaster would be inclined to pay much higher prices for these events\(^\text{282}\).

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\(^\text{276}\) Commission Decision, 2000/400/EC, Eurovision (Case IV/32.150), [2000] OJ L 151/18, para. 43. The Commission’s Decision was successfully challenged before the Court of First Instance. However, the Court, in fact, upheld the market definition “adopted” by the Commission, see CFI, Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00, Météropole télévision S4 a.o., [2002] ECR II-3805, para. 57. See also D. Brinkman/ E. Vollebregt, “The Marketing of Sport and its Relation to EC Competition Law”, [1998] ECLR 281 (283 et seq.).


\(^\text{279}\) See supra Chapter 1, paras. 1.924-92 et seq.

\(^\text{280}\) The Commission did not mention any other sporting events of international importance which belong to the category “major sporting events”. Here, one could consider to use the list drawn up by the Member States according to Article 3a Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (hereafter referred to as “Television Without Frontiers Directive”), [1989] OJ L 298/3 amended by Directive 97/36/EC of the European Parliament and of the Council, [1997] OJ 202/60. The UK listed sporting events, for instance, also enclose the European Football Championship Finals Tournament and the Rugby World Cup Final. However, it should be recalled that this list was drawn up in the context of a piece of legislation which has predominantly cultural aims, rather than economic aims, see E. J. Carter (supra note 211), pp. 116.

\(^\text{281}\) The Commission, here, used the results of a study conducted for DG IV, see D. Harbord/ A. Hernando/ G. v. Graevenitz, Market Definition in European Sports Broadcasting and Competition for Sports Broadcasting Rights, October 1999, at pp. 54 et seq.

The Commission’s most recent decision dealing with the broadcasting of sport events concerned the compatibility of the UEFA’s broadcasting rules with Article 81 EC283. A substantial part of the decision is dedicated to the definition of the markets potentially affected by the UEFA’s broadcasting rules284. The Commission held that there may exist a separate market for broadcasting rights to football events. However, no final conclusion was reached as to the market definition issues at stake, since, in its view, the UEFA broadcasting regulations would not appreciably restrict competition even where markets were defined as narrowly as a separate market for the broadcasting of football events played regularly throughout every year285. By and large, the methodology and the criteria used to define a market for the acquisition of football broadcasting rights follow the lines of the Commission’s decision in Eurovision.

The Commission’s analysis outlines several reasons why there could be a separate market for the acquisition of rights to broadcast football events such as the UEFA Champions League, the UEFA Cup and the matches of national championship and cup competitions. In the Commission’s view, the distinctive characteristics of football broadcasting and the special purpose of rights to broadcast football events justify to treat the market as separate from the market for the acquisition of broadcasting rights for other sporting events. Demand side substitutability for the rights to broadcast football is assessed not only by considering the views of broadcasters but also by taking into consideration the preferences of viewers and advertisers. Notably, the Commission did not employ the hypothetical monopolist test.

A very important feature of football is the fact that it enables broadcasters to develop a brand image for a channel. Football has a distinct high profile among desirable viewers and it generally provides high audience figures286. Football helps broadcasters to induce viewers to regularly make an appointment to view a particular channel and to associate it with football. If a channel usually broadcasts certain programmes such as the UEFA Champions League, viewers will develop the habit of screening that channel as their first port of call in determining their viewing choices. A particular value of football in brand-building is its regularity287. Unlike many other sporting events, football is characterised by tournaments which are played regularly throughout most of the year. Football, unlike other sports, therefore allows broadcasters to achieve high viewing figures on a regular, sustained and continuous basis. Because of these features broadcasters are willing to pay higher prices for broadcasting rights to football events than for any other events, including the most exceptional sporting events such as the Olympic Games and Formula One288.

283 Commission Decision, 2001/478/EC, UEFA Broadcasting Rules, [2001] OJ L 171/12. The UEFA’s rules allow national football associations to prohibit the broadcasting of matches during a certain time period on weekends corresponding to the time at which fixtures are scheduled in the respective country. For a critical account of the Commission’s decision see S. Weatherill, “‘Fair Play Please!’: Recent Developments in the Application of EC Law to Sport”, [2003] CMLRev 51 (75 et seq.).


288 In fact, for some broadcasters, football can be considered as loss leader, see Commission Decision, 2001/478/EC, UEFA Broadcasting Rules, [2001] OJ L 171/12, para. 35.
The unrivalled position of football as a “brand image creator” determines the special value of football for broadcasters who want to attract viewers or subscribers respectively. However, football can also give broadcasters the edge over their competitors in the market for television advertising. This is due to the fact that football as a regular and frequent event attracting high viewing figures, allows the advertiser to make frequent contact with a potential customer with a distinct profile. The attractiveness and elusiveness of the target group make programmes watched by them of significant value to broadcasters and they are, thus, keen to have programmes which attract this target audience. Football is the programme which seems to be the most effective tool for addressing a group which is believed to be the most sought after target audience, the group of men with an above-average spending power and who are in the age group of 16 and 35. This special feature of football lets broadcasters charge much higher rates for advertising in connection with football compared to other sport programmes.

Having left open in the past whether there exists a separate market for broadcasting rights of football events played regularly throughout every year (this mainly includes national First and Second division and cup events as well as the UEFA Champions League and UEFA Cup and excludes World Cup and European Championship matches), the Commission recently decided this matter in Newscorp/Telepiù and UEFA Champions League. The Commission argued that only rights to broadcast football events played regularly throughout every year can achieve the above described purposes, i.e. to regularly attract high audience numbers, specific audiences or to provide a certain brand image. Consequently, there are no other programmes which place a competitive restraint on the rights holders’ ability to determine the price of these TV broadcasting rights. The Commission, in its UEFA Champions League decision, left open whether the relevant market had to be narrower. In the earlier Newscorp/Telepiù case, however, it accepted that, at least with a regard to the Italian market, the relevant market was the market for the acquisition of broadcasting rights for football events played every year where national teams participate.

Markets for Acquisition of Film Rights

As well as the market for the acquisition of sport broadcasting rights, the market for the acquisition of rights to broadcast films has been found to be further segmented. The Commission had to deal with markets for the acquisition of rights to broadcast films in several

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290a Commission Decision, Case COMP/M.2876, 2 April 2003, Newscorp/Telepiù, para. 66.
290d Even narrower market definitions could be used in the forthcoming Commission’s decisions relating to the joint selling of the commercial rights of the German Bundesliga and the English Premier League, see Commission, Press Release IP/03/1106, 24 July 2003 and Press Release IP/02/1951, 20 December 2002.
decisions under the Merger Regulation, to be precise in Seagram/Polygram\(^{292}\), Vivendi/Canal+/Seagram\(^{293}\) and in Newscorp/Telepiù\(^{292a}\). In these decisions it distinguished a variety of submarkets of the market for the acquisition of exclusive broadcasting rights for premium motion pictures without going into detail. The determinant factors here are the attractiveness of content from the point of view of the consumer as well as the price of the rights to broadcast the content.

(1) Separate Markets for the Acquisition of Broadcasting Rights for Feature Films and Rights for Made-for-TV Programmes

The market for broadcasting rights was found to be separated into a market for broadcasting rights for feature films and a market for broadcasting rights for made-for-TV programmes\(^{294}\). The Commission assessed the market from the demand side as well as the supply side point of view. The rights for feature films and the rights for made-for-TV were not interchangeable from a pay-TV operator’s perspective since they do not have the same value in terms of consumers’ attractiveness. These different values were reflected on the supply side by different pricing structures for the two categories of rights.

The market for the acquisition of broadcasting rights for made-for-TV programmes excludes productions which are made by broadcasters and are only intended for captive use, so-called in-house productions\(^{295}\). The Commission, in RTL/Veronica/Endemol, seemed to be stating the obvious since products which are not offered on a market can hardly be part of that market. However, the parties in that case claimed that in-house productions should be included in a general market for TV productions since broadcasters will always have to make a “make or buy decision” with regard to production. The Commission did not buy the parties’ arguments and stated that, on the contrary, broadcasters did not have a free choice to decide whether to produce a programme themselves or to buy it from a producer because of the high overhead and personnel costs for in-house productions\(^{296}\).

(2) Market for the Acquisition of Broadcasting Rights for First Window (Premium) Films by Pay TV Operators

In Vivendi/Canal+/Seagram, distinct markets for the broadcasting rights for films were identified according to the different timing and windows of the exhibition of films\(^{295a}\). The Commission, in particular, defined a market for the acquisition of broadcasting rights for so-
called first window films by pay TV operators. Film rights are generally exploited according to a special exhibition schedule (so-called “pay periods”). Premium films can be broadcasted on pay TV only after the film has been shown in theatres, been available on video and offered on a pay-per-view basis. Films released in the time period of 6 months thereafter, are so-called first-window films. The first window is followed by a second-window of 6 months before films, finally, become available for the free TV market.

Just like sport events, premium films are considered to be a “driver” for pay TV. The broadcasting of first window films, therefore, constitutes an essential factor in relation to the attractiveness of pay-TV since second window films will be regarded as “second quality” by the pay TV subscribers. The Commission, therefore, maintained that second-window content signified lower value from a consumer’s point of view and that consumers did not consider that first and second-window films were interchangeable in terms of novelty. Furthermore, from a supply side point of view, it was not possible to substitute a first-window film by a second-window film as second-window fees represented in average 5-25% of the first-window fees. According to the Commission, the market for premium films is further subdivided into the market for premium films produced by the US Hollywood studios and the market for those films produced by other studios because most of the premium films are produced by the majors US studios.

Market for Film Production

In Seagram/Polygram, the Commission defined the upstream market for the production of films. The production of films involves the co-ordination of various operations such as finding promising film scripts, finding talented actors and directors, financing, developing a marketing and distribution plan, etc. In the Commission’s view, the making of films is distinct from other productions because of the short life cycle of films and the fact that films can be considered as heterogeneous products.

Furthermore, the Commission considered whether “mainstream” films for a wide international audience may represent a separate category from “arthouse films” which are smaller productions, not necessarily intended for a wide (international) audience. The question whether the enormous financial resources required to produce a “mainstream film”, such as

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298 Commission Decision, Case COMP/M.2876, 2 April 2003, Newscorp/Telepiù, paras. 59. In the specific case of Italy, the difference between first and second window has not, to date, been significant or relevant in the current commercial practice.


303 The production of a big-budget film intended for showing on international markets is usually a multi-million Euro project, see Commission Decision, Case IV/M.1219, 21 September 1998, Seagram/Polygram, at IV. B.1.a.
the ones typically made by the big Hollywood studios, demand a narrower market definition was, however, left open.

**bb. Wholesale Market for the Supply of Film and Sport Channels for Pay TV**

In *British Interactive Broadcasting*, the Commission defined a wholesale market for the supply of film and sport channels for pay TV. This wholesale market involves the supply of channels, which are then sold on an individual basis and at a premium to the subscriber by the pay-TV operator in the retail market, as opposed to the package of general interest and thematic channels. In some Member States like the UK, the Netherlands and Spain pay TV operators sell their sport or film channels – either separately or in a package – to retailers such as cable operators. The market, however, can also include the acquiring of such channels by pay TV operators themselves from, for instance, Hollywood studios.

To delineate the boundaries of the wholesale market the Commission, again, assessed demand on the retail market. In its opinion, pay-television operators’ demand for particular channels reflects the demand of their subscribers. The price and the characteristics of pay TV channels composed of recently released films and live exclusive coverage of attractive sports events differ significantly from those of basic channels. Film and sport channels attract higher viewing figures and the subscription to such channels is far more expensive. While thematic or general interest pay television channels are supplied to customers as part of a package, film and sports channels are charged on an individual basis. In *British Interactive Broadcasting*, the Commission was also able to use the hypothetical monopolist test to support its initial findings because, in the past, small permanent increases in relative prices of sport and film channels had been profitable. It has been left open whether there are separate wholesale markets in respect of films and sports channels or whether the relevant market should be divided into different markets according to different types of channels (generic or thematic ones, for example, sports, children or news).

c) Technical Services for Pay TV and Digital Interactive Services

The Commission has defined a product market for the wholesale provision of technical services necessary for pay-television. The operation of pay TV requires a special technical infrastructure and services which are either provided by the pay TV operator or other firms.
The infrastructure and services essentially comprise the making available of set-top boxes, the provision of conditional access services including smart cards, subscriber management services and possibly the services relating to accessing the electronic programme guide and the writing of applications compatible with the application programming interface included in the set-top box. However, the Commission did not give any particular reasons why the activities involved with the wholesale provision of the technical services necessary for pay-television form a separate product market. One can only assume that the reasons can be found in the unique characteristics of the services in question and that the pay TV market – a market which the market for digital interactive television services is closely linked to – constitutes a separate product market itself.

Since there is a very large area of overlaps between the technical services necessary for pay-television and the services necessary for digital interactive television the Commission also included these services in the market described above. Also, as both satellite and cable transmission require the same technical services it was not necessary to define separate markets according to the different technologies for satellite and cable transmission.

d) Relevant Geographic Markets in the Broadcasting Sector

The Commission’s decisional practice suggests that markets in the broadcasting industry remain – with few exceptions – stubbornly national. The varying conditions of competitions prevailing in the different Member States have prevented markets from becoming transnational or even community wide. The reasons are primarily to be found in the different regulatory regimes, language barriers, cultural factors and copyright restrictions. In particular, these differences between the Member States become apparent when looking at the markets for pay TV and free TV.

aa. Pay TV and Free TV Markets

The programmes of the different national pay TV operators are not substitutable to a large extent. Even after digitalisation of transmission paths and the roll-out of digital pay TV the conditions of competition faced by the pay TV operators differ significantly for a number of reasons. Despite the fact that in certain niche markets channels like MTV, Eurosport or arte broadcast throughout Europe, television broadcasting is still generally organised on a national

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309 A detailed account of the technical infrastructure needed for the provision of digital pay TV is given by the Commission in MSG Media Services, see Commission Decision, 94/922/EC, [1994] OJ L 364/1, paras. 20 et seq.

310 The methodology used here has been described as “factual-based” by Bird&Bird, (supra note 86), para. 263.


312 See Commission Decision, 94/922/EC, MSG Media Service, [1994] OJ L 364/1, para. 31. Commission Decision, 1999/2935, British Interactive Broadcasting/Open (Case IV/36.539), [1999] OJ L 312/1, para. 32. The question whether the fact that the skills and technologies underlying each of the individual technical services necessary for pay-television and/or digital interactive television services are different in some aspects justify narrower product markets was left open.


314 See E. J. Carter (supra note 211), p. 121.
basis. At least in the five big Member States television is predominantly broadcasted nationally and in the language of the given Member State. Broadcasting rights are confined to one or more Member States or to a certain region. Broadcasters also incur different costs when broadcasting foreign films: In Spain, France, Germany and Italy, English films are often dubbed while, for instance, in the Scandinavian or the Benelux Member States broadcasters simply use sub-titles. Furthermore, the pay TV market in some Member States is dominated by one operator while a number of operators compete for subscribers in the Scandinavian Member States. Prices for pay TV and the number of channels accessible vary accordingly. Lastly, pay TV has been rolled out with varying success in the different Member States. In its judgement in Cableuropa, the CFI upheld the Commission’s decision that pay TV markets were national. In that decision the relevant geographic market was Spain. The CFI maintained that because some Spanish pay TV operators were also active in other European countries, the relevant geographic market did not necessarily have to be wider than national. Furthermore, the fact that services offered in Spain could also be accessed from outside the country did not automatically remove the national character of the respective market.

The markets for free TV advertising are also national. TV advertising is directed to the area where TV broadcasters have their main audience. Since TV broadcasting still generally takes place on a national basis, the markets for free TV where broadcasters compete for advertising revenue are national, too. The same applies to the wholesale market for the supply of film and sport channels for Pay TV although the Commission, in the only case dealing with this issue, left open whether the market could not only comprise the UK but also Ireland.

The determinant factor in defining the geographic boundaries for pay TV and free TV markets is clearly language. Consequently, with regard to cases where pay TV was broadcasted to a single linguistic area the Commission considered whether the relevant geographic markets for pay-TV could extend, comprising, for instance, the entire German-speaking area or the UK and Ireland respectively.

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317 See supra Chapter 1, para. 1.791.
316a CFI, Case T-246/02 etc., Cableuropa SA a.o. v. Commission, [2003] ECR II-[Judgement of 30 September 2003, not yet published], para. 125. The ruling concerned an Article 230 (4) EC action against a decision by the Commission to refer back to Spanish competition authorities according to Article 9 (3) MR a merger relating to the integration of the two satellite digital television platforms operating in Spain, see Case COMP/M.2845, Sogecable/Canalsatellite Digital/Via Digital, 14 August 2002. It must not be forgotten, however, that the CFI in its judgements merely examines whether the Commission made a manifest error of assessment when defining relevant markets, see CFI, Case T-342/99, Airtours v. Commission, [2002] ECR II-2585, paras. 26 and 33.
316b CFI, Case T-246/02 etc., Cableuropa SA a.o. v. Commission, [2003] ECR II-[Judgement of 30 September 2003, not yet published], paras. 125 and 133.
316c CFI, Case T-246/02 etc., Cableuropa SA a.o. v. Commission, [2003] ECR II-[Judgement of 30 September 2003, not yet published], paras. 125 and 133.
bb. Digital Interactive Television Services

The Commission also found the market for digital interactive television services to be national. It will be remembered that the market for digital interactive television services has been described as being “separate from but linked and complementary to pay TV”\(^{321}\). The digital interactive television services planned by the parties in British Interactive Broadcasting and in BSkyB/Kirch Pay TV were to operate on a national basis. Therefore, the services offered were to be determined by the national taste and national demand. In addition, the information services would be related to national demand for information.

c. Market for Acquisition of Broadcasting Rights

At first glance, the geographic market for the acquisition of TV broadcasting rights seems to be broader than the geographic markets delineated in respect of pay TV, free TV and digital interactive television. Theoretically, broadcasting rights can be sourced from anywhere in the world and operators can acquire rights for more than one territory at a time. Despite this, broadcasting rights are still acquired mainly on a national basis or, at the most, by language area. Particularly film broadcasting rights are usually granted for a given language version and broadcasting area\(^{322}\). Obviously, trading patterns have adapted to the fact that TV broadcasting is still organised on a national basis. Therefore, the Commission held the geographic dimension for the acquisition of broadcasting rights to be national or at least confined to single language areas. The Commission, in Eurovision, left open whether the submarkets for the acquisition of the rights to broadcast major sporting events is national or wider\(^{323}\). In respect of a possible market for broadcasting rights for football, the Commission stated that this market would be national since football broadcasting rights were generally sold on a national basis even for pan-European events such as the UEFA Champions League\(^{324}\).

dd. Technical Services for Pay TV and Digital Interactive TV Services

The fact that the market for technical services for pay TV and digital interactive television services is closely linked to the market for pay TV led the Commission to conclude that both markets have the same geographic boundaries. This implies that in some cases the market is found to be national\(^ {325}\) while in other cases it comprises an entire single language area\(^ {326}\).

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321 See supra Chapter 1, para. 1.971.


324 Commission Decision, 2001/478/EC, UEFA Broadcasting Rules, [2001] OJ L 171/12, para. 44. Even where sporting events rights are acquired on an exclusive basis for the whole European territory they are resold thereafter per country, see Commission Decision, 2000/400/EC, Eurovision (Case IV/32.150), [2000] OJ L 151/18, para. 46.

325 Commission Decision, 1999/781/EC, British Interactive Broadcasting/Open (Case IV/36.539), [1999] OJ L 312/1, paras. 44 et seq. In British Interactive Broadcasting the Commission also based its decision on the finding that there existed a specific regulatory regime in the United Kingdom. Quite surprisingly, this
2. Radio

Compared with the numerous decisions relating to television broadcasting, radio has played a minor role in the application of competition law to the media sector. Bertelsmann/CLT is the only decision dealing with radio markets. Similar to free access TV the Commission defined a relevant market for radio advertising where radio broadcasters compete for advertising revenues. As in the case of the free TV viewers market it was, however, “not necessary to decide whether there was a relevant market for radio broadcasting since the audience share had to be taken into account, in any event, in the assessment of the position of the broadcasters in the advertising market”.

For similar reasons applicable to TV markets, the geographic scope of the market for radio advertising was found to be at least limited to a specific country. Moreover, it could be considered that there are distinct regional markets within one country since numerous radio stations are essentially directed to a specific region.

3. Relevant Markets in the Music Sector

The Commission has defined several markets in relation to the music sector basically following the different economic activities surrounding music such as music recording and distribution, music publishing and music retailing.

a) Music Recording and Distribution

Considering the Commission decisions dealing in more detail with the music sector such as Seagram/Polygram and the more recent decision in Bertelsmann/Zomba it seems that the Commission starts out from there being a market for recording and distributing music. This market was delineated with regard to the principal activities of record companies, the manufacturing and selling of records.

The market for recording and distributing music, however, was thought to be subdivided into several segments according to the different types and characteristics of music. The major dividing line with regard to the characteristics of music was drawn between classical and pop music. The Commission left open the question whether the market for recording and distribution of pop music was further segregated into different genre markets such as jazz.
soul, heavy metal and techno\textsuperscript{332}. The view taken in \textit{EMI/Virgin}, that the pop music market might consist of separate markets for international pop (English songs performed by UK and US artists) and national pop (songs performed by non-UK or non-US artists in whatever language), was given up by the Commission in \textit{Seagram/Polygram}. There, the Commission held that “the distinction between national and international pop has to a certain extent lost its importance and is not necessarily based on the language of the song”\textsuperscript{333}. Finally, the Commission refused to accept a narrower product market definition distinguishing between individual artists or even individual songs. In basing its finding on the demand side views of retailers, the Commission held that the demand side, though mainly driven by the demand of the ultimate consumer, did not take such a limited approach\textsuperscript{334}.

b) Music Publishing

Apart from the market for the recording and distribution of music and its different submarkets the Commission also defined a market for music publishing\textsuperscript{335}. Music publishing consists mainly of the acquisition by publishers of rights to musical works and their subsequent exploitation upon remuneration, mostly in the form of a commission charged by the publisher to the author on the revenues generated by the commercial exploitation of musical works\textsuperscript{336}.

According to the Commission’s decisions in \textit{Seagram/Polygram} and in \textit{Bertelsmann/Zomba}, the market for music publishing could consist of a number of submarkets with respect to the different categories of rights used in the commercial exploitation of musical works. These rights are mechanical rights\textsuperscript{337}, performance rights\textsuperscript{338}, synchronisation rights\textsuperscript{339} and printing rights (licensing the production of sheet music). From a demand side point of view the different types of rights present different characteristics and relate to different customer needs.


\textsuperscript{333} It seems to be highly questionable, though, whether the division between national and international pop made in \textit{EMI/Virgin} was based on language. It rather seems that the distinction stemming from the parties’ contributions was based on the nationality or place of residence of the artists. Either way, it is clear that some pop music is marketed only nationally and can thus represent a separate category and possibly a separate market, see Commission Decision, Case IV/M.1219, 21 September 1998, \textit{Seagram/Polygram}, IV A. 1.a.

\textsuperscript{334} See also Commission Decision, Case IV/M.202, 27 April 1992, \textit{Thorn EMI/Virgin}, para. 11.


\textsuperscript{337} Here, the publisher gives a license to a record company for the reproduction of copyrighted music by mechanical means such as CDs and tapes.

\textsuperscript{338} Here, the publisher licenses the performance of copyrighted music to commercial users of music such as radio, television stations and night-clubs.

\textsuperscript{339} Here, the publisher licenses the recording of a composition as a part of the soundtrack of a film or advertisement.
On the supply side one could find the application of dissimilar licensing rates and the diverse commercial and financial significance of each type of right for the publisher. The Commission, here, did not go into detail but left open the question of a further segmentation of the market for music publishing.340

c) Music Retailing – Market for Online Delivery of Music

In the merger decision AOL/Time Warner, the Commission for the first time had to deal with the competitive assessment of online delivery of music and defined an emerging market for online music delivery.341 In comparison, for instance, with videos, music is a product well-suited for online distribution. The increase of bandwidth and, in particular, the development of advanced methods of compressing digital audio data such as the mp3-format allow users to obtain music via the Internet quite easily. They can listen to online music on their PC or transfer downloaded music files to another physical carrier, such as a CD-ROM or a minidisk.

In AOL/Time Warner, the Commission made out two different ways of online music distribution, downloading and streaming. It characterised the two methods as follows: “Music downloading is [...] a technology permitting the electronic transfer of an entire music file to a device before playback is allowed. As a result of music downloading, such file remains on that person’s device as a permanent copy.”342 Streaming audio, on the other hand, is described by the Commission as a system which “transforms a computer into a virtual jukebox. The user ‘clicks’ on the link to the audio file, which begins to play after a few seconds.”343 In the view of the Commission, the main difference between downloading and streaming is that with the former a music file is transmitted from one computer to another, is stored locally and is accessible directly on the recipient’s computer; with the latter the audio file is only temporarily transferred to the user’s playing device.344 Despite the characteristics of the two methods of online music delivery being so different, the Commission left open the question of whether each of them constitutes a separate market.

However, the Commission had to assess whether online music delivery, and in particular music downloading, was constrained by traditional methods of music distribution. The Commission disagreed with the arguments put forward by the parties in AOL/Time Warner in favour of a broad market definition comprising all recorded music by referring to retail-demand side as well as supply side considerations. For instance, consumers can access or buy

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340 See Commission Decision, Case COMP/M.2883, 2 September 2002, Bertelsmann/Zomba, para. 12. Possible other market definitions like a market for professional music publishers, a market comprising so-called self-publishing authors and music publishing markets similar to the markets in music recording and distribution were taken into consideration but not adopted.


344 One could argue that the Commission, here, drew the right distinction for, partially, the wrong reasons. The difference between the two types of online music distribution is not whether files are streamed or downloaded. In fact, in both cases files are downloaded, and whether users can listen to the music while downloading is essentially determined by bandwidth and the player software used. The main difference between the two, however, is the audio quality delivered and the users ability to make further use of the downloaded data.
and receive music immediately from any computer with Internet access, without having to visit a store, no matter the time and the location. From the supply side, the structure of online distribution of downloadable music is completely different from the physical distribution of music. These differences lead the Commission to conclude that music downloads and music CDs constitute two completely separate product markets.

d) Relevant Geographic Markets in the Music Sector

aa. Music Recording and Distribution

Although the market for music recording and distribution showed some international aspects, the Commission noticed strong indications that the scope of the market was national. The main reason cited by the Commission was that record distribution was mainly organised nationally. Furthermore, in spite of considerable price differences between Member States, cross-border trade remained rather insignificant.

bb. Music Publishing

The Commission also left open the precise geographical scope of the market for music publishing. While with regard to mechanical and performance rights, several elements pointed in the direction of national markets, synchronisation and printing rights were thought to be trans-national or even broader. Here, the question whether rights were administered and collected on a national or international basis played a decisive role.

c. Market for Online Delivery of Music

The geographical dimension of the market for online music delivery was considered to be at least Community wide if not global because of the possibilities offered by digital technology.

4. Relevant Markets in the Print Media Sector

The following section deals with the market definitions adopted by the Commission in the print media sector. Unlike in the TV broadcasting and the music sector, only a very limited number of Commission’s decision deal with competition issues of print media. In most of these decisions, the Commission did not delineate the precise scope of the markets under investigation. Vertically, markets in the print media sector are basically segregated into


348 Cf. also the numerous reasons given by the parties in Seagram/Polygram in favour of national geographic markets for music recording and distribution, Commission Decision, Case IV/M.1219, 21 September 1998, IV A. 2. a.


351 The print media sector is sometimes also referred to as the publishing sector, see e.g. Bird&Bird (supra note 86), para. 289.
publishing, wholesale distribution and retail sales of publications. Horizontally, one can broadly distinguish between books, written press and other publication markets.

a) Markets for Specialised Publications

The Commission delineated a (retail) market for academic publications and a market for publications related to different professions in its decision Bertelsmann/Wissenschaftsverlag Springer. When trying to define publication markets from the demand side the Commission was faced with a dilemma. Within professional edition, two publications are rarely considered as perfect substitutes, particularly on the basis of their content, precision and comprehensiveness. Furthermore, publishers seek differentiation from one another. Therefore, few publications are entirely interchangeable from a reader’s point of view. A doctor will hardly regard a law book to be interchangeable with a medical book. The strict application of the demand side substitutability test would, therefore, lead to mini markets, a phenomenon well known from other fields of application of EC competition law.

In the electronic communications sector, for example, the traditional demand side substitutability test does not work satisfactorily. Applying the test to e.g. telephone calls does not only lead to the delineation of separate markets for international calls to certain countries or cities. From the consumer’s point of view, a call to one number is even not substitutable with a call to any other number. In a strict application of the substitutability test from the demand side, the conclusion must be drawn that markets should be defined on a number by number basis.

It is clear that these results do not reflect the competitive constraints faced by firms in the respective cases. Therefore, the Commission, in Bertelsmann/Wissenschaftsverlag Springer, decided to assess the markets for specialised publications from the supply side.

aa. Market for Academic Publications

The Commission based its decision to define a market for academic publications on an analysis of the conditions in which an editor could launch a publication to a certain category of professional users. The most important preconditions to be fulfilled in order to launch a publication to a certain category of users are the editor’s expertise in the respective field of activity, the publisher’s reputation and brand image, copyright protection and knowledge of

352 Commission Decision, Case IV/M.1377, 15 February 1999, Bertelsmann/Wissenschaftsverlag Springer, paras. 8 et seq.
353 Commission Decision, Case IV/M.1377, 15 February 1999, Bertelsmann/Wissenschaftsverlag Springer, para. 10. See also Bird&Bird (supra note 86), para. 294.
355 This approach is criticised by Bird&Bird (supra note 86), para. 294 who point out that assessing publication markets from the supply side would lead to rather narrow market definitions. However, it cannot be seen how the above problem should be solved without referring to supply side substitutability. With respect to market definitions of electronic communication markets, a similar approach is suggested by S. Taylor (supra note 354), at p. 132. The Commission, however, chose a completely different way to solve the problem by using layers of the telephone hierarchy to delineate markets for local, long distance and international calls, see Commission Decision, 2001/98/EC, Telia/Telenor (Case IV/M.1439), [2001] OJ L 40/1, para. 88.
356 See Bird&Bird (supra note 86), para. 294.
the distribution circuits to address this particular category of users. The question whether the market for academic publications was further segmented with regard to the categories of academic literature such as maths or economics was left open. The Commission did also not elaborate on the issue of whether there were separate markets for academic books and academic periodicals.

In Havas/Bertelsmann/Doyma, a decision under Article 6 (1) lit. b Merger Regulation, it was left open whether there exists a relevant product market for medical publishing comprising all kinds of medical publications and related products in all formats, such as for example books, periodicals, brochures and CD-ROM. The parties had also suggested that the overall market for medical publishing could be further subdivided into the medical books segment for general and specialist medical practitioners, other medical professions and students and the advertising of suppliers of medical products like pharmaceutical companies in medical press segment.

bb. Market for Publications Related to Different Professions

The Commission also defined a market for publications related to different professions. The main difference between publications related to different professions and academic publications is that the content of the former is more practically orientated and that they target practitioners rather than universities. Again it was left open whether the market could be broken down into separate markets for the different professions.

c. Geographic Markets

Due to language barriers markets in the print media sector might generally be national or at least confined to a certain language area. This applies to the market for publications related to different professions. Such publications are normally published in the national language of the given countries and are distributed nationally.

Contrary, since multinational publishers increasingly offer multilingual publishing or publications in English language to reach more readers, the geographic market of academic publications could well comprise the whole world.

b) Book Markets

With regard to the book sector the Commission did not adopt a definition as broad as the retail market for book sales but gave consideration to a number of more specific markets. In its

359 The views of the competitors of Bertelsmann and Springer did suggest that this was not the case.
Decision *Publishers Association - Net Book Agreements*, the Commission refused to grant an exemption pursuant to Article 81 (3) EC with regard to certain agreements relating to the UK “book market”364. Although it used the term “book market”, the Commission, technically, did not adopt such a market definition. On the contrary, it appears that a definition of the relevant markets was not needed to assess whether the agreements in question had as their object or effect the prevention, restriction or distortion of competition within the common market365. The Commission usually distinguishes between consumer books and other books although this difference did not lead to the adoption of corresponding market definitions.

**aa. Markets for Different Quality Books**

Consumer books can be distinguished following the different categories of book publishing editions. In *Bertelsmann/Arnoldo Mondadori*, the Commission, however left open whether hard cover, soft cover and paperback books form separate markets or if they – despite their different physical characteristics (book size and quality of cover), their different price, and timing of publication – belong to an overall market comprising all these categories366.

**bb. Distant Sales**

In *Bertelsmann/Havas/BOL*, a merger decision under Article 6 (1) lit. b Merger Regulation, the Commission determined that there may indeed be an overall market for all forms of ‘distant sales’ of consumer books (including book club sales, mail order and sales via Internet), within which a narrower segment for the online sales of consumer books via the Internet could be identified367.

**cc. Geographic Markets**

Geographically, book markets will usually be limited to a country368 or a language area such as the Spanish-speaking countries369. A different view could be taken with regard to distant sales. Sales by Internet, in particular, have a wider scope than simply national because of the global accessibility of the Internet370.

c) **Written Press**

Within the print media the written press can be distinguished as a media product with unique characteristics. Similar as in TV broadcasting it is possible to delineate separate markets according to the different trading relationships. Written press markets, therefore, usually comprise an advertisers markets and a readers markets371. In the readers market for

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365 See, however, supra Chapter 1, para. 1.504.50.


newspapers, the demand stems from the buyers of the newspapers as a source of information. In the advertising market, demand comes from the advertisers who buy advertising space to promote the sales of goods or services.

**aa. Reader Markets – Magazine and Newspaper Market**

The Commission has considered whether there exists a readers market for daily newspapers, on the one hand, and non-daily (weekly, monthly) magazines on the other. The decisions with particular relevance in this respect are **Recoletos/Unidesa** and **Gruner+Jahr/Financial Times**\(^{372}\). In assessing the market for written press from the consumer’s perspective, the Commission found that magazines and daily newspapers – due to different periodicity – satisfy diverse needs: daily press provides information about events the day after they have taken place while weekly magazines cannot offer such immediate coverage. Furthermore, weekly magazines are substantially more expensive than daily newspapers.

The market for daily newspapers could – with regard to content – be further subdivided into three main categories: general information, sports and financial newspapers\(^{373}\). Although the Commission chose not to conclude on the precise market definitions, it reflected relatively thoroughly on the grounds such a market definition could be based on.

It has been stressed, that the different types of newspapers satisfy different type of consumers’ needs. General information newspapers include a wide range of sections such as international news, national political news, culture, a local news section, sports pages to name but a few. Furthermore, sport and financial newspapers meet a need for much more focused and specialised information than general information ones. Moreover, the Commission, noted that – at least with regard to Spain – differences in price and selling patterns between the three types of newspapers existed and that they had different peak days\(^{374}\). Finally, in **Recoletos/Unidesa**, the hypothetical monopolists test supported the Commission’s view that there was a market for general newspapers separate from the market for sport and financial newspapers\(^{375}\).

It should also be noted, that the Commission suggested that the general magazine publishing market may be further sub-divided into sub-markets according to topics and category of

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\(^{373}\) Commission Decision, Case IV/M.1401, 1 February 1999, **Recoletos/Unidesa**, paras. 21 et seq. However, in some countries like the UK, the editorial line of the newspaper or the quality of the publication (quality press (“broadsheets”) as opposed to tabloids) could be used as criteria, see Commission Decision, Case IV/M.423, 15 March 1994, *Newspaper Publishing*, para. 14. In other Member States, the daily newspaper market can further be divided into national daily newspapers and regional daily newspapers, see Commission Decision, Case IV/M.1455, 20 April 1999, **Gruner + Jahr/Financial Times**, para. 17.

\(^{374}\) Commission Decision, Case IV/M.1401, 1 February 1999, **Recoletos/Unidesa**, para. 22.

\(^{375}\) The Commission reached its conclusion by applying the test to the demand side as well as the supply side, see Commission Decision, Case IV/M.1401, 1 February 1999, **Recoletos/Unidesa**, paras. 22 and 23.
readers the magazines aim at. According to the Commission Decision in *CEP/Groupe de la Cité*, whether inter alia two magazines are substitutable depends on whether they share the same readers, publish the same information and are edited in very close presentation.

*bb. Advertising Markets*

One could consider advertising in daily newspapers and magazines to be part of a broader market of advertising in all sorts of media. However, it will be remembered that the Commission constantly held advertising on TV and on radio to constitute markets separate from advertising through other media such as print media. This distinction was based on the fact that television advertising had different characteristics, was more expensive and that the type of consumers targeted through the various types of advertising differed considerably.

In similar vein, the Commission held that advertising in newspapers and magazines was different from advertising through other media and could possibly constitute a separate market. Generally, the targeted group of consumers is different from other media since written press is generally addressed to the most educated segments of society. Therefore, one can distinguish advertising markets according to the different types of media employed.

However, the Commission did not take the same approach when delineating a separate market for media buying within the market for media advertising in *Havas Advertising/Media Planning* and *Havas/Tempus*. Media buying includes planning and purchasing time and/or space in various media, including television, radio, newspapers, magazines, billboards and the Internet. Media buying activities are carried out by specific agencies. Because there is a large supply side substitutability between media buying for different media and because there are no specialised agencies for one specific media the Commission decided that media buying activities could not be divided in several markets according to the media in question.

Although suggested by the Commission’s decisions in *Newspaper Publishing*, there is no such principle that readers market and advertising market always correspond. Accordingly, there is not necessarily, for instance, a separate market for advertising in sports newspapers or a market for advertising in magazines for women.

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378 For the market for TV advertising see supra Chapter 1, para. 1.761. For the market for radio advertising see supra Chapter 1, para. 1.1291.


380 A different view is taken by Bird&Bird (supra note 86), para. 311.


383 There, the Commission indicated that the distinction between readers markets for tabloids and “quality papers” was mirrored by separate markets for advertising in tabloids and “quality papers”. See Commission Decision, Case IV/M.423, 15 March 1994, *Newspaper Publishing*, para. 16. See also Bird&Bird (supra note 86), para. 310.

384 The fact that the relevant markets for advertising may be very different from those for the supply of content is also stressed by Europe Economics (supra note 45), para. 2.4.6.
cc. Geographic Markets

The geographic market for daily press has been held to be national. For language reasons as well because of the need for publishers to respond to the demand for national or local information the market could be considered infra-national\(^{385}\). The Commission, in *Gruner + Jahr/Financial Times*, a case concerning the launch of a new German language newspaper, considered the geographic market to comprise Germany, Austria and Switzerland since the paper was to be distributed in these three countries\(^{386}\).

5. Internet

a) Access

The provision of access to the Internet to end users is according to the Commission an activity separate from other Internet related activities. The “access” market may potentially comprise all infrastructures required for the provision of the services to end-users. In narrow terms, “access” is at the retail level the physical connection between the final users and the Internet Service Providers (ISPs), which consists essentially of the supply to subscribers of an Internet address, provision of the relevant software to enable messages to be sent and received in the correct electronic format used for Internet traffic, and “connectivity”, which in its turn means access to all other networks which together make up the Internet\(^{387}\). In order for the ISP to be able to provide its customers universal connectivity to any other computer connected to the Internet, the ISP usually enters into agreements with other ISPs for securing that data sent by its customers to users of other networks and vice-versa will reach the final destination while making use of other ISP’s service facilities (wholesale level). Thus, before analysing Internet access markets, a description of general Internet infrastructure is considered necessary.

aa. Internet Infrastructure

On several occasions the Commission has stated that Internet has a hierarchical structure. In the *WorldCom/MCI* decision of 8 July 1998, the Commission identified three levels with regard to the structure of the Internet, the top-level networks, an intermediate ISP category and the third level of ISP providers that act as simple transit resellers\(^{388}\). The only organisations which are capable of delivering complete Internet connectivity entirely on their own account are the top level ISPs. This connectivity is referred to hereinafter as “top level” or “universal” Internet connectivity. Secondary peering ISPs may be able to deliver some of their own peering-based connectivity (or “second-tier” connectivity), but have to supplement it through bought transit. Resellers ISP can only supply resold connectivity. Depending on who it is bought from resold connectivity might be a combination of first and second tier connectivity.


aaa. The Top-Level Networks

The Commission defined in the *WorldCom/MCI*\(^{389}\) decision the provision of top-level or universal connectivity as a separate market since it found that only organisations which are capable of delivering complete Internet connection entirely on their own account are the top level Internet connectivity providers (so-called top-level or top-tier providers). This connectivity is usually referred to as “universal” Internet connectivity and is supplied entirely by peering agreements between those top level networks, or internally between the top-level provider and the networks “belonging” to it.

bbb. Intermediate Level ISPs

Secondary Internet connectivity providers (or second-tier providers) may be able to deliver some of their own peering-based connectivity, but had to supplement it through bought transit. It was found that second-tier ISPs could not avoid continuing to buy transit from the top-level networks and could not provide a competitive constraint on the prices charged by the top level networks.

ccc. ISPs at Retail Level

The ISP resellers follow at the bottom of the pyramid and usually provide Internet connection to end-users, be it residential consumers or small and medium businesses. These ISP cannot provide a competitive constraint on the prices charged by the top level networks and usually deliver their services through bought transit.

bb. Access Markets

In the *WorldCom/MCI*\(^{390}\) the Commission identified three distinct access markets: (i) the market for provision of connectivity of the host computer to the point of ISP presence, (ii) provision of Internet access services and (iii) provision of top-level or universal connectivity. The Commission concluded that there was substantial competition on the Internet access market and the analysis therefore focused on the market for the provision of top-level or universal connectivity where both parties to the transaction were active.

Regarding this market, the Commission noted that the products offered by the top-level networks are differentiated in that the connectivity is supplied entirely by peering agreements between those top-level networks traditionally on a no-charge basis or internally. This “top level” organisations are able to deliver their traffic and the traffic originated at their dependent “transit” customers ISP to the whole of the Internet entirely on their own account. Regarding the geographic dimension of this market, the Commission has identified it as a global market\(^{391}\).

The second market, i.e. the provision of Internet access services market, comprises according to the Commission all forms of such hardware, software, network configuration, customer


support and billing services as are required to enable the customer to make use of his Internet access. The parties argued with reference to this market that other forms of data transmission service should be regarded as being equally substitutable for Internet services. This view was rejected by the Commission based on demand-side grounds. According to the Commission, when customers purchase an Internet access service, they do so in the expectation that it will permit them to reach other users connected to the Internet.

The provision of specific end-user to end-user data transmission facilities using other data protocols might also enable customers to reach a limited number of other customers using the same protocol. However, this provision would not provide the permanent, unfettered access to the community of Internet users which is the main purpose of buying the service. Accordingly other forms of data transmission service would not be significantly substitutable.

aaa. Retail Internet Access Market

The first market delineated by the Commission in WorldCom/MCI decision, the market for provision of connectivity of the host computer (or point of access in the case of a private network) to the point of ISP presence, constitutes the last link in the chain of access services, i.e. the physical connection between the final user and the ISP. The Commission maintained the distinction it had previously made in Telia/Telenor/Schibsted between two different types of connectivity, i.e. connectivity achieved (i) over a public switched telephone circuit, known as “dial up” access, and (ii) connectivity achieved by means of a dedicated private line, known as dedicated access.

Dial up Internet access (narrow-band access) is usually the choice for lower usage customers, such as the residential or small business customers. Such access consists essentially of the supply to subscribers of an Internet address, granting of the relevant software to enable messages to be sent and received in the correct electronic format used for Internet traffic, and “connectivity” to other Internet networks or Internet users. Other features such as “search engines”, gateways, or content services may also be supplied as part of the access package. On the other hand, dedicated access is simply the provision of a cable connection. This service might be supplied in the market either by telephone companies but also by any other undertakings, which can lease out or develop the necessary capacity.

The Commission concluded in BT/ESAT that from the demand point of view dial up and dedicated access services appear to constitute two separate product markets. Dial up access is targeted at residential customers or small and medium enterprises, while dedicated access is requested mainly by large corporate customers. Consequently, from the customers’ point of view these two markets are considered to be separate markets for they serve different consumer categories. The Commission noted that within the context of the dial up access market, it could be possible to distinguish between residential and business dial up access, the latter being provided on the basis of more sophisticated dial up mechanisms. However, it pronounced unnecessary for the case at hand to establish whether residential and business dial

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up access constitute two separate relevant product markets since the transaction would have not given rise to competitive concerns in this area even on the basis of the narrowest market definition.

The Commission found in the *Vizzavi* case\(^{397}\) that Internet access provided over access mechanisms with different transmission, display, and usage characteristics, notably mobile handsets, set-top boxes, and PCs, *may* also constitute separate markets. According to the Commission’s observations, with the development of WAP technology, mobile telephone users now have the ability to access the Internet and to send e-mails using second generation (GSM/DCS) mobile networks and WAP mobile handsets, and this ability is to be more developed with the implementation of further technological advances. On the other hand, the notified parties were disposed to offer the Vizzavi portal over Canal+ digital TV services. In addition, the Commission noticed that other digital TV operators in the EEA had also offered access to interactive services through TV set-top boxes. These developments give rise to serious deliberations towards considering these modes of Internet access as being separate markets. However, due to factors such as the size of the screen, and the current data transmission capacity of mobile networks, Internet services delivered via mobile networks are according to the commission unlikely to be a substitute for existing methods of accessing the Internet through a PC screen.

The geographic dimension of the market for provision of connectivity of the host computer (or point of access in the case of a private network) to the point of ISP presence has been considered to be national. On several occasion the Commission has stated that since the current means of network distribution may be limited due to national infrastructures and national licensing schemes, the relevant geographical market is at least national\(^{398}\). Thus in *Telia/Telenor* the Commission noted:

“It is a common view that the geographical market for ISP services is essentially national, based on the need for a local loop service or the installation of a fixed line in order to connect physically the subscribers with their consumers. This limits the extent to which existing access markets could be wider than national\(^{399}\).”

The Commission reaffirmed this finding in its later *AOL/Time Warner* and *BT/ESAT* decisions\(^{400}\). Thus, with regard to first level of access service, *the market for provision of connectivity of the host computer to the point of ISP presence* is national in scope.

**bbb. Broad-Band Internet Access**

In the course of its investigation in *AOL/Time Warner* case,\(^{401}\) the Commission observed evidence of the existence of a developing demand for the provision of residential *broad-band Internet access*. Broad-band access provides high-speed Internet access and delivers greater

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audio and visual functionality than dial-up (narrow-band) access. This is usually done with the use of the new technology, i.e. xDSL technology and cable modems. DSL is a new technology using existing telephone network wiring to deliver an all-digital connection. DSL can share a wire path with a conventional telephone line so that the user can receive high-speed service and conventional telephone service on the same wire. DSL provides a single data channel and a dedicated point-to-point circuit, usually used to connect a home to an ISP. Cable modems deliver multi-megabit speeds by using the local cable TV network. Thus, **broad-band access** delivers greater audio and visual functionality, such as streaming video and audio, video e-mail, interactive advertising and video conferencing, none of which can be delivered effectively over traditional narrow-band lines. However, the Commission noticed that at the time of the decision broad-band access was not yet widely available in Europe and was generally more expensive than dial-up access.

According to the Commission, the market for broad-band Internet services appears to be essentially national, based on the need for the installation of a physical connection (telephone line for DSL and cable for cable modem) between the customers and the ISP\(^{402}\). However, the Commission did not find it necessary to conclude whether there exists a separate broad-band Internet access market, whether DSL, cable and other forms of fast Internet access belong to the same relevant product market, and whether this market is national, since, this was not required for the purpose of the case at hand. Similar conclusions were reached by the Commission in its **UGC/Liberty Media** decision\(^{403}\).

b) Internet Content Markets

The Internet content services markets have been delineated in a number of the Commission’s initial decisions\(^{404}\) as being separate from the Internet access markets, and consist of (i) the market for Internet advertising and (ii) the market for paid-for content, relying on the assumption that these different activities earn revenue in different ways and from different sources, that they are frequently carried out by different undertakings, and that they require substantially different inputs. However, ‘the dynamic nature of Internet markets, and emergence of new products and services’\(^{405}\) have led to a situation that in a number of its later decisions the Commission has either specifically identified also other types of Internet related markets or at least pointed out to the possibility of the existence of such markets without taking a definite position. The following analysis of the Internet media content markets has been done, splitting the identified content markets into two groups – Internet and e-commerce specific markets, and Internet business-to-consumers (B2C) and business-to-business (B2B). The first of these groups covers those markets that relate to the Internet particular features as a specific phenomena, whereas the second covers issues related to the use of the Internet as a medium for connectivity between businesses and consumers, or between businesses themselves.

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\(^{403}\) See Commission Decision, Case COMP/M.2222, 24 April 2001, **UGC/Liberty Media**, paras. 12 et seq.


aa. Internet and e-Commerce Specific Markets

aaa. Internet Advertising

In the market for Internet advertising, content providers compete with each other for advertising revenues. The Commission has consistently stated that this market represents a market in its own right. As far as geographic dimension of this market is concerned, the Commission considers it to be at least national in scope, using linguistic characteristics as a basis for its reasoning.

bbb. Web-Sites, Internet Portals and Gateways

Gateway services in their function are similar to those of advertising. They provide the consumers and businesses with access to a range of services, such as financial information, games, business and financial information, shopping, travel, ticket sales, whereby revenues are being generated by advertising, commissions on transactions and subscriptions to other services accessed through the gateway. Gateways are essentially a kind of web-site hosting several different services or groups of services, some or all of which may be provided by third parties. They are generally financed through advertising rather than subscription income, and most of them are supplied to the Internet subscribers free of charge, and therefore the Commission has refused to accept them as constituting a separate market.

A portal, in its turn, serves as a gateway through which consumers and businesses can have access to a range of online services and the wider Internet, aggregating a large number of recurring Internet users and/or subscribers around specific types of services. In Vizzavi decision, after having distinguished broad focus portals from the ones with narrow focus, the Commission identified a distinct market for horizontal multi-access portals, i.e. portals which provide comprehensive directories, personal home pages, email and shopping as well as entering into business relationships with business partners that offer content and cross-promotional opportunities, thus seeking to satisfy a particular consumer demand for intermediary services. These portals will exist on a variety of access mechanisms and will be delivered over mobile telephones and digital TV set-top boxes as well as over PCs, thus

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407 Ibid.
412 See Commission Decision, Case IV/JV.48, 20 July 2000, Vodafone/Vivendi/Canal+, para. 52. The existence of this separate market has been confirmed by later decisions of the Commission, see Commission Decision, Case IV/M.2050, 13 October 2000, Vivendi/Canal+/Segram, para. 25; Commission Decision, Case COMP/M.2222, 24 April 2001, UGC/Liberty Media, para. 16.
serving distinct customer demand. The question whether the portal market is further segmented has been left open by the Commission.

Vertical portals (narrow focus portals), to the contrary, are meant to provide access to a particular content category and types of functionality devoted to a specific consumer needs (such as sports, video games or travel). Vertical portals offering different content do not compete with one another as they satisfy distinct consumer demand and the customer base is distinct for each sector.

ccc. Web-Site Production

In Telia/Telenor/Schibsted, the Commission touched upon the issue of the web-site production. Although it did not decide on the issue, it nevertheless pointed out that web-site production may be sufficiently technical and specialised to be considered as representing a separate market. The geographic dimension in this case would be at least national, and may well be also wider.

ddd. Search Engines

The Commission, when dealing with the case Deutsche Telekom/Springer/Holtzbrink/Infoseek/Webseek, decided that search engines do not constitute a relevant market in themselves because of the free-of-charge character of the offered service. The relevant markets, in this case, are those of Internet advertising, the paid-for content, and Internet access.

bb. Internet B2C and B2B Markets

aaa. Broadband Content

The Commission has decided that there is an emerging market for the supply of broadband content via Internet. In AOL/Time Warner, after having made reference to the case Telia/Telenor/Schibsted where a market for paid-for content has been defined, the Commission stated that it found evidence of the existence of an emerging demand for the one-stop integrated supply of broadband content via the Internet. It went on saying:

“This demand is for bundled audio/video content (such as film plus sporting contests plus pop music concerts) via the Internet and as such appears to be separate from the demand for films and

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TV programmes supplied through more traditional distribution channels (such as pay-per-view, video on demand or DVD/video rental). The different broad-band contents would not be substitutes, but complementary goods. An ISP able to offer such a range of content could be compared to a supermarket offering a wide range of complementary products in a single place.”

The geographic scope of this market, is according to the Commission, most likely national due to linguistic requirements of different national audiences for film and TV programming. Nevertheless, it was also noted that US films and programmes (cartoons), which constitute the main focus of the Internet film offers, have international appeal and are popular in all the EEA countries423.

bbb. Online Computer Games

The paid-for content argument was once again applied by the Commission in relation to online computer games in the case Bertelsmann/Viag/Gamechannel424. The Commission referred once again to its previous decisions, stating that only paid-for content can constitute a separate market. This was said to be applicable also with regard to the online computer games, and, therefore, games provided for free playing could not constitute separate relevant market. Thus, the issue whether paid-for online games would constitute a separate market or would be considered as a part of broader market for paid-for content was not resolved425.

As far as geographic dimension of the market for online and offline electronic games is concerned, the Commission stated that the fact that electronic games are being produced in various language versions could be a decisive factor to give this market a national scope (in particular case – Germany) or a dimension expanding in a single linguistic area (i.e. German speaking territories)426.

Table 1

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<th>Media Markets</th>
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<td><strong>TV-Broadcasting</strong></td>
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* * indicates that the Commission left open whether the respective markets exist.
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<th>Market Category</th>
<th>Main Markets</th>
<th>Submarkets (1&lt;sup&gt;st&lt;/sup&gt; Level)</th>
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<td>Technical services for Pay-TV and digital interactive services</td>
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<td>Markets for the rights to broadcast certain major sporting events *</td>
<td>Markets for the acquisition of rights to broadcast football events played regularly throughout every year</td>
<td>Markets for the acquisition of rights to broadcast football events played regularly throughout every year where national teams participate</td>
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<td>Market for second window films *</td>
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<td>Film Production</td>
<td>Market for film production</td>
<td>Market for the production of &quot;mainstream films&quot; *</td>
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Market for the production of "arthouse films"
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<td>Market for radio advertising</td>
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* These market definitions have been found not to be valid anymore.
### Markets for Music Retailing

- Market for online music delivery

### Print Media

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<th>Submarkets (1st Level)</th>
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<td>Market for distant sales of books *</td>
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<td>Market for financial newspapers *</td>
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<td>Market for specialised publications</td>
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<td>Residential broadband Internet access (DSL, cable)</td>
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<td>Market for provision of Internet access services</td>
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<td>Market for the provision of top-level or universal connectivity</td>
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<td>Internet Content Markets</td>
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<td>Market for Internet horizontal portals</td>
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<td>Market for the supply of broadband content via Internet</td>
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<th>Markets not belonging to any of the aforementioned media sectors</th>
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<td><strong>Market Category</strong></td>
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<td>Media Advertising Markets</td>
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III. Influence of Sector-Specific Regulation in the Electronic Communications Sector on Market Definition in the Media Sector

In 2002, the Community’s entire telecommunications law was reformed and replaced by a sector specific framework for the electronic communications sector. Consisting of six directives, the new legislative package establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services (Article 1 Framework Directive 2002/21/EC). It has already been discussed in how far these sector-specific measures can affect the general approach to market definition. In the context of the application of competition law to the media sector, the question arises in how far the new legislative package for the electronic communications sector may influence market definition in the media sector.

First of all, the 2002 framework for the electronic communications sector claims to be without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy. On the contrary, the new regulatory framework is based on the principle of separating the regulation of transmission from the regulation of content. This means that the Framework Directive 2002/21/EC, generally, does not cover the content of services such as broadcasting or radio content delivered over electronic communications networks and services. The Community, thereby, acknowledges that sector-specific legislation being mainly driven by competition law goals is not suited to achieve goals pursued by national and EC legislation such as media pluralism, freedom of expression, cultural and linguistic diversity to name but a few and should, therefore, not interfere with the regulation of media content.

For more details see J.-D. Braun/R. Capito, in: Ch. Koenig/A. Bartosch/J.-D. Braun (supra note 121), at pp. 59 et seq.

See supra note 58.

See supra Chapter 1, paras. 1.151-15 et seq. and paras. 1.221-22 et seq.

See Article 1 (3) and Recital 5 Framework Directive.


See also supra Chapter 1, para. 1.691-69. It seems to be highly questionable, however, whether it is feasible to completely separate the regulation of transmission from the regulation of content in particular where it comes to regulatory “interfaces” of content and transmission of content. Even the drafters of the 2002 legislative framework must have acknowledged this when they included goals in the framework which clearly relate to the regulation of media content. For instance, Article 18 (1) Framework Directive states that interoperability of digital interactive television services and enhanced digital television equipment, should be encouraged in order to ensure the free flow of information, media pluralism and cultural diversity. See also A. Neumann, in: Ch. Koenig/A. Bartosch/J.-D. Braun (supra note 121), at pp. 662 et seq. Furthermore, Article 31 Universal Service Directive, [2002] OJ L 108/51, lays down rules for the
Instead, the 2002 framework for the electronic communications sector concentrates on regulating electronic communications infrastructure and associated services. Since separate regulatory frameworks for different electronic communications structures are inconsistent and potentially distort competition, the new framework covers all electronic communications infrastructure and access services. The convergence of the telecommunications, media and information technology sectors, driven by Internet and digital television improvements in processing, access and basic transmission technologies and developments in wireless applications, requires a flexible regulatory framework applying to all electronic communications irrespective of the means of transmissions.

Therefore, the 2002 framework for the electronic communications sector has gained particular importance for the media sector since it lays down the principles governing the access to the underlying electronic communications infrastructure many of the developing and existing media services require. In this respect, two pieces of legislation are of special relevance: the Access Directive 2002/19/EC and the Commission Recommendation. With a view to the methodology used to define electronic communications markets, one also has to take into consideration the Commission’s Guidelines on Market Analysis and the Assessment of Significant Market Power.


The Access Directive 2002/19/EC sets forth criteria for regulatory intervention on access and interconnection issues. Its purpose is to establish a harmonised regulatory framework for the market between suppliers of networks and those of services that will result in sustainable competition, interoperability of services and consumer benefits. The scope of the directive includes fixed and mobile telecommunications networks, cable television networks, networks implementation of so-called must-carry obligations. For an account on this provision as included in the Commission’s proposal of a Universal Service Directive, see J. Capiau, “EC Must-Carry Rules on the Brink of a Lost Opportunity: Harmonisation and Free Movement of TV Broadcasts within the Communications Review”, [2001] Journal of Network Industries 277 [298 et seq.].

434 Cf. M. Brodey (supra note 431), at p. 181.


436 See S. Taylor (supra note 354), at p. 134.


438 See supra note 53.

used for terrestrial broadcasting, satellite networks, and networks using Internet protocol. The Access Directive 2002/19/EC describes a number of market definitions relating to access to digital interactive television and radio services.

Article 6 and Annex I Access Directive 2002/19/EC deal with conditions for access to digital television and radio services broadcast to viewers and listeners in the community. Furthermore, according to Article 5 (1) lit b. and Annex I Part II Access Directive 2002/19/EC national regulatory authorities can impose obligations on operators to grant access to application programming interfaces (APIs) and electronic programme guides (EPGs) on fair, reasonable and non-discriminatory terms. Article 6 (3) Subsection 2 Access Directive 2002/19/EC defines the following markets:

- Retail market for digital television services and radio broadcasting services to viewers and listeners
- Market for conditional access systems and other associated facilities

Besides being mentioned by Article 6 (3) Subsection 2 Access Directive 2002/19/EC these markets also seem to be the basis of Article 18 Framework Directive 2002/21/EC. Under the 2002 legislative framework the markets for conditional access systems and other facilities and the retail markets for digital television services and radio broadcasting services cannot be further divided according to the means of transmission.

The markets defined by Article 6 (3) Subsection 2 Access Directive 2002/19/EC constitute the basis in the market analysis which national regulatory authorities carry out according to Article 6 (3) Access Directive 2002/19/EC in conjunction with Article 16 Framework Directive 2002/21/EC. In the course of this analysis the national regulatory authorities will decide whether one or more undertakings have significant market power on the given markets and whether the access obligations set out by Article 6 (1) and Annex I Access Directive 2002/19/EC need to be maintained, amended or withdrawn.

2. Market Definitions Commission Recommendation

Market definitions in relation to the media sector can also be found in the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive.

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440 For an account on this provision see A. Neumann, in: Ch. Koenig/A. Bartosch/J.-D. Braun (supra note 121), at pp. 662 et seq.
442 For details on the market analysis under this provision see J.-D. Braun/R. Capito, in: Ch. Koenig/A. Bartosch/J.-D. Braun (supra note 121), at pp. 312 et seq.
443 The concept of significant market is defined by Article 14 (3) Framework Directive in accordance with the concept of dominance under community competition law. “An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.”
2002/21/EC (Framework Directive)\textsuperscript{444}. According to Article 15 (1) Subsection 1 Framework Directive 2002/21/EC the Recommendation on Relevant Product and Service Markets shall identify those product and service markets\textsuperscript{445} within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the 2002 regulatory framework. The Commission shall define these markets in accordance with the principles of competition law.

Article 249 (5) EC stipulates that recommendations are not legally binding. Nevertheless, Member States cannot completely disregard recommendations and, in particular, the Recommendation on Relevant Product and Service Markets. Normally, Member States have to consider recommendations because of Article 10 EC\textsuperscript{446}. In \textit{Grimaldi}, the Court of Justice ruled that national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them, or where they are designed to supplement binding Community law\textsuperscript{447}. In respect of the Recommendation on Relevant Product and Service Markets, Article 15 (3) Framework Directive 2002/21/EC intends to implement this line of the ECJ’s case law into secondary Community law\textsuperscript{448}. This provision obliges national regulatory authorities inter alia to take utmost account of the recommendation when defining relevant markets\textsuperscript{447a}.

The initial version of the Recommendation on Relevant Product and Service Markets has been published by the Commission on 11 February 2003. The Commission’s Recommendation distinguishes at least two main types of relevant markets to consider: Markets for services or products provided to end users (retail markets), and markets for the inputs which are necessary for operators to provide services and products to end users (wholesale markets)\textsuperscript{449}. A market defined by the Commission with particular relevance to the media sector is the wholesale market for broadcasting transmission services to deliver broadcast content to end users (Annex No. 18 Recommendation on Relevant Product and Service Markets).

3. Influence of Market Definitions under the EC Electronic Communications Law on Market Definitions in the Media Sector

The overlaps between regulation of the media sector by general competition law and regulation of the electronic communications sector by means of sector-specific regulation raise the question whether market definition under general competition law is influenced by

\textsuperscript{444} [2003] OJ L 114/45, hereafter referred to as “Recommendation on Relevant Product and Service Markets”.

\textsuperscript{445} The Recommendation leaves it for national regulatory authorities to define relevant geographic markets within their territory. By doing so, the national regulatory authorities, however, will have to comply with the Framework Directive and observe the principles set out by the Guidelines for market analysis and the assessment of significant market power, cf. Recital 2 Recommendation on Relevant Product and Service Markets.


\textsuperscript{447a} With a view to the wording (“taking into consideration” vs. “taking utmost account”) one might even argue that Article 15 (3) Framework Directive 2002/21/EC imposes on Member States an obligation stronger than the obligation created by the Court’s \textit{Grimaldi} ruling, see*

\textsuperscript{449} See Recital 6 Recommendation on Relevant Product and Service Markets. See also Commission Guidelines on Market Analysis and the Assessment of Significant Market Power (supra note 53), para. 67.
market definitions used under the 2002 legisatory framework. The relevant provisions of the new legisatory framework, however, appear to deny any (direct) impact of the two competition law systems on one another in this respect.

First of all, the Commission’s Guidelines on Market Analysis and the Assessment of Significant Market Power note that markets defined in competition cases may vary from those identified under the Framework Directive 2002/21/EC:\[450\]: “[…] markets defined under competition law are without prejudice to markets defined under the new regulatory framework as the context and the timeframe within which a market analysis is conducted may be different”.

More importantly, Article 15 (1) Framework Directive 2002/21/EC states that the Recommendation shall define markets without prejudice to markets that may be defined in specific cases under competition law. It is obvious that the Commission when applying general competition rules to the media sector is not bound by any market definitions employed under the 2002 legisatory framework. Nevertheless, to deny any interdependencies of the market definitions used under the two different competition law systems would be too rash a judgement.

Notably, Article 15 (1) Framework Directive 2002/21/EC requires the Commission to define markets under the 2002 legisatory framework in accordance with the principles of competition law. With few exceptions:\[451\] the markets appearing in the Recommendation on Relevant Product and Service Markets have been delineated in compliance with the methodological approach of the Community Courts under Article 82 EC and Article 2 Merger Regulation, and the Commission’s decisional practice and its 1997 Notice on Market Definition. Although markets under the legisatory framework for the electronic communications sector may vary from the ones defined under general competition rules not least because of the different context and time frame, the Commission, when required to define markets under, for instance, the Merger Regulation cannot completely disregard the markets definition upheld under the 2002 legisatory framework.

4. Differences in Media Sector Related Market Definitions under the New Regulatory Framework and Media Market Definitions under General Competition Law

This draws the attention to the main differences of media sector related market definitions under the new regulatory framework for the electronic communications sector in comparison with the markets delineated under general competition law.

In Nordic Satellite Distribution, the Commission defined a separate retail market for pay TV via satellite:\[452\]. This segregation according to the means of distribution was mainly based on the lock-in effect created by the cost involved when switching from satellite to cable TV. A

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\[451\] Recital 3 of the Recommendation on Relevant Product and Service Markets highlights that some of the markets delineated in the Recommendation are identical with the markets predefined by the old regulatory framework for the telecommunications sector and “are not always ‘markets’ within the meaning of competition law and practice. These ‘market areas’ need be included in the initial version of the Recommendation in order that national regulatory authorities can carry out a review of existing obligations imposed under the 1998 regulatory framework, see Recital 4 Recommendation on Relevant Product and Service Markets; see also Annex I Framework Directive.

different view was taken by the Commission regarding both France and the United Kingdom where pay TV markets were delineated irrespective of the means of transmission. As already mentioned, the latter view is now also taken by the Commission under the 2002 legislative framework. The Recommendation on Relevant Product and Service Markets states that national regulatory authorities under Article 6 (3) Access Directive 2002/19/EC should delineate the market for conditional access system to digital television and radio services broadcast, irrespective of the means of transmission.

In this respect, the divergences between the definitions of retail markets for the provision of media services on the one hand, and wholesale markets for the provision of transmitting infrastructure on the other, could cease to exist under the 2002 legislative framework. It will be remembered that the Commission, in *MSG Media Services*, held that the wholesale market for the transmission of broadcasting content over TV cable networks constituted a separate relevant market but at the same time found that retail markets for pay TV comprised all modes of transmission in *British Interactive Broadcasting* and *TPS I*. The Recommendation on Relevant Product and Service Markets, however, defines a wholesale market for broadcasting transmission services to deliver broadcasting content to end users regardless of the different networks used to transmit broadcasting content. Nevertheless, the Commission’s Guidelines on Market Analysis and the Assessment of Significant Market Power state that “[w]hether the market for network infrastructures should be divided into as many separate submarkets as there are existing categories of network infrastructure, depends clearly on the degree of substitutability among such (alternative) networks.”

In this context it is noteworthy that the Commission under the 2002 regulatory framework acknowledges the different forms that wholesale markets for broadcasting transmission services to deliver broadcasting content to end users can take. Some of these wholesale markets have already featured in the Commission’s decisional practice, in particular in *MSG Media Services* and *Telia/Telenor*. The Explanatory Memorandum issued concurrently with the Recommendation on Relevant Product and Service Markets identifies three possible “market links.” The undertaking owning or operating a transmission network may seek broadcast content that it delivers or transmits to its retail customers or end users. This describes the *Telia/Telenor* scenario. The programme provider or broadcaster may also provide content to a transmission or broadcast network or negotiate conditional access arrangements by which it can transmit broadcasting content to the end user via an access link.

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453 See supra Chapter 1, paras 1.821-82 et seq.
454 See supra Chapter 1, para. 1.1951-195.
453a Despite the competitive links between the respective upstream and downstream markets, the Commission generally distinguishes between the substitutability between cable and satellite on these markets, see Commission Decision, 2001/98/EC, *Telia/Telenor* (Case IV/M.1439), [2001] OJ L 40/1, para. 269.
457 See Commission’s Guidelines for market analysis and the assessment of significant market power, para. 67.
456a See Explanatory Memorandum, Commission Recommendation on Relevant Product and Service Markets, p. 37. The Memorandum can be downloaded from the Commission’s website at *.
456b See supra Chapter 1, para. 1.83b.
arrangement. A situation characterised by such “market links” could be called an *MSG Media Services* scenario. In the third scenario the broadcaster that has content or rights to content may own or operate a broadcasting network or transmission network and also supply conditional access services by which other broadcasters or content providers may supply services to end users. Which market definition criteria can be employed and how, for instance, the hypothetical monopolist test will be used depends solely on the given scenario and the “market links”. While the *Telia/Telenor* scenario requires NRAs to delineate the wholesale market from the point of view of the undertakings buying content from broadcasters, in *MSG Media Services* scenarios markets have to be defined from the perspective of the broadcaster. At the end of the day, with regard to these wholesale markets everything comes down to identifying the right buyer and seller in such markets.

The main difference between the media market definitions under general EC competition and the markets delineated under the 2002 legislatory appears to be the existence of a TV viewers and radio listeners market under the latter. The Commission has constantly maintained that it was questionable whether there were TV viewers and radio listeners markets in several of its decisions under the Merger Regulation since – at least with respect to free TV and free access radio – there was no trading relationship between the broadcasters and his viewers or listeners respectively. Article 6 (3) Access Directive 2002/19/EC, however, defines retail markets for digital television services and radio broadcasting services to viewers and listeners. One can certainly argue that the definitions included in Article 6 (3) Access Directive 2002/19/EC are far too broad to be used in cases under general EC competition law. What counts, however, is that the Access Directive 2002/19/EC does not hold a trading relationship to constitute the decisive criterion in delineating broadcasting markets. Whether this insight will find its way into the decisional practice of the Commission under general competition law is an open question.

IV. Peculiarities of Market Definition in the Media Sector

1. The Implications of a Finding That Two Markets Are “Closely Related”

   a) Closely Related Markets in the Media Sector

   The Commission, in numerous cases, has described markets in the media sector as being closely related, complementary or linked. This applies, particularly, to the market for pay television and the market for digital interactive television services, the market for the

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456c See supra Chapter 1, para. 1.81.

458 The outcome of this analysis might have far reaching consequences. If it is concluded that the relevant wholesale market is a market where network operators buy content from broadcasters, that market would constitute a content market and could not be regulated under the new regulatory framework if the principle of separating the regulation of transmission from the regulation of content was to be observed (See Explanatory Memorandum, Commission Recommendation on Relevant Product and Service Markets, p. 36). If, on the other hand, broadcasters were found to pay network operators for transmitting their TV signals, the relevant market would be an infrastructure market and, therefore, be within the scope of the new regulatory framework.

459 See e.g. Commission Decision, Case IV/M.878, 14 February 1997, *RTL 7*, para. 7. See also supra Chapter 1, paras. 1.674-67 et seq. For radio markets see supra Chapter 1, para. 1.1294-129.

460 See supra Chapter 1, para. 1.971-97.
wholesale provision of the technical services and the market for pay TV\textsuperscript{461} and the markets for the distribution of books and the markets for the publishing of books\textsuperscript{462}. First of all, the finding that markets are closely related is important when it comes to the assessment of a joint venture under the Merger Regulation. According to Article 2 (4) Subsection 2 Merger Regulation, the Commission shall, when making the appraisal of co-ordination of the competitive behaviour of undertakings that remain independent in accordance with the criteria of Article 81(1) and (3) of the Treaty, take into account in particular whether two or more parent companies retain to a significant extent activities in the same market as the joint venture, in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market.

The implications of a finding that two markets are closely related can, however, go further. This becomes apparent when taking a look at the concept of interdependent markets. The concept draws a link between two different stages of the competition analysis, the stage of market definition and the stage of the assessment of market power.

b) The Concept of Interdependent Markets

In EC competition law the term “closely related market” usually refers to the concept of interdependent markets\textsuperscript{463}. In a nutshell, this concept takes note of the fact that there are a number of cases where different relevant markets do not co-exist independently of each other but influence each other up to a certain degree. The concept of interdependent markets was introduced to EC law by the European Court of Justice within the framework of the EC competition rules. Guidance on the substance of the concept cannot only be provided by the Court’s case law but also by Article 14 (3) Framework Directive 2002/21/EC, a provision which introduces the concept of interdependent markets as interpreted by the Court into the sector specific framework for the electronic communications sector\textsuperscript{464}.

The question arises, however, of which criteria have to be fulfilled to qualify markets as closely related. Without any criteria even the toothpaste market and the market for local telephone calls would have to be regarded as related\textsuperscript{465}. The wording of Article 14 (3) Framework Directive 2002/21/EC already provides some help as far as the sector-specific regulation of the electronic communications markets is concerned: only “closely related markets” are to be taken into account. This automatically raises the question, however, of according to which criteria “related markets” on the one hand and “closely related markets” on the other are to be distinguished.

\textsuperscript{461} See supra Chapter 1, para. 1.1201-1209. See also Commission Decision, Case COMP/JV.30, 3 February 2000, \textit{BVI Television (Europe) Inc}/SPE Euromovies Investments Inc/Europe Movieco Partners, paras. 27 et seq.


\textsuperscript{463} This term will here be used synonymously with the term “concept of related markets”.


\textsuperscript{465} See Ch. Koenig / J. Kühling/ J.-D. Braun (supra note 464), at p. 746.
The question of whether Article 82 EC can apply to closely related markets was dealt with in detail by Advocate General Colomer in his opinion in *Tetra Pak II*. The Commission had argued that Tetra Pak, a world leader in the manufacture of aseptic cartons for liquid and semi-liquid food, had abused its dominant position with its pricing policy on non-aseptic cartons. Tetra Pak had a dominant position on the market for aseptic cartons, and the Commission had alleged that the company had used profits from this market to subsidise sales on the market for non-aseptic cartons. Advocate General Colomer started by identifying the following five categories in his analysis of the relationship between the dominant position and the abuse committed by the leverage of such dominant position:

- The dominant position and the abuse are confined to the same market (1).
- The abuse takes place on the dominated market, but its effects are felt on another market on which the undertaking does not hold a dominant position (2).
- The abuse is committed on a market on which the undertaking does not hold a dominant position in order to strengthen its position on the dominated market (3).
- The abuse takes place on a market separate from, but related to and connected with, the market dominated by the undertaking (4).
- The dominant position and the abuse are on different and unrelated markets (5).

It is beyond any doubt that Article 82 EC is applicable to cases belonging to the first category, which is probably the most common situation. With regard to the last category, Advocate General Colomer expressed his view that a violation of Article 82 EC had to be rejected. He argued that it is unreasonable that an undertaking should have to bear the special responsibility imposed by Article 82 EC when it participates in markets completely separate from the dominated market. A contrary approach would not help to maintain undistorted
competition in the internal market, the objective laid down in Article 3 (g) of the EC Treaty, on which the interpretation of Article 82 EC must be based\textsuperscript{470}.

The categories (2), (3), and (4) lie in the middle of those two extremes. Nonetheless, the application of Article 82 EC to category (3) is easy to defend. It does not make a difference wherefrom the attack on the remaining competition is launched\textsuperscript{471}. Therefore, it does not come as a surprise that there is a long line of case law of the Court of Justice and the Court of First Instance which applies Article 82 EC to category (3)\textsuperscript{472}. Category (2) is just the reverse of category (3)\textsuperscript{473}, which already indicates that similar considerations must apply\textsuperscript{474}. Furthermore, the very wording of Article 82 lit. d) EC demonstrates clearly that this category is encompassed by this provision\textsuperscript{475}. The Court of Justice decided accordingly in a number of cases\textsuperscript{476}.

The question, however, of whether Article 82 EC can be applied to cases of category (4) cannot be answered that easily. In Tetra Pak II, the Court of Justice applied Article 82 EC to a case of this category as well. The Court argued that the application of Article 82 EC presupposes a link between a dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market\textsuperscript{477}.

In the case of distinct, but associated markets, the application of Article 82 EC to conduct found on the associated (non-dominated) market and having effects on that associated market can, according to the ECJ, only be justified by “special circumstances”. The ECJ then adopted the approach of the Court of First Instance to find that such “special circumstances” existed, concluding that Tetra Pak was in a situation “comparable to that of holding a dominant position on the markets in question as a whole”\textsuperscript{478}.

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\textsuperscript{470} Opinion of Advocate General Colomer (supra note 467), at para. 42. Cf., however, Opinion of Advocate General Verloren van Themaat in: Case 322/81, Michelin v. Commission, [1983] ECR 3461, who took the view that the prohibited abuse of a dominant position may well occur on a product market on which the undertaking concerned does not precisely have a dominant position, without looking at whether the two markets were related to and connected with each other or not. This question is also dealt with in some detail by Ch. Koenig / J. Kühling/J.-D. Braun (supra note 464), pp. 748 et seq.


\textsuperscript{473} Opinion of Advocate General Colomer (supra note 467), at para. 45.

\textsuperscript{474} Ch. Koenig/J. Kühling/J.-D. Braun (supra note 464), p. 749.


\textsuperscript{476} See e.g. ECJ, Case 211/84, CBEM, [1985] ECR 3261, para. 25 et seq.; ECJ, Joined Cases 6 and 7/73, Commercial Solvents, [1974] ECR 223, para. 25. This view is shared e.g. by M. Ross (supra note 472), at p. 604; H. Schröter (supra note 475), Article 86, para. 106.


The Court of Justice did not elaborate on the definition of “special circumstances” any further. However, the Court emphasised that Tetra Pak’s customers in one sector were also potential customers in the other. This criterion may also be used in other cases in order to decide whether or not “special circumstances” justify the application of Article 82 EC. Some further guidance is provided by the opinion of Advocate General Colomer in this case. He stressed that it is not possible to define with complete accuracy what constitutes related markets, which means that it must be decided on a case-by-case basis. The Advocate General proposed taking account of the following circumstances: supply and demand structure on the markets; characteristics of the products; use by the dominant undertaking of its power on the dominated market in order to penetrate the linked market; market share of the dominant undertaking on the non-dominated market and; degree of control of the dominated market by the dominant undertaking. Advocate General Colomer added that the link between the dominant market and the market affected by the abuse must be a close one.

The interpretation of Article 14 (3) Framework Directive 2002/21/EC can provide further guidance on the concept of interdependent markets under the new sector-specific framework for the electronic communications sector. In its Guidelines on Market Analysis and the Assessment of Significant Market Power, the Commission emphasised that Article 14 (3) Framework Directive 2002/21/EC was intended to address a market situation comparable to the one that gave rise to the Court’s judgement in Tetra Pak II. The Commission also stressed that close associative links between different markets are most likely to be found in vertically integrated markets. According to the Commission this is regularly the case in the telecommunications sector, where an operator often has a dominant position on the infrastructure market and a significant presence on the downstream services market. The Commission concluded that, under such circumstances, Article 14 (3) Framework Directive 2002/21/EC entitles a national regulatory authority to consider it appropriate that such an operator has significant market power on both markets taken together.

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481 As to the relevance of the Advocate General’s opinion to the interpretation of the Court’s judgements see the references given in supra note 466.
482 Opinion of Advocate General Colomer (supra note 467), at para. 57. Advocate General Alber used some of these criteria to argue that such “special circumstances” existed in TNT Trato. He concluded that the market for courier services and basic postal services are separate, but closely related: Opinion of Advocate General Alber in: Case C-340/99, TNT Trato, [2001] ECR I-4109, paras. 72 et seq. In similar vein, some of these criteria were used by the Commission in Tetra Laval B.V./Sidel SA. to argue that the market for carton packaging equipment and the market for PET packaging equipment are closely related neighbouring markets within the meaning of Article 2 (4) Merger Regulation, see Commission, Press Release IP/01/1516 of October 30th, 2001.
483 Opinion of Advocate General Colomer (supra note 467), at para. 57. Advocate General Colomer expressed his belief that there will not be many situations falling within it (ibid.). Cf. P. Larouche, Competition Law and Regulation in European Telecommunications, at pp. 268 et seq., who distinguishes between very close links, close links, and loose links.
485 Ibid., at para. 75.
486 Ibid., at para. 75. See also S. Taylor (supra note 354), at p. 134.
487 Commission (supra note 484), at para. 76.
As already mentioned, the wording of Article 14 (3) Framework Directive 2002/21/EC refers to a situation where “links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking”. The very wording makes clear that “leverage of market power” need not take place: the mere objective possibility of leverage of market power is sufficient. A typical, but by far not the only example of such a possibility is cross-subsidy. In a similar vein, the objective possibility of the strengthening of the undertaking’s market power is also sufficient.

c) The Concept of Interdependent Markets in the Media Sector

The question needs to be raised whether the concept of interdependent markets should be applied to the media sector as it is employed in the electronic communications sector. The two sectors have a number of common characteristics arguing for such a transfer. The media sector sees a number of vertically integrated undertakings being active in numerous downstream and upstream broadcasting and music markets. Moreover, the media as well as the telecommunications industry are more or less network industries. In any event, there is a similar danger that undertakings might leverage their market power into neighbouring markets. In the end, after Tetra Pak, the Commission does not use the term “closely related” or “linked” unintentionally. Therefore, it is safe to assume that the concept of interdependent markets can be applied – where necessary – at least in the case of markets, the Commission qualified as being “closely related” such as the market for pay television and the market for digital interactive television services, and the market for the wholesale provision of the technical services and the market for pay TV.

2. Difficulties in Assessing Emerging Markets

The fundamental methodological problem of defining markets in the media sectors has been said to arise from rapid change. Many of the markets across the media sector have experienced, and continue to experience, rapid change. The change has taken place in terms of the size of the market, the identity and preferences of the market participants, and most crucially through innovation and the introduction of new products and services.

The Commission, in defining markets in the media sector, had to deal with the problems posed by rapid change in a number of cases dealing with so called emerging markets. In general, these markets can be divided into three categories with the first being the future markets, i.e. distinctive products and services that have not come yet into existence or operation, nevertheless, there exist some sort of preparations or arrangement or plans of undertakings, which provide for a relatively high degree of conviction that these may emerge.

489 For more details, see Ch. Koenig/J. Kühling/J.-D. Braun (supra note 464), at p. 751.
491 See Europe Economics (supra note 45), paras. 2.1.19 et seq.
492 See supra Chapter 1, para. 1.971-97.
493 See supra Chapter 1, para. 1.1204-120.
494 See supra Chapter 1, para. 1.4.3.
in the near future\(^\text{495}\). The second category comprises all those products and services that have existed for a relatively short or medium period of time, however, there are uncertainties as to whether they comprise a separate relevant market or not (\textit{developing markets})\(^\text{496}\). The third class evolves existing relevant markets which are subject to rapid evolution, which may carry structural or product or service or other changes that might reshape product base of these markets or the actors being active within (\textit{evolving markets})\(^\text{497}\). Whereas in the latter case time horizon is the most important factor taken into consideration for evaluating the expected change, in the former cases, innovation, technology development or other features\(^\text{498}\) not necessarily related to time horizon play a primary role.

In \textit{British Interactive Broadcasting} the Commission identified that the company was going to be in the near future active mainly on the digital interactive television services market and on the market for technical services for digital interactive and pay television. The Commission found these markets to be separate from the pay TV market\(^\text{499}\). The main difficulty in dealing with future markets is the lack of available data for defining demand substitutability\(^\text{500}\). The Commission noticed that due to the fact that digital interactive television services, such as those which were likely to be offered by British Interactive Broadcasting, were not at that time available in UK (\textit{future markets}), past data did not exist to evaluate the likely response of customers to a hypothetical small, non-transitory change in relative prices of British Interactive Broadcasting’s services and possible substitutes\(^\text{501}\). Nevertheless, the Commission surpassed this obstacle by pointing to the fact that demand substitutability can also be assessed by comparing the characteristics of products or services in order to determine whether they are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services.

With regard to the second category (\textit{developing markets}), the Commission stated in \textit{AOL/Time Warner} that it had identified an emerging market for online music delivery comprised of music downloading and music streaming\(^\text{502}\). However, the Commission noticed in \textit{Vivendi/Canal+/Seagram} that the question of whether there exist a separate emerging market for online music delivery to mobile customers seems premature, as it is difficult to predict the \textit{future features} of the emerging market for online music to mobile customers\(^\text{503}\). In both cases,


\(^{496}\) Commission Decision, Case COMP/M.2222, 24 April 2001, UGC/Liberty Media.


\(^{500}\) \textit{British Interactive Broadcasting} is a good example of how the high pace of innovation in the media industry makes the task of assessing supply-side substitutability and the potential availability of substitutes that are not currently offered on the market (as well as the scope for new entry) more speculative than in more stable industries, see Europe Economics (supra note 45), para. 2.6.9.


time horizon did not play a significant role, whereas the future state of innovation seems to be the central element for defining the boundaries of the markets so delineated.

The same methodological approach can be found with regard to the developing market for portals. Indeed, although the product was clearly distinguished and the different portal types were analysed in details, a separate market nevertheless was not awarded, based on the event that the definition of a portal market would need to be based on consumer demand for particular intermediation services, rather than simply on the various revenue streams by which portal operators will earn their revenue (e-commerce commissions, advertising revenue, subscriptions). The Commission is aware of the fact that given the number of different services that can be provided over the Internet, it is likely that a number of different product and service markets exist, satisfying distinct consumer demands. However, there will be different content markets relevant to each delivery mechanism only as long as consumers regard the provision of services across the different access mechanisms as non-substitutable.

With a view to the third category (evolving markets), it can be noted that the evolution of markets may bring a switch on the contents of the relevant markets or size changes or changes on the number of the participants, which will in their turn, influence the definition of the relevant markets or the competitive assessment therein. The time horizon seems to be a quite important element in assessing evolving markets.

In TPS I, the Commission stated that the relevant product market for pay-TV cannot be subdivided into analogue and digital pay-TV since digital pay-TV is only a further development of analogue pay-TV. Although, at that time, the two technologies coexisted on satellite and cable, analogue pay-TV was expected to be completely superseded by digital pay-TV in future. In parallel with this development the TV distribution, Internet and telephony sectors are also widely expected to converge. As a result of this evolution, the distinction between satellite and cable transmission is also likely, in due course, to become less relevant.

Even in cases where the market evolution process is in its early stages and it can not be taken into account for market definition purposes, the Commission has nevertheless considered it for assessing the market power of the parties under investigation. Thus, in WorldCom/MCI the Commission observed that if the smaller ISPs who currently peer only at the NAPs were refused settlement-free private peering by the largest networks, they would no longer be capable of acting as top-level networks, and would drop out of the market definition. Because this process was in its early stages, the market definition adopted in the case was not narrowed to anticipate such future developments, but the fact that this was likely to happen should be borne in mind according to the Commission as a relevant factor when considering the market power of the parties.

As a conclusion, it should be said that innovations in the media sector have taken place and are going to continue taking place in the future thus bringing about changes on the market situations. These features make the economic understanding of markets especially difficult for they require an analysis of competitive constraints to be performed without the support of a significant track record of the operation of the markets, and in particular, without any of the price and volume data that are required by some quantitative techniques for market definition such as SSNIP. This renders the market definition process more speculative. Nevertheless, as the analysis has shown, the Commission has tried to circumvent these difficulties by making use of the other characteristics of demand side substitutability test (such as product characteristics) for assessing the potential availability of substitutes that are not currently offered, but also supply-side considerations and the time factor evaluations.

V. Concluding Remarks

The above account outlined the Commission’s approach to market definition and the relevant markets defined with regard to the media sector. First of all, it should be borne in mind that the Commission’s approach is derived from an analysis of its case law. However, there lies a certain risk in using case law as a source of interpretation since the facts and circumstances of the cases can vary and the Commission’s approach in a single case must not be considered absolute.

Nevertheless, one can witness a remarkable consistency in the way markets in the media sector are defined. Although from a geographical viewpoint markets in most segments of the media sector remain stubbornly national, product market definitions employed with regard to one country have often been upheld in decisions dealing with other countries. This applies in particular to TV broadcasting markets and the distinction between the pay TV market and the (free) TV advertising market.

In most cases, the Commission assesses the market from the demand side. In this respect, the Commission’s approach to market definition in the media sector does not differ from the general approach. Supply side substitutability, on the other hand, plays a minor role and is mainly used as a complementary tool to handle the deficiencies of the concept of demand side substitutability. As already noted when assessing the general approach of the Commission to market definition, the number of decisions employing the hypothetical monopolist test to delineate markets is low. In fact, none of the Commission’s decisions in the media sector uses the test as a sole criterion to define markets but rather as an instrument to support the market definitions found by assessing demand side and supply side substitutability.

When defining relevant product markets in the media sector, the Commission employs product characteristics and intended use of products as criteria in the vast majority of cases. This might be surprising since the Commission, in its 1997 Notice on Market Definition,

510 See Europe Economics (supra note 45), para. 1.4.4.
511 See supra Chapter 1, para. 1.661.
512 See supra Chapter 1, paras. 1.1431 et seq.
513 See supra Chapter 1, paras. 1.214-21 et seq.
514 See supra Chapter 1, paras. 1.984-98 and 1.1191-119.
seemed to favour the use of the criterion price over product characteristics and intended use.\textsuperscript{515}

Being reluctant to delineate a free TV viewer and radio listener market, in the past the Commission over-emphasised the existence of a trading relationship as a precondition for a market.\textsuperscript{516} This is certainly a unique feature of market definition in the media sector. Whether the Commission’s decision in Newscorp/Telepiù constitutes the beginning of the end of the use of trading relationships in market definition in the television sector remains an open question.

Notably, in several decisions relating to the media sector, the Commission analysed retail-demand not only to delineate retail markets but also to define the corresponding upstream wholesale markets. This has been practised, for instance, in relation to the upstream market for access to digital interactive services platforms\textsuperscript{517} and the wholesale market for the acquisition of sports broadcasting rights\textsuperscript{518}.

With regard to the geographical scope of media markets, different regulatory regimes, language barriers, cultural factors and copyright restrictions are the determinant factors in almost all segments of the sector.\textsuperscript{519} In the majority of cases, this leads to the geographic scope of media markets being confined to one country or at least to a single language area. However, the phenomenon of convergence of the different media, the roll-out of broadband Internet access and the advancing integration process might lead to Community wide media markets in the future.

The 2002 framework for the electronic communications sector gains particular importance for the media sector since it lays down the principles governing the access to the underlying electronic communications infrastructure many of the developing and existing media services require. Although some markets under the legislatory framework for the electronic communications sector vary from the ones defined under general competition rules, the Commission, when required to define markets under, for instance, the Merger Regulation cannot completely disregard the market definitions upheld under the 2002 legislatory framework. This, for instance, must certainly apply to the market definitions used by Article 6 (3) Access Directive 2002/19/EC (retail markets for digital television services and radio broadcasting services to viewers and listeners).

\textsuperscript{515} See supra Chapter 1, paras. 1.111 et seq.
\textsuperscript{516} See supra Chapter 1, para. 1.674 et seq.
\textsuperscript{517} See supra Chapter 1, paras. 1.924-92 et seq.
\textsuperscript{518} See supra Chapter 1, para. 1.1054-105.
\textsuperscript{519} See e.g. supra Chapter 1, para. 1.1251-125.