Market Definition in the Media Sector
- Comparative Legal Analysis –

Report by Bird & Bird
for the European Commission,
DG Competition

December 2002
This report has been prepared by Bird & Bird as part of an assignment for the Media Unit of the Competition Directorate General of the European Commission.

Bird & Bird was appointed to produce this report following the restricted tender procedure COMP/C2/2001/16, which comprised two lots:

Lot 1: Market definition in the media sector: comparative legal analysis (awarded to Bird & Bird).

Lot 2: Market definition in the media sector: economic issues (awarded to Europe Economics).

The two studies are complementary.

This report covers the market definitions used by the EU institutions and by four Member States, namely France, Germany, Italy and the United Kingdom. The studies covering the other Member States will be completed in the course of year 2003.

Further information on decisions of the Competition Directorate-General of the European Commission in the media sector can be found in the 2002 compilation “EU competition policy in the media sector”, available on request from the Media Unit of the Competition Directorate General of the European Commission.

The opinions expressed in this report are purely those of the authors and may not in any circumstances be regarded as stating an official position of the European Commission.

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Market definition in the media sector:

a comparative analysis

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EXECUTIVE SUMMARY

1. Introduction

1. The media is undergoing a significant technological development, which is leading, albeit progressively, to a unification – or at least to a convergence – of the means of transmission and of the types of contents available on different types of networks. Take a digital TV broadcaster and an Internet service provider (ISP); they both acquire digitalised content; they currently convey them through different transmission paths, though that technological difference will soon fade away; TV will also convey interactive services, which will in turn be available on the Internet as well. Does that mean that the TV broadcaster and the ISP are on the same market? Or that they will be in the near future? How near is that future?

2. Market definition plays a key role in competition law. The very behaviours that are considered as perfectly normal for an average-sized company are strictly forbidden and sanctioned when established by a dominant one. The same is true for mergers and acquisitions: an acquisition is only authorised if it does not lead to the creation or threatening of a dominant position. Obviously, the narrower the market, the more likely the company will be to have such a dominant position. Thus, market definition is actually key to the assessment of market power and thus, the clue to the type of day-to-day business decisions that companies may or may not adopt.

3. Ideally, market definition should abide to three characteristics: (i) it should endure in time and not be subject to superficial trend changes, while duly taking into consideration genuine evolutions, (ii) it should be coherent and foreseeable, whatever the Member State at stake in Europe; finally, (iii) it should be consistent with economic principles since, at the end of the day, it is the legal transposition of an economic concept. Even if that ideal goal is often hardly reachable, it should nevertheless be sought, in the current media convergence context.

4. Market delineation issues – applied to a developing sector where, as will be seen further, the authorities at stake adopt evolving positions – become even more problematic in the media sector because of its link with fundamental freedoms. Media services are of a particular nature. They relate to the freedom of expression, and thereby to diversity and pluralism, which explains why most European countries have special media ownership control regimes. Media also interferes with the cultural field and represents a means for promoting national or trans-national cultural and social values. It is therefore all the more necessary to determine the playing field boundaries for the undertakings that are active in the media sector, in order to make sure that the regulations which aim at promoting objectives other than fair and feasible competition may be applied uniformly and take into account new forms of transmission.
In that sensible context, regulatory and competition authorities now face the challenge to duly integrate a time dimension in their market definition appraisal, while remaining consistent. That challenge is not to be missed if competition authorities want to play their role as a watchdog of the healthy evolution of markets, the promotion of the appearance of new players and the overall supervision of the concentration and consolidation process, while preserving the specificity and sensitiveness of the media sector. A coherent and uniform methodology for market definition is thus needed, so as to ensure a consistent treatment of all media players throughout the EU, to promote legal certainty and to enhance trust in the competition and regulatory authorities.

2. Presentation of the executive summary and of the Study

The present executive summary aims at presenting the main conclusions that were drawn from the report, and provide an overall presentation of the study itself. It will therefore not go into the details of the analysis carried out in the study itself, which would be too long and diverse to be summarised in the present document.

This study was conducted following an invitation to tender launched by the European Commission, DG Competition, on the issue of market definition in the media sector. The starting point of this work was the analysis of the criteria used by the EU institutions (and more particularly the Commission) for market definition purposes, in competition law and from a media sector-focused standpoint. The identified criteria led to the drafting of a grid of analysis along the lines of which regulatory instruments and case law were analysed.

This study therefore involved the examination of all EU cases rendered by the Commission in the media sector and, as the case may be, by the Court of First Instance and the European Court of Justice on appeal of such cases, in the EU sector since 1972, based on a compilation of cases handed by the Commission.

The study then analysed, under the same grid of analysis, the competition and media sector-focused legislation of four Member States, namely France, Germany, Italy and the U.K. In order to make comparisons amongst Member States and between Member States and the EU regime, the same analysis criteria were relied upon throughout the entire study. This study thus implied reviewing over 400 precedents in 4 countries, together with the legislations in each of these countries, which in the end produced a 300 pages report.

That analysis is set up to appraise the global coherence and consistency of the upheld definitions, in view of the aims pursued by a market definition, while bearing in mind the central position of market definition in competition law analysis and, consequently, its crucial practical importance on business decisions.
9. However, notwithstanding the work already carried out, one should bear in mind that this study remains a factual report and a pilot project, covering only four Member States as well as the EU practice. The intrinsic limitation in the scope of the study thus makes it particularly difficult to draw strong operational conclusions from the report, as the study is not representative of the situation prevailing in all – nor even in most – EU Member States. This study thus brings together in one single report the market definitions in the media sector, as held by various competition and regulatory authorities. A second and subsequent task would therefore be to analyse whether this factual evidence may raise immediate and substantial operational conclusions.

3. Presentation of the concepts and issues at stake

3.1. Market definition is at the core of any competition law analysis

10. One should bear in mind that competition law\(^1\) is essentially articulated around two concepts, namely (i) anticompetitive agreements, \(i.e.,\) the agreements which restrict competition on a given market and (ii) creation, reinforcement or abuse of a dominant position, whether by legal means (\(e.g.,\) mergers and acquisitions) or illegal ones (abuses to eliminate or weaken competitors). In both cases, the starting point of the analysis is, by definition, the identification of the market on which such dominant position would be held.

It therefore appears that no competition law analysis may be carried out independently from market definition. This is actually all the more true in cases where the market power of the undertaking at stake determines the outcome of the case. In this respect, it should be recalled that under competition law\(^2\), the same behaviour may be authorised when set up by a company that has limited influence on the market, while it will be considered as an infringement when it emanates from a dominant undertaking\(^3\).

In the same way, the EU legal regime for mergers is articulated around the concept of dominance: the concentrations that shall be authorised by the European Commission are those that do not lead to the strengthening or creation of a dominant position.

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\(^1\) Except as regards State aids, which pertain to a different logic and appreciation and therefore use a distinctive set of criteria and methodology.

\(^2\) In EU competition law, the prohibition of so-called abuses of a dominant position is set in article 82 of the EU Treaty; national competition laws contain analogous provisions.

\(^3\) See \(e.g.,\) case T-111/96, \(ITT Promedia\) of 17 July 1998 [1998] ECR-II-2937.
Legal certainty for undertakings thus requires predicting where they stand in a given sector, and whether they - and other companies that provide complementary or related services - may be considered to be acting on the same market.

### 3.2. Difficulty to identify market definition in an evolving, converging and politically sensible sector such as the media.

11. The identification of the market, which should be carried out prior to any significant move by a company, is not as simple as it may look, particularly in the media sector.

12. Market definition is divided into the so-called product and geographic markets. As the Commission points out\(^4\), the definition of the product market is the framework within which the Commission applies competition law principles. The market is defined according to both product and geographic factors. As far as the product market is concerned, it is traditionally considered to include “all those products and/or services which are regarded as interchangeable or substitutable by reason of product characteristics, prices and intended use”.

All products and/or services that could be placed on the market by producers or competitors without significant switching costs and within a reasonable time period need to be included in that definition as well. That definition of the product/service market needs to be read in its geographic dimension, which covers the “area 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 areas.”

13. At the EU level, the criteria relied upon to identify product and geographic markets are explained in various EU materials, including in particular the Commission’s 1997 Notice on market definition\(^5\). In practice, both product and geographic markets are delineated following the analysis of demand and supply, by looking at the product at stake, its price and intended use. National competition laws also perform that core product/geographic and supply/demand distinction.

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From a product standpoint, the market encompasses all substitutes for a given product or service; it therefore focuses on demand, though supply is also taken into account, albeit at a secondary stage. Demand analysis is essentially focused on the so-called “Hypothetical Monopolist Test”, otherwise referred to as the SSNIP test (standing for “Small Significant Non-transitory Increase in Price”).

In substance, that test aims at assessing in abstracto the reactions of consumers in the event that a company would increase its prices by 5-10% over a rather long period of time (about one year and more). Products to which the consumers would switch would therefore be included in the same product market, as they would represent substitutes from the consumer’s point of view to the product which became more expensive.

From a geographic perspective, the market will include the areas to which the customers could switch in the short term to companies included elsewhere at negligible cost (demand) and the barriers to entry that differentiate companies from one area from those located outside of it (supply).

14. The practical implementation of these two sets of tests, which may already seem rather delicate to apply to traditional consumer goods industries, raises specific issues in the present media environment, due to the intangible nature of the services at stake and to their considerable current evolution, though at a pace which is particularly difficult to predict in advance. The time horizon factor, which by definition is uncertain and includes a degree of subjectivity, plays a key role here.

The above-mentioned example of the ISP and the TV broadcaster offers a classic illustration of the difficulties of delineating market boundaries in such an evolving sector. The same issue would arise concerning the on-line distribution of music and the classical “brick and mortar” distribution system.

The accuracy of a substitutability test and the necessity to properly identify dominance is all the more important in light of the issue of upstream access to content. Indeed, different forms of transmission will ultimately require access to analogous contents, the prices of which on the other hand seem to be rising significantly, particularly as regards premium content.

Furthermore, that field of activity is currently going through an important concentration phase, thereby creating competition concerns. It thus appears that content is potentially becoming an upstream bottleneck for the players in the media environment, the access to which should be adequately regulated by competition law. For that purpose, a proper analysis of the market, the players thereon and their relationships (whether vertical or horizontal) is necessary.
15. Finally, the global coherent application of these criteria is particularly difficult to achieve considering the number of rules applied and institutions involved. Indeed, besides competition law, media is governed by specific sets of rules, which are at the boundaries with fundamental liberties, cultural protection and public service, and which must now be applied in the context of an important economic recession which has hit the media sector over the last year. These sets of rules coexist with competition law, which fully applies to the media sector.

The diversity of the legal frameworks (competition together with sector-focused and coexistence of national and EU rules) is echoed by the number of institutions that are involved in the media market definition process. DG Competition of the EU Commission intervenes at the supra-national level, for competition cases which have a pan-European (or at least a cross-country) effect, while DG Education and Culture intervenes on the regulatory side.

At the national level, jurisdiction in the media environment is split between the National Competition Authorities (NCA’s), which apply national and EU competition rules, and the National Regulatory Authorities (NRA’s); while the former deal with competition cases, the latter are usually involved in “purely media related” matters; besides, most national systems provide for a cooperation framework between these institutions.

3.3. Worries on the market definition methodology as applied in the media sector.

16. Market definition is a particularly difficult exercise in a fast changing and sensible environment such as the media, which may raise the issue of determining whether traditional market definition methodologies are adapted.

17. As mentioned above, the perfect and ideal market definition should (i) endure in time while duly taking into consideration genuine evolutions, (ii) be coherent and foreseeable, whatever the Member State at stake in Europe and (iii) be consistent with economic principles. However, practice may seem detached from these theoretical goals.

First, it appears that theory and practice may sometimes be separated from one another. Second, media players meet considerable difficulties in anticipating the definition of the market. Lastly, the SSNIP test, which is one of the core references in market definition, bears in itself intrinsic limits.
The first concern in the market definition methodology may result from the absence of distinction in the analysis between product and services markets. It results from the analysis of the EU and national tools set up to provide for market definitions, that most of the product market approach was initially drafted for industrial production concerns; therefore, services markets are considered as a sort of a sub-category of product markets.

That approach may have its origin in the time when competition law principles were first set, since most cases dating back to thirty or forty years ago actually related more to products than to services. However, the respective product/service weights in economic life are now balanced.

Some of the factors traditionally upheld for product market definition (such as patterns of production costs, billing, determination of price level in comparison with the price of the “production”, distribution and transport costs, advertising) may therefore be ill-suited for services markets. It seems, however, that most competition authorities are well aware of the product/services differences and therefore apply the market definition criteria accordingly.

However, the difference between the number of possible market definition criteria that exist in theory and their practical implementation in case law shows that there may be a difference between competition law theory and practice. Indeed, the regulatory tools and explanatory soft law instruments that refer to market definition go thoroughly through the criteria that should be used to define product and geographic markets, and even identify the evidence that should be relied upon for that purpose. However, that methodology is set in abstracto.

On the other hand, in practical cases, most of the information which would theoretically be required in order to rely upon a particular substitutability test, simply cannot be gathered. Furthermore, the criteria used both by national and EU authorities vary considerably from one case – or from one category of media – to the other. For instance, theory states that demand should be the primary and main focus for market definition; however, in the press sector for instance, the Commission nearly exclusively defined the market according to supply criteria.

Furthermore, even the very notion of demand is not necessarily a fixed concept; it sometimes refers to end-consumers, while in some other cases, it actually refers to the party which, within the relationship examined in the case at stake, is in a demand situation. Obviously, that same party may, in another case or with another undertaking, be in an offer situation. A close scrutiny of the case at stake is therefore necessary for the understanding of the relations between the parties and, consequently, of competing and substitutable products or services that would belong to one and the same market.
21. However, it appears on the contrary that case law is becoming, to a certain extent, self-sustaining. Not only is it somehow detached from theoretical developments but it also appears that most cases tend to rely upon and explicitly refer to precedents where market definitions that are analogous or identical to the ones serving for the purpose of the pending case, were upheld. Competition case law is thus progressively becoming independent from its own conceptual approach.

Relying on precedents is certainly necessary and shows the internal cohesion of case law. However, as mentioned earlier, a market which was upheld in a given case may not be mutatis mutandis transposable to another case, particularly if the demand/supply relationship is not identical. Furthermore, that approach should take due care of the technological evolutions which take place over small periods of time and should thus include the evolutions that may have appeared since the last precedent was rendered.

The difficulty for the actors on the market to anticipate the definition of the market.

22. The second worry results from the difficulty to anticipate the outcome of a given market definition. That phenomenon is backed by a threat of “narrowisation” of market definitions, i.e., a tendency of competition authorities to define markets in a more and more narrow fashion. Indeed, most cases that involve a thorough market analysis involve either (i) abuses of a dominant position or (ii) concentrations, i.e., the threat that companies may, by means of acquisitions, joint ventures or mergers, create a dominant position on a given market.

In the first case (i), the very existence of the abuse entails the presumption that a dominant position was held in the first place, thanks to which the undertaking that is subject to the proceedings had the possibility to behave independently of its suppliers, customers and ultimately of its consumers, i.e., to perpetrate the abuse. As far as concentration cases are concerned (ii), the methodology adopted for market definition will most often lead competition authorities to identify all possible markets, even the narrowest ones, in order to see whether on one of these markets, the concentration may lead to the creation or strengthening of a dominant position held by the undertakings party of the notified operation.

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6 Case 27/76 United Brands [1978] ECR 207: “the dominant position referred to in this article related to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.
As a paradox, the difficulty to anticipate market definition is actually derived from the above-mentioned tendency of case law to become self-referencing. Indeed, later cases will often refer back to the market definitions upheld in previous cases that arose in the same sector. However, the identification of a string of market definitions, which include even the narrowest possible ones and some of which are left open, leaves little room to precisely anticipate market boundaries.

The practical difficulty for the actors on the market is therefore one of predictability: an undertaking needs to know whether it is likely to hold a dominant position on a given market, before engaging in certain commercial and strategic activities. How may it know it if the boundaries of the markets are unclear? That difficulty to anticipate the outcome of the market definition should probably be further explained as it may sometimes leave a negative impression upon actors in the industry, which should be remedied. Transparency is thus essential for the credibility of the entire system.

23. The third and major worry regards the central practical role which is played by the SSNIP test in the market definition process. First, one should recall that market delineation is a legal exercise, intended for legal purposes. Law is not an exact science, and the inclusion of economic evidence may not alter that conclusion.

24. Moreover, the small significant non-transitory increase in price relies on the assumption that the initial price is set at a competitive level. It thus requires the gathering of precise data, over a substantial period of time, which may raise considerable practical difficulties. Furthermore, it may well be that the starting price, which was used as a basis for the application of the test, was already above the competitive level. In such a hypothesis, any increase by 5-10% of the already supra competitive price will naturally lead consumers to discover new alternatives; however, such a search may actually just be a consequence of the fact that the price is well above (and not merely by 5-10%) its competitive level. Including all such alternatives in the market definition would thus tend to unduly extend the market boundaries.

This difficulty, known as the “cellophane fallacy”, was particularly emphasized by the French Competition Council, which is sometimes rather reluctant to apply that test.

The fact that the very level of competitive prices is particularly delicate to determine is all the more true in the media environment. First, media companies bear considerable upstream costs for access to bottlenecks, whether they are technical (in terms of infrastructure) or pertain to the intellectual property and copyrights realm (acquisition of contents).
The development of convergence is meant to reduce the access to infrastructure cost, by expanding the number of operators and the transmission capacities. On the other hand, access to content and particularly premium content, such as exclusive sports rights, does entail substantial investments. Therefore, in view of these types of costs, the determination of a competitive price, or of a price above marginal cost – as set in product industries – is particularly difficult to set. The later identification of an increase of 5 to 10% of that price and of the consequences thereof seem even more delicate to assess.

25. In any event, the SSNIP test may only reflect, in abstracto, the likely reactions of consumers to an increase (or decrease) of prices. The detection of a theoretical reaction of consumers to a theoretical price increase may appear as rather abstract. It may even seem more so in growing services industries, such as the media one.

26. Finally, the SSNIP test is exclusively focused on a quantitative approach to substitutability, i.e., the reaction of consumers to a variation in price. Consequently, that test takes little if not no account of qualitative criteria such as strategic competition and innovation decisions, on the grounds of which a company may decide to compete not only on prices but also on services. However, that criterion may be crucial, particularly in the media environment, where innovation plays a key role. Companies would therefore tend to compete with new tools, which are often considered as more important than price. The likely reaction of consumers to a theoretical price increase may therefore be of limited use.

27. Despite its intrinsic limits, it is however very difficult to find any replacement test that would be more reliable than the SSNIP one. As expressed earlier, law is hardly an exact science. It therefore seems that even though the SSNIP test is not, as such, any worse than other methods used to determine market definitions, it should nevertheless be used very cautiously, particularly in fast-changing services industries. At the end of the day, the perception of the consumers and companies present in a given sector may represent a more subjective approach to market definition, but not necessarily a less reliable one.

4. Findings of the study

4.1 A global coherent approach amongst the Member States subject of the study

28. The present pilot study reveals that, overall, the four Member States studied and the EU Commission have comparable global and overall positions on market definitions. The topics examined in this respect among the media environment covered (i) broadcasting and TV, (ii) music and radio, (iii) books and publishing and (iv) the Internet-related sectors.
29. For instance, as far as the broadcasting and TV sector is concerned ((i) above), all Member States identify, at the upstream level, an access to raw content, within which premium content or even sports events are identified as a separate market, and then make a distinction from the viewer’s standpoint between pay and free TV.

4.2. The divergences amongst Member States on evolving sectors and their consequences: a need for an enhanced cooperation

30. Some differences remain in market definition approaches, particularly at the periphery of given markets and as regards their interaction and links with other media forms.

Take digital TV for instance:

- France tends to consider that there is a global market for digital terrestrial and for pay-TV, whether by cable or satellite.

- On the other hand, the German authorities distinguish between a market for terrestrial transmission and one for network cable transmission, relying on the fact that there is no direct contractual relationship with the consumer in terrestrial transmission.

- In the U.K., on the contrary, the DGFT relied precisely on the consumers’ perspective, to determine that terrestrial TV and other forms of audio-visual entertainment were close substitutes for subscription to cable and satellite TV.

- Finally, in Italy, even though we did not identify any relevant decision, the regulation identified several market areas, including in particular the market for digital terrestrial TV programming and the market for the provision of digital terrestrial TV services.

31. These differences may actually simply result from the fact that the authorities were not asked the same questions: the position of a given authority on a particular point often comes up at the occasion of a case that was submitted to it and which rose that issue. Should a case not arise in a given Member State, then the authority does not have the opportunity (nor sometimes the jurisdiction) to give its opinion on the market definition. Furthermore, most markets are identified in a given context, i.e., by comparison to another product or service. It may therefore well be that in a given Member State, the issue is to determine whether A and B are interchangeable, while in the neighbouring Member State, the case would involve the substitutability between A and C.
32. Nevertheless and whatever the reasons for such differences, the result is that participants in the media industry are left with imprecise case law, the outcome of which in turn is often at odds amongst the various authorities of the Member States and with the position of the EU Commission.

In cases involving a new service or technology, two results are possible: either market definition endorses a narrow oriented approach, so that each technology or new distribution mechanism corresponds to a relevant market definition; or it encompasses a broader market definition so as to cover all multi-purpose delivery networks and services.

The choice between the two branches of the alternative has considerable repercussions on a company’s likeliness to hold a dominant position: the narrower the market, the more likely an undertaking will be dominant thereon.

33. Should these differences between national authorities be confirmed over time and throughout various Member States, it would then be worrying as it may actually put the attainment of a true common market at risk. Analogous undertakings placed in similar situations could be treated differently from one Member State to another, simply because the market on which they are active is defined differently between these two Member States.

Therefore, one may wonder whether competition authorities should not adopt a common position regarding the boundaries of the converging markets and the perimeter of services that are actually included in one and the same product or service market, even bearing in mind that the delineations of such markets may evolve rapidly over time. Such a common position could result from a greater cooperation between competition authorities, particularly in light of the new reform of Regulation 17.

4.3. The need for anticipating the actual outcomes of Convergence

34. Convergence is currently an important topic in the media sector, even though this term has admittedly been used to indistinctively cover all sorts of worries and hopes regarding the evolution of the media environment. In any case, it seems that no competition law institution has actually, for the time being, made any decision expressly which extensively apprehends the market definition issues which arise from such technological evolution. These decisions do mention the existence of convergence. However, they consider convergence as a somehow abstract ineluctable process, which would ultimately lead all services to be provided through the same means of communication as it reduces technological differences amongst the various forms of media.

Convergence is thus often apprehended as a conceptual evolution, without real tangible and practical analysis of the actual consequences of the convergence of technologies. This approach seems biased for two main reasons.
35. First, that approach relies heavily on supply-side substitution since it aims at evaluating the technological alternatives for content providers to reach consumers. It is therefore in apparent contradiction with the theoretical position of competition authorities, who declare assessing primarily demand-side substitution and then, at a second stage, to take supply into account. That remark does not aim at providing any value judgement: it merely notes that the supply-based approach is necessarily detached from the users’ perspectives and behaviours.

Thereby, the analysis on convergence focuses on the substitutability between technologies (digitalisation of content and convergence in conveyance means); however, such technological unification does not necessarily entail uniformity in the offers made by the suppliers. Therefore, convergence does not necessarily mean that services will become substitutable from a consumer’s perspective.

Contents are already digitalised, whether on the Internet or on digital TV, though TV sets remain mostly analogue; digital cable and satellite TV are made under the same format, though they may not be substitutable. The real issue is thus to determine, from the consumers’ point of view, the types of services that will emerge from homogeneous content formats and which the consumer or the advertiser will find substitutable.

36. Second, that approach to Convergence lacks global guidelines and legal certainty for the participants in the market. Therefore, the necessity to take a greater account of time horizon factors clearly appears in fast-moving industries such as the media sector. The evolution of products and services and the reaction of consumers is notoriously problematical to anticipate. This difficulty may be illustrated by what was particularly shown in recent cases, such as the Kirch/Bertelsmann/Premiere decision, which imposed stringent conditions on the parties of the undertakings. Will these undertakings endure in time, with the economic evolution companies are currently going through?

37. At the same time, one may not deny the difficulty in anticipating the market evolution. This difficulty is particularly illustrated by the Commission’s decision in the Vivendi/Canal+/Seagram case, where the Vizzavi joint venture was given a green light, subject to conditions, due to the dominant position of Vivendi and Canal+ in certain European pay-TV markets and their privileged access to content. The recent failure of the Vizzavi portal puts this decision in a different perspective. Nevertheless, the principles laid down by this decision are there and still show the path the Commission might follow in analogous types of cases.

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7 Commission Decision of 27 May 1998, Case No IV/M.993 - Bertelsmann/Kirch/Premiere
8 Commission Decision of 13/10/2000, Case No IV/M.2050 - VIVENDI/CANAL+/SEAGRAM
4.4. The need for a coherent approach on geographical markets

38. Another striking factor in the market definition process is the somehow limited place given to the geographic appraisal of market definitions, both under competition law criteria and resulting case law, and under regulatory measures.

39. However, one may consider that geographic scope is going to become of even greater importance in light of the coming reform of regulation n°17/62, which aims at decentralising the application of competition law, by leaving national competition authorities that have more autonomy in this respect while setting up information and cooperation mechanisms, in order to guarantee consistent application of the rules within the Community. The reform provides for a network of authorities, including the NCA’s and the DG Competition, which should ensure an efficient allocation of cases.

40. The creation of such a network would enlighten the divergence in appreciation of national authorities in market definitions, if any. It therefore seems necessary to make sure that a uniform and consistent methodology for market definition in the media sector is applied throughout the EU in order to avoid any tendency for undertakings to go “forum shopping”, should some authorities, for instance, adopt positions towards certain market definition issues that are more favourable to their interests. Moreover, the adequate definition of the geographic market will be the key to the allocation of cases to national competition authorities. Considering the pilot nature of the present study, it is particularly difficult to draw any conclusion in that respect.

41. Finally, it seems that for the time being and particularly at the national level, there is some confusion between the jurisdiction of the authorities and the market’s dimension. Some authorities tend to consider that whenever their national antitrust legislation is applicable, the geographical scope of the market is necessarily national.

This results in a tendency, in a significant number of cases, to elude the geographic market issues and to underestimate the existence and importance of infra-national markets. It may therefore seem necessary to focus on that geographic market dimension, which is too often neglected in some decisions. This definition would not as such determine the allocation of cases between national competition authorities and the Commission, which is carried out under other criteria (such as affect on trade between Member States, Community interest, etc.) but may be conclusive in determining the allocation of cases amongst national authorities, within the European network of national competition law authorities which is about to be set up. A greater cooperation between authorities thus seems to be needed again.
4.5. The search for a unique and coherent market definition test in the media sector.

42. The questioning of the use of the SNIPP test necessarily entails the further issue of determining what would be an appropriate test, particularly in the media sector. In this respect, it may be necessary to formally draw a value chain that is specific to the media sectors, in order to examine precisely the patterns of relationships and, consequently, the supply and demand connections that exist between the parties.

43. Indeed, all forms of media pertain to the same logic: there is the upstream acquisition or creation of content (whether for broadcasting on TV or radio, for the press and for the Internet); then the formatting and distribution and then the reach of consumers; depending on the type of trading relationships, the consumer of the product may either be the advertisers (free media) or the subscribers (pay media). For the time being, these different forms of media pertain to separate industries, even though they correspond to the same value chain; convergence will thus technologically blur the frontiers between these differences.

44. Thus, thanks to underlying technological changes, services which were previously produced by separate firms shall now be produced within the same firm. In this respect, the media sector is enjoying a development of digitalisation and processing power, combined with a general decline in the price of computing, an increasing network capacity and the development of conditional access technologies. That trend is supported by the liberalisation of the telecommunication sector, which allows new firms to enter previously protected markets.

45. That value chain may be split in two different and parallel chains of (i) access (both to content and to infrastructure), (ii) acquisitions, (iii) “distribution” (by means of publication, broadcasting, on-line availability or distribution), (iv) access to the consumer (reader, viewer, subscriber), which leads to the examination of (v) the financing sources (advertising, subscription, public funding).
46. The setting up of a value chain is not a new tool. It is (or at least should be) a basic element for any market definition purpose. Nevertheless, it may be interesting to highlight the relations between content on one hand, and access on the other. In the same way, any value chain should probably underline the problem of financing, which was hardly found in the case law analysis conducted throughout the present study. Indeed, in theory, the meeting of supply and demand leads to the formation of a price, which is considered, from a competition point of view, as the optimal value which should be given to that particular good or service.

47. The setting up of this tool (or any analogous one) enables identifying more clearly the overall logics behind the media sector in its entirety, which does not emerge particularly clearly from a case-law reading. Indeed, one may have the impression that case law results in a vast collection of market definitions, some of which are left open, which may lack strong sector coherence. On the contrary, media sectors do tend to present the same overall patterns and a corresponding analogous similarity in their value chain. The difficulty in identifying the connections between all upheld market definitions and amongst the various media sectors may be further accentuated by the internal cross-references within case law, to previous cases rendered by the Commission which give a general impression of a self-nourishing system. Few references are made either to sector-focused legislation or to “exterior” references.

48. The drafting of a value chain may also lead to taking into greater consideration the opinions of the actors in the industry. Such opinions are obviously duly taken into account, particularly by the means of the questionnaires sent by the Commission when appraising concentrations. However, such opinions mostly tend to relate to the position of the parties, rather than to the definition of the market.

49. Based on the value chain, the product and geographic market definitions would be determined according to the substitutability in terms of demand and then, in terms of supply. Even though this approach is largely similar to the one currently followed by the competition authorities, it would probably tend to highlight the connections that exist between the different markets and to investigate substitutions that exist outside the “traditional” market boundaries.

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Brussels, December 2002
INTRODUCTION

Scope of the study

50. In its invitation to tender for the provision of a study in the area of competition policy concerning television, the Internet and other related media markets (Lot 1) of 15 October 2001, the European Commission, Competition DG, defined the scope of the study to be carried out. In substance, the Commission expressed that the study should proceed to a comparative legal analysis of market definitions in the media sector by (i) providing an overview of the main media markets defined in application of EU, national and other competition rules, and by (ii) assessing the impact of different EU regulatory frameworks on the competition policy in the media sector.

51. More particularly, as for the overview ((i) above), the “study should give an outside overview of the relevant markets defined by the European Commission in the media sector and examine the boundaries of these market definitions taking into account that market definition is not a static exercise but that markets are under constant evolution”. As for the assessment of the impact of the regulatory frameworks on the competition policy in the media sector ((ii) above), the Commission indicated that the study should investigate the regulations made in the media sector, and should determine if and how these regulatory markets affect the media markets and, therefore, have effects on the work of the competition authorities. In this respect, the study should consider the impact and importance of the regulatory instruments on the definition of the markets in the media sector.

52. The answer that Bird & Bird submitted to that tender aimed at meeting the concerns of the Commission, and at precisely delineating the scope and methodology to be adopted for carrying out that study. This answer was based on a three-step approach, which constitutes the framework of the present interim report. This approach essentially consisted of (i) establishing an EU grid of analysis, in order to list and appraise the various criteria used at the Community level for market definition. Then (ii), this grid was to be compared with the ones drafted at national level. Finally, (iii) the analysis would inventory each of the relevant markets and highlight the main issues to appear in the market definition in the media sector.

53. As for the geographic scope of the study, the answer provided by Bird & Bird suggested focusing an in-depth analysis on three countries, namely France, Germany and the UK, and to then extend the analysis to other countries including more particularly Italy. That suggestion was dictated by time considerations. This approach was confirmed through subsequent exchanges with the Commission, the conclusion of which showed that the study should be considered as a pilot study, as it could only involve a limited number of countries and could therefore not be fully representative of the various Member States.
54. It may nevertheless prove necessary, before going into the core of the study itself, to briefly present the methodology that was adopted, as it is the basis for understanding the conclusions we reached.

**Methodology**

55. For analysing the criteria used by the EU institutions (and more particularly the Commission) for the definition of the markets, as applied to the media sector, two paths have been followed:
   - analysis of the criteria for the market definition under competition law and
   - analysis of the market from a sector-focused approach.

56. The identified criteria enabled us to draft a grid of analysis along the lines of which the Commission case law has been examined. The grids of analysis, whose content are at the heart of our developments, are attached as annexes.

   (i) Identification of the criteria upheld by the Commission in competition law.

57. The present report took the 1997 Commission Notice on the definition of the market\(^9\) as the starting point of the analysis. The grid is thus based on the first distinctive and traditional criterion of market definition, which divides that definition along product and geographic markets.

58. Within each of these two markets (product and geographic), we examined the criteria taken into account by DG Comp, as mentioned in the Commission Notice on the definition of the market, to identify demand, supply and potential competition. These criteria (column n°2 “Criteria” within the grids) therefore refer to the tests used by the Commission to identify the characteristics and boundaries of markets. However, it also appeared that for the geographic dimension, the Commission indicated that the degree of market integration in the EU should be taken into account, which we therefore also listed as a criterion in that respect.

59. Under the very terms of the 1997 EU Notice, the use of the various criteria identified may vary according to the type of case at stake; moreover, the respective weight of the criteria at stake varies considerably, some being “essential” and used in all cases while others appear more “secondary”. We thus decided to divide our grid of analysis according to the goals pursued and their importance for the identification of the relevant market (columns n° 3 "goal pursued" and 5 “weighting factors” within the grids).

60. Then, our analysis took into account all other material that were considered as relevant for the definition of the market, from a competition law standpoint.

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\(^9\) Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372 of 9/12/1997.
Considering that they are not as detailed on the subject as the Guidelines themselves, they were taken into account at a second stage\textsuperscript{10}.

61. Apart from the traditional product/geographic distinction, it also appeared from our reading that additional factors could be taken into account. These are listed in a complementary part (“1.1.3. Additional factors”), and take into account elements such as time horizon, the existence of chains of substitution and secondary markets, and the existence of IP rights.

62. Finally, we also focused, within the identification of the factors involved for the definition of the market, on the perspective of the present study, which is to evaluate the application thereof to the media sector. It therefore appeared interesting to also take into account sector-focused legislation, in order to see whether it contains any definition of the markets. However, we realised that the definition of the market within this type of legislation could not “fit” into a purely competition law approach, as previously drafted. We therefore decided to make an additional grid (“2. Criteria used for market definition in sector-specific regulation”).

63. In doing so, we came across criteria which were at the boundary between competition law and sector-specific approaches, and which principally relate to the network / infrastructure markets as opposed to content-specific areas. Once again, these criteria were mentioned, as they seemed particularly relevant in the media sector.

(ii) Elaboration of a grid of analysis for Commission cases in competition law, within the media sector.

64. The grid of analysis used for the Commission’s competition case law in the media sector consists of retaking the criteria identified in the first step (1 above), in order to compare the theory of the Commission’s approach with its actual implementation. The grid is used individually for each Commission’s decision, in order to have an analysis of each case, according to a homogeneous grid of analysis. As the parts of the Commission’s decisions on market analysis are less detailed than its theoretical approach, this grid of analysis quite naturally divides product and geographic markets, within each of which it examines the factors relating to supply, demand and potential competitors. It then checks whether in the case at stake the Commission made a distinction between network and content. For each one of these factors, the grid allows the identification of the criteria, as the evidence as well as their weight within the Commission’s decision is used. The final line of the grid is the conclusion, \textit{i.e.} the market definition finally upheld in that particular case.

\textsuperscript{10} The text referred to is indicated in brackets.
**Presentation of the report**

65. The present report outlines (1) the EU analysis of the market as identified both from regulatory instruments (competition and sector-focused legislation) and in case law. The same outline is used for analysing each of the national markets: (2) France, (3) the U.K, (4) Germany, and (5) Italy. Finally, the report tries to investigate some of the conclusions that can be inferred from these approaches (6).
1. ANALYSIS OF THE MARKET DEFINITION UPHELD AT EU LEVEL

66. This part of the report aims at presenting the criteria used at the EU level for defining markets in the media sector in competition law (1.1.) and sector-focused legislation (1.2), and examines their practical implementation in case law (1.3). This Study was based on the analysis of competition law and sector-focused regulations and on the Commission cases in the media sector since 1972, as collected in its 2002 compilation and, when applicable, on the judgements from the ECJ and CFI rendered on appeal of such decisions.

1.1. Origin and criteria for market definition in EU competition law

67. Market definition is one of the core issues of competition law. Therefore, the DG Competition of the European Commission elaborated various instruments for that purpose, thereby progressively introducing a series of factors; each of these factors may have different weights and values corroborated by various types of evidence. In spite of the variety of criteria, the traditional or standard approach consisting of separating the product from the geographic market appears as a persistent starting point.

Within that traditional product/geographic market distinction, the European Commission then identified the necessary factors for assessing the characteristics of supply and demand. The present Report therefore examines successively demand and supply, according to their product and geographic dimension (1.1.1). In addition to these traditional factors more “sophisticated” ones were also introduced. These are not systematically used for the purpose of market definition, but may prove nevertheless necessary in some cases (1.1.2).

68. For the purpose of identifying the various criteria upheld for market definition, the following documents have been reviewed and analysed:

- Commission Notice on the definition of the relevant market for the purpose of Community competition law [hereinafter “the 1997 EU Notice”]
- Commission Regulation N° 3385/94 of 21 December 1994 [Form A/B]
- Form CO relating to the notification of a concentration pursuant to Regulation (EEC) n°4964/89 [Form CO]

For a list of the competition law materials referred to, see infra, introductive paragraphs of chapter 1.1.

For a list of the sector focused materials referred to, see infra, introductive paragraphs of chapter 1.2.

EU competition policy in the media sector, Commission decisions (compilation 2002).


- Regulation n°4064/89 on concentrations\textsuperscript{16}
- Notice on co-operative joint ventures of 1993\textsuperscript{17} as amended by the (Notice on horizontal agreements, 2001)
- Guidelines on the applicability of article 81 of the EC Treaty to horizontal cooperation 2001\textsuperscript{18}
- Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices\textsuperscript{19}
- Guidelines on vertical restraints\textsuperscript{20}
- Commission Regulation (EC) n° 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements\textsuperscript{21}
- Commission Regulation n° 240/96 of 31 January 1996 on the application of article 81(3) to certain categories of technology transfer agreements\textsuperscript{22}.

Aside from these documents, which are focused on competition law issues, the present Report also included more specific pieces of legislation. These documents embody both the previous telecommunications regulatory regime and the new common regulatory package, which instead extends to all electronic communications activities (“networks and services”). In this respect, there are certain provisions of these documents that focus specifically on market definition, whether by means of guidelines and/or a general outline to market approach. Therefore, these documents are included in the general part of the analysis grid rather than in the sector-focused grid. In particular, these documents include:

- Notice on the application of the competition rules to access agreements in the telecommunications sector [the 1998 Notice on Access Agreements in Telecoms]\textsuperscript{23}
- New regulatory package 2002\textsuperscript{24}

\textsuperscript{17} OJ C 43 of 16/02/1993 p.2.
\textsuperscript{18} 2001/C/ 3/02 of 6/01/2001.
\textsuperscript{19} OJ L 336,of 29/12/1999 p. 0021 – 0025.
\textsuperscript{20} OJ C 291/1 of 13/10/2000.
\textsuperscript{22} OJ L. 031 of 09/02/1996 p. 2.
\textsuperscript{23} OJ C 265/2 of 22/08/1998.


1.1.1. The standard approach of demand and supply

1.1.1.1. The standard approach of demand and supply from a product point of view

69. Section 6 of Form A/B and section 6 of Form CO define the concept of “Relevant product markets” as: “comprising 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”.

70. The Commission considers that the “process of defining relevant markets may be summarised as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed” (§ 28 of the 1997 EU Notice). It appears from section 6 of Forms A/B and CO that the information submitted by the involved undertakings is largely based on the consumer’s perspective, and therefore that the essential criteria brought about by the parties will be centred on a demand perspective (i). Nevertheless, the supply side is also duly taken into account (ii).
(i) **Demand**

71. From a product point of view, the starting point of any identification of demand is to determine the range of products that may be viewed as substitutable for consumers. That starting point is mentioned in (nearly) all the above-mentioned documents issued by the DG Competition, which are focused on competition law issues. It should also be underlined that this criterion is referred to in other pieces of legislation that relate to specific telecom issues, and particularly in the 1998 Notice on Access Agreements in Telecoms and the Draft Guidelines in article 14.

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(ii) **Test used**

72. From that perspective, the market definition would include all products that may be considered to have the same characteristics or intended use; it would therefore encompass all possible substitutes for a given product or service. A part from the physical characteristics of the products, the perimeter of the products considered as interchangeable can also be defined by reference to the price of the products at case, on the basis of a speculative experiment relying on the so-called “hypothetical monopolist test”; in substance, that test consists of determining the consumers’ reactions in the event of a small, non-transitory change in relative prices (in the range of 5%-10%) of a given range of products or services. When the outcome of that test results in a switch in consumption patterns, then it can be deduced that (i) the products from which the consumption changed and (ii) the products that benefited from that change belong to the same product market.

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(iii) **Evidence relied upon**

73. For the purpose of product market definition from a demand standpoint, the analysis of the Commission will take into account both evidence derived from past experience as well as actual and present characteristics.

74. As far as the appraisal of the past situation is concerned, various series of evidence are taken into account to assess demand substitution:

- **Economic evidence**: the Commission bases its approach on a number of “quantitative tests that have specifically been designed for the purpose of delineating markets” (§ 39 of the 1997 EU Notice). More particularly, the Commission indicated that these tests should take into account the cross-price elasticities, which consists of appraising “various econometric and statistical approaches estimates of elasticities and cross-price elasticities (5) for the demand of a product”. 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”. These tests are therefore based on quantitative evidence, and are described by the Commission as providing a
rigorous scrutiny for the purposes of establishing substitution patterns in the past.

- **Evidence of substitution in the recent past, between products and/or services**: This substitution criterion takes into account any launch of new products in the recent past. The Commission considers this evidence as particularly significant, and indicates that “when available, this sort of information will normally be fundamental for market definition”\(^{26}\) (§ 38 of the 1997 EU Notice).

It therefore appears from the above that the first step undertaken in market definition intends to be based on objective criteria. Indeed (and subject to the developments below as well as the developments of Lot 2 carried out by Europe Economics), economic evidence may be qualified as an objective and neutral approach since it does not rely on subjective points of view (whether developed by the parties, their competitors or the consumers), but instead includes figured-based elements, which are less likely to be subject to opposition.

75. As far as the appraisal of the present product/service substitutability from a consumer’s standpoint is concerned, the Commission indicates the following factors to be taken into account:

- **The actual characteristics and intended use of the product** (§ 36): this analysis represents the first step in the market definition investigation conducted by the Commission and aims as identifying possible substitutes. However, the Commission recons that “functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because responsiveness of customers to relative price changes may be determined by other considerations as well”.

- **Views of consumers and competitors**: experience shows that this point of view is particularly taken into account in cases of notifications (whether under Form A/B for agreements of Form CO for concentrations), where the Commission often tends to gather the point of view of consumers and competitors about the market definitions submitted by the parties to the notified agreement.

However, and as indicated in the 1997 EU Notice (§ 40), the competitors’ and consumers’ point of view shall only be taken into account provided it is supported by strong factual and economic evidence (particularly evidence as to the “hypothetical monopolist test”). Indeed, it may often be the case that competitors desire to oppose a particular deal and may, for that purpose, provide elements contradicting the parties’ analysis of market definition.

\(^{26}\) Emphasis added.
(e.g. a narrower market definition which would, by definition, lead to an easier identification of a dominant position).

- **Consumer preferences**: the consumer preferences aim at evaluating the consumer’s purchasing patterns and attitudes, the views of retailers thereon, as well as the importance given to brands from a consumer’s perspective, as supported by market research studies submitted either by the parties or by their competitors. As the Commission underlines, identifying such existing consumption patterns is often delicate, particularly as it is difficult to gather the consumer’s point of view on that subject. Besides, this criterion is in most cases supported by “surveys carried out ad hoc by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17”; indeed, the Commission is aware that these studies “have not been prepared in the normal course of business for the adoption of business decisions”, and this may raise doubts as to their objectivity.

- **Different categories of customers and price discrimination**: the existence of different and specific categories of customers and price discrimination are only taken into account for the purpose of market definition if two conditions are met. First, any such group of consumers should be clearly identifiable at the moment of the sale and, second, trade among customers or arbitrage by third parties should not be feasible. This criterion is taken into account for the purpose of narrowing a market definition. It therefore appears that it is appraised at a later stage, when a possible relevant product market (wider) has already been identified.

Thus, even though this market definition criterion is mentioned among the “general” factors taken into account ab initio by the Commission, it may actually be more relevant in more specific situations (particularly, for instance, for the purpose of defining secondary markets, where customers are captive).

Moreover, and as will be seen below, it may be considered that this criterion tends to mix two sets of consideration, namely the definition of the market on the one hand, and the behaviour of the undertakings present on the market on the other hand. Indeed, price discrimination is traditionally one of the behaviours that can be qualified as an infringement to competition law, should it be derived from an abuse of a dominant position or from an anticompetitive agreement.

The set of criteria used by the Commission to determine the present (as opposed to the past) features characterising a market definition therefore appears to be more subjective, and thereby more subject to discussion, than the ones previously mentioned.
• Barriers and costs associated with switching demand to potential substitutes; (§ 42 of the Notice) the Commission considers that a number of barriers and costs may lead to the conclusion that two *prima facie* substitutes may actually not belong to the same product market. Such barriers or obstacles may include, in particular, specific capital investment, retooling costs, uncertainty about quality and reputation of unknown suppliers etc. It should be noted however that these costs are related to demand and therefore concern the difficulty, from the customer’s point of view, to migrate and switch their orders. These costs are therefore different from the one existing at the supply level from the costs associated, from a supplier’s point of view, to a switch in production.

(ii) Supply

76. Market definition from a supply point of view is taken into account at a complementary stage, since the Commission indicates in this respect that, “supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy”\(^\text{27}\). In the same way, the 1998 Commission Notice on Access Agreements in Telecoms indicates that, “Supply substitutability may in appropriate circumstances be used as a complementary element to define the relevant markets”. In other words, supply criteria shall only be examined provided they purport evidence for market definition that is comparable to those that can be found in terms of demand.

Tests used

77. The first test carried out with respect to supply concerns the possibility for suppliers to switch production to the relevant products and market them in the short term, without incurring significant additional costs or risks in response to small and permanent changes in relative prices. The test therefore examines if “supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays”. The essential test is to assess whether a producer may (quite easily) change its production patterns. It appears therefore that, once again, the Commission bases its first approach to market definition analysis on economic (small and permanent changes in relative prices) evidence.

However, it is interesting to note that should the answer to that question be positive, supply-side substitutability “will *not* be considered at the stage of market definition”\(^\text{28}\). Such a conclusion is interesting as it may have been considered, on the contrary, that supply-side substitutability should in any event be taken into account, and that in cases where such substitutability is

\(^{27}\) § 20 of the Commission 1997 EU Notice.

\(^{28}\) § 23 of the Commission 1997 EU Notice.
difficult it would tend to show that the products or services at stake do not belong to the same market.

78. The Draft Guidelines on article 14 also mention the existence of a second test, consisting of determining if the costs of switching production to another product are relatively negligible, in which case that product may be incorporated into the product market definition. This test, however, appears largely similar to the previous one, albeit phrased in different terms.

79. Finally, in “procurement or purchasing markets”, supply-side substitutability occupies a major role in the market definition mechanism. Under the Notice on horizontal agreements, substitutability criteria have to be defined solely from the supply point of view. In other words, the suppliers’ alternatives are decisive in identifying the competitive constraints on purchasers. Therefore, the test would require an investigation on whether suppliers of a given product would be able to evade a price decrease imposed by a group of buyers constituting an ‘hypothetical monopsony’ by switching their supplies to another group of buyers. As a result, if the suppliers had to accept a price decrease imposed by such hypothetical monopsony, then the demand of the monopsony would constitute a procurement or purchasing market.

**Evidence used**

80. Among the list of factors mentioned by the Commission in its 1997 Notice, the only one that seems particularly relevant in terms of supply related to the “existence of barriers and costs associated with switching demand to potential substitutes”\(^{29}\). Even though this criterion mentions the existence of “demand”, it may nevertheless be considered to relate to supply side substitutability as it concerns the possibility for the producer/ manufacturer, i.e. actually for the supplier, to direct its offer towards a new and interchangeable product or service.

This criterion appears to be used rather frequently in the course of Commission decisions, even though such may actually be the case because it is a “polyvalent” criterion. Barriers to entry and cost in switching demand may indeed be one of the elements used to delineate the boundaries of a market (as they may result in specific patterns of supply rendering one product or service not substitutable with another), but their presence also tends to indicate that the supply patterns of the market are not likely to evolve.

The Commission indicated\(^{30}\) that such barriers include, *inter alia*, “regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur 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, and others”.

\(^{29}\) § 42 of the Commission 1997 EU Notice.

\(^{30}\) § 42 of the Commission 1997 EU Notice.
81. The existence of barriers to entry and the costs for switching production also appear to be used for the purpose of determining the existence of so-called “secondary markets”. In this respect, the Commission evaluates whether the barriers to enter a market, the costs for penetrating the market, or switching production thereon may result from the presence of vertically-integrated entities on the market, *i.e.* from the presence of undertakings both on an upstream and downstream market. It might be the case, for example, that barriers to entry in the primary market may also extend to a secondary market or *vice versa.*

82. In the particular framework of the assessment of purchasing agreements (Notice on horizontal agreements), the test used by the Commission assesses the reaction of the buyers and suppliers in case of a small but lasting price *decrease*. That specific test is to be read in the light of the most “usual” one, which is mentioned above, and which refers to the reaction of consumers in case of a small but lasting price *increase*. Indeed, the two tests correspond to a similar approach, namely the possible switch in consumption patterns – and thereby the inclusion in one and the same product / service market of the products object of the switch – in case of price evolution. It should be noted, however, that the price-decrease test is to be used only in a limited number of cases, dealing with the particular issue of horizontal purchasing agreements.

83. **Ambivalent nature of the supply-side criterion for the purpose of market definition**

84. In the same way, the 1998 Commission Notice on Access Agreements in Telecoms indicates that, in practice, the existence of supply-side substitution is difficult to distinguish from the existence of potential competition, as it is used for the purpose of both determining the existence of a dominant position and the existence of a competition restriction under article 81. It appears that this reasoning, which was developed particularly in the context of access agreements subject to article 81, is clearly transposable to the application of article 82 and to the appraisal of concentrations, where the existence of market power and hence, of potential competition, is at least as much of an issue as under article 81.

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31 § 10 of the 1997 EU Notice, Emphasis added.
85. Finally, an analogous conclusion may already be drawn in regards to the use of supply-side substitutability in downstream markets. This point will be developed further hereunder, and is therefore merely mentioned in the present paragraph. It suffices to say that the existence of narrow secondary markets may lead, in some cases, to determine rather easily the existence of a dominant position thereon. Besides, the existence of such markets is usually upheld in infringement cases, where an undertaking has abused its dominant position over such market. The close link between market definition on the one hand, and the use of market definition criteria for assessing the behaviour of an undertaking on the other hand, therefore appears particularly strong in cases of secondary markets.

1.1.1.2. The standard approach of demand and supply from a geographic point of view

86. Sections 6 of Form A/B and CO define the “relevant geographic market” as comprising “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”.

87. Under the exact terms of the Commission\textsuperscript{32}, “the Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition”.

In practice, this working hypothesis shall be elaborated by using the same distinction as for product market, namely between demand and supply. It should be noted, however, for the sake of completeness, that the developments dedicated to the geographic delimitation of the market are usually substantially less detailed than the ones relating to product market.

\textsuperscript{32} § 28 of the 1997 EU Notice.
(i) Demand

Test used

88. The starting-point test in the identification of demand for geographic purposes relies on determining whether the customers of the undertakings at stake would switch their orders in the short term to companies located elsewhere at a negligible cost. This test is used in order to establish whether companies in different areas really do constitute an alternative source of supply for consumers, and constitutes a preliminary analysis of pricing and price differences at national and EU or EEA levels.

Evidence relied upon

89. Using the same approach as for product market, the Commission makes a distinction between the evidence that may be gathered from past factors and the existence of actual and present patterns of trade, indicating the geographic boundaries of the market.

90. As far as past factors are concerned, the Notice exclusively refers to the existence of economic evidence, namely the “past evidence of diversion of orders to other areas”. The evidence used in that respect is largely identical to the evidence used for product market, as it is based on cross-price elasticities between different geographic areas. It should be noted, however, that this type of evidence is considered very cautiously, as international comparisons of prices might be more complex than in the definition of the product market, due to import and export patterns, exchange rates, taxation, or product differentiation. Notwithstanding this warning, it may be worth noting that once again, the first set of evidence and criteria used by the Commission for the purpose of market definition is based on an economic approach, which therefore intends to be as objective as possible.

91. On the other hand, the 1997 Notice is much more explicit about the present evidence to take into account in order to determine the geographic scope of the market. The evidence is:

- Basic demand characteristics (§ 46 of the 1997 EU Notice): this evidence aims at assessing the national or local preferences for certain products or services with regard to their functional and structural characteristics, brands, and language, as well as the prevailing culture and lifestyle. This piece of evidence may be read in the light of the evidence existing in terms of product market definition, where the Commission also takes into account consumer preferences.

33 § 45 of the 1997 EU Notice.
However, in the case of geographic definition, the Commission gives it a higher consideration than when it is used in defining the relevant product market. Indeed, in the case of the product market, the consumer’s point of view needs to be supported by strong evidence whereas the criteria used in the case of the geographic market are more easily definable (see e.g. language and brands), and therefore less likely to be drawn from the subjective approach of the parties or their competitors.

- **Views of customers and competitors** (§ 47 of the 1997 EU Notice): this criterion is identical to the one mentioned in the product market section, and therefore will not be developed further. As in the product market approach, it is considered cautiously and only if it is supported by factual evidence.

- **Current patterns of purchase by customers** (§ 48 of the 1997 EU Notice): the Commission indicates that this specific piece of evidence is particularly important when it shows a trend of customers purchasing or procuring their supplies from undertakings located in the EU or EEA. In this case, the Commission even goes so far as to pre-define the geographic market, which is then to be considered as Community-wide.

- **Trade flows/pattern of shipments** (§ 49 of the 1997 EU Notice): these factors are only taken into account in cases when the number of customers is so large that it is not possible to obtain a clear picture of geographic purchasing patterns from them. Besides, it should be supported by convincing evidence and, more particularly, by trade statistics that are sufficiently detailed for the relevant products.

- **Barriers and costs associated with switching orders to companies located elsewhere** (§ 50 of the 1997 EU Notice): this particular piece of evidence is further detailed in the section below relating to potential competition. The factors typically showing the existence of such barriers are: (i) transport costs arising from the nature of the product (i.e., bulky and heavy materials), although the Commission noted that this factor could be counter-balanced by the fact that the transport cost could be compensated by some advantages, such as low labour costs and the necessity of the products (e.g., raw material), (ii) transport restrictions arising from regulation and (iii) quotas and custom tariffs. The Commission indicates that these factors are given a high priority for the purpose of delimitating the geographic market.
(ii) Supply

Test used

92. As for product market, the supply factor in relation to the appraisal of the geographic market is taken only as a complementary tool, and the main focus is on demand. The supply features characterising the geographic market relate to the possibility to identify potential obstacles and barriers which isolate companies located in a given area from the competitive pressure of companies located outside that area. As phrased in Form A/B, these features should be the ones that lead to the conclusion that the competition conditions between undertakings are sufficiently homogeneous. The goal pursued in that respect is to check whether companies located in differing areas “do not face impediments in developing their sales on competitive terms throughout the whole geographic market”.

Evidence relied upon

93. The evidence relied upon by the Commission in order to assess the geographic dimension of supply relies essentially on criteria such as the examination of requirements for a local presence in order to sell in that area, the conditions of access to distribution channels, the costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. It should, however, be recalled that these criteria are only taken into account on a complementary basis, if necessary.

94. The geographic assessment of the market from a supply point of view therefore consists of determining the degree of market inter-penetration at national, European or global levels (see in this respect below, on internal market interpenetration).

95. It therefore appears that some of the criteria used for the preliminary approach of the Commission to geographic market definition are analogous to the ones used for product market.

1.1.2. The introduction of more elaborated criteria

96. Aside from the traditional demand and supply approach, the Commission also takes into account the existence of potential competition, both from a product and geographic standpoint, in its assessment of market definition. This criterion was classified, for the purpose of the present analysis, as a “more elaborated” one, since it goes further than the definition of the market as the
place where demand and supply meet. Various other factors are also considered in market definition, whether from a geographic or product standpoint. These factors are used to either restrict or widen what would be considered in most cases as the “most natural” definition of the market.

1.1.2.1. Is potential competition a factor included in product market definition?

97. The reading of the 1997 Notice on market definition indicates that potential competition is not one of the factors included for the purpose of market definition. In this respect, the Commission declares that, “the competitive constraints arising from (...) potential competition are in general less immediate and in any case require an analysis of additional factors. As a result, such constraints are taken into account at the assessment stage of competition analysis”35.

A bit further, the Commission confirms this point of view by recalling that “the third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view”36.

In light of the above, the decision to include potential competition as one of the factors defining product market could appear surprising.37

98. However, potential competition is mentioned in other documents and particularly in notifications, both under Form A/B or Form CO. In this respect, Form CO requires a description of the markets that are closely affected by the affected market (in upstream, downstream and horizontal neighbouring markets). These factors can be used both from a product and geographic standpoint. The same considerations are mentioned in Form A/B, which indicates that the evidence to be used for that purpose is the importance of research and development, licensing, patents, know how and other IP rights. Moreover, the notice on horizontal agreements mentions the existence of emerging and technology markets38.

35 §14 of the 1997 EU Notice, Emphasis added.
36 §24 of the 1997 EU Notice.
37 Indeed the Commission in its Guidelines on relevant market and SMP supports the view that 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” (emphasis added). See Commission Guidelines on market definition and SMP, para. 38.
38 These markets can probably be classified as neighbouring markets, albeit of a particular kind.
99. Furthermore, some of the factors mentioned in the Notice itself\textsuperscript{39} tend to take into account the existence of potential competition in market definition. These criteria include in particular the location of customers, the existence of specific investments in production processes, the existence of regulatory barriers to enter a market, retooling costs or other investments, the uncertainty about the quality and reputation of unknown suppliers, or the existence of technical barriers (likely evolution of technology). In our point of view, these factors tend to include the appraisal of potential competition within the very definition of the market.

100. The Commission Regulation n°240/96 on technology transfer agreements also considers the existence of potential competition in the definition of the product market. In this respect, this regulation is mentioned for the purpose of identifying ‘competing manufacturers’ (and therefore, for identifying manufacturers operating on the same market). The relevant market should be defined as including all the products, which in view of their characteristics, price and intended use, are considered by users to be interchangeable or substitutable for the licensed products. Up until to that stage, the product market definition process seems very similar to the above-mentioned “traditional” approach.

However, the regulation goes further and includes a very wide notion of potential competition, since parties of a license agreement who were competitors before the innovation which is the object of the license agreement, are still considered to be competitors, even if the licensed product was so successful that there would be no competition absent from that license. Therefore, the market definition includes potential competitors, in so far as it includes entities that could not be considered as competitors had they not entered into a license agreement. It should, however, be noted that the scope of that regulation is specific and, therefore, the conclusions reached therein for assessing whether an agreement may benefit from the block exemption, may not necessarily be extended to other competition analysis.

101. It therefore appears that potential competition is not only used for the purpose of assessing, at a later stage, the impact of an operation or action on a given and defined market, but may also be used within the process of market definition. This issue shall be further examined at a later stage of this report, as it may indeed prove particularly important for evolving media markets.\textsuperscript{40}

\footnotesize{Aside from the one relating to supply and demand that were already mentioned above and that will therefore not be further commented upon.}

\footnotesize{Indeed the Commission observes in its Guidelines on relevant market and SMP that “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 formers. 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.” (emphasis added). See Commission Guidelines on market definition and SMP, para. 38, note 24.}
1.1.2.2. Additional criteria for geographic market definition

(i) Market integration

102. From a geographic standpoint, the Commission indicates in the 1997 EU Notice (§ 32) that the measures adopted and implemented within the internal market programme to remove trade barriers and further integrate the Community markets should be taken into account. Indeed, given the current trend of market integration, the geographical scope of relevant markets is destined to grow. The market integration criterion is actually used to disregard some evidence that shows the existence of market separations, which have been removed as a result of market integration. Such evidence particularly includes market shares, past evidence regarding prices, or trade patterns, whenever such criteria resulted from artificial national barriers. Therefore, this criterion is not to be considered as reflecting a political goal (i.e. the possible will to proceed to market integration by using competition law tools), but rather as an ex post factor to analyse whether some delineations, which were previously in force, were not actually set up because of lack of market integration. The common market integration factor is, however, essentially used in the case of joint ventures in order to assess whether a wider geographic market may be taken into consideration.

(ii) Broadening the market definition: chains of substitution

103. The 1997 Notice mentions the possibility to take into account chains of substitution among the so-called “additional factors”. This particular criterion applies in cases where products or areas at the extreme of the market are not directly substitutable, but nevertheless are considered to belong to the same market. This criterion is to be applied particularly concerning the definition of geographic markets, and the Commission mentioned in this respect the impact of significant transportation costs that may impact the pricing of the products at stake because of a chain substitution effect. Chains of substitution will therefore be taken into consideration to examine whether there may be price interdependence at the extremes of the price chain, which may therefore tend to widen the geographic market definition initially upheld.

This criterion will be not be further developed in the present report, as it essentially concerns the potential effect of product transport and is therefore of limited use in the media sector.

41 § 57 of the 1997 EU Notice.
1.1.2.3. Additional criteria for product market definition: the rights and products linked to the “main” market: secondary and IP rights markets

(i) Restricting the market definition: secondary markets

104. The secondary market issue relies on two possible tests, based respectively on supply and demand.

105. The first test consists of determining the reaction of customers or other suppliers to price increases, taking into account the specific characteristics of secondary markets. In other words, the test consists of checking whether high prices and a long lifetime of the primary product will allow the undertaking to increase prices or adopt another type of anticompetitive behaviour on the secondary market. The test therefore is the classical SSNIP test, which aims at identifying the possibility for customers to react to a price increase. It further appears that the existence of secondary markets is more likely to be upheld in cases of an upstream/downstream relationship between the markets at stake, where a spill-over effect can be identified.

The existence of a secondary market will therefore be held to exist in cases where an undertaking can control the bottleneck access to that secondary market, usually as a result of the dominant position it holds on the upstream market. The undertaking is then in a kind of de facto monopoly situation on the secondary market, since any switch for customers would actually entail a switch in the upstream market, whose costs or delays are prohibitive or have at least a largely deterrent effect.\(^2\)

106. The second test consists of analysing the secondary market issue from a supply point of view. The existence of that test is mentioned in the 1998 Commission Notice on Access Agreements in Telecoms, as regards the electronic communications service providers [formerly “telecommunications operators”], since they require access to upstream or downstream markets. The test used in that respect determines the outcome of the situation, should all providers of electronic communication services raise their prices by 5% or 10%. If such an increase results in a rise in the collective profits held by service suppliers, then two markets can be identified:

- the upstream “access market”, which concerns the market of access to those facilities that are necessary to provide such services to end-users and which includes those of the

\(^2\) This phenomenon is often acknowledged as a Tetra Pak II situation. See, for example, the criteria used in the publishing sector, such as in the Magill TV Guide case of 1988. There the Commission used the secondary market (comprehensive weekly TV guides) as a barrier to entry to the primary market (advance weekly TV listings). See in more detail section 1.4. of this Report.
access services that are interchangeable for service providers\(^{43}\); and

- the downstream “service market”, which concerns the services provided to end-users: electronic communication services will be considered as interchangeable if they show a sufficient degree of substitutability for end-users.

107. The geographic approach upheld in the 1998 Commission Notice on Access agreements in telecoms regarding these secondary markets, assesses the existence of the possibility for the electronic communication service providers to access an end-user in a specific area (where the conditions of competition are similar and competitors are able to offer their service) under similar and economically viable conditions. The scope of the geographic market will therefore be largely dependent on regulatory conditions that prevail in given geographic areas (terms of licences), and on the existence of exclusive or special rights owned by competing local access providers.

108. As a result of the above, the existence and definition of secondary markets is actually based entirely on an economic appraisal of the situation and on the “traditional” test of the Commission, which consists of evaluating the influence of a price increase on the reaction of consumers or suppliers.

(ii) **Focusing the market definition: IP rights markets**

109. The Commission also examined in its Guidelines on horizontal agreements the possibility to identify an IP rights market that would be separate from the one of the product or service to which such rights relate. In this respect the Commission applies the **hypothetical monopolist test**, consisting of determining the reaction of consumers in the event that the technology / product / processing method which is the subject-matter of the IP rights undergoes a small non-transitory change in relative prices of all other products.\(^{44}\) This test aims at assessing, in the particular framework of horizontal agreements, whether the agreement at stake has as its object or effect the restriction of competition and if, as a result of its anticompetitive nature, it may nevertheless benefit from the block exemption or from an individual one.

110. In the particular case of research and development agreements, the Commission identifies a series of different links between the improvement...

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\(^{43}\) With this regard, the Commission has identified the “access market” as the market that “comprises all types of infrastructure that can be used for the provision of a given service.” Moreover, in line with EU case law, the Commission raises the issue of “whether the market for network infrastructures should be divided into as many separate submarkets as there are existing categories of network infrastructure”, and it concludes that any such definition should be decided upon the application of the substitutability test. Commission Guidelines on market definition and SMP, para. 67.

\(^{44}\) See, for example, in the field of R & D agreements, Commission Guidelines on market definition and SMP, paras. 43–44.
entailed and the existing products, which determines whether or not the improved product and the “basic” one belong to the same product market.\footnote{Guidelines on horizontal agreements, para. 45-52.}

Here, a secondary market criterion may also be used for the purpose of assessing whether or not the new technology constitutes a separate product ‘secondary’ market,\footnote{Indeed, in the field of production and specialisation agreements, the Guidelines on horizontal agreements observe that for the purpose of defining the relevant market, “production agreement in one market may also affect the competitive behaviour of the parties in a market which is downstream or upstream or a neighbouring market closely related to the market directly concerned by the cooperation.” It is further specified that such ‘secondary’ markets are also called “spill-over markets”. Guidelines on horizontal agreements, para. 82 (emphasis added).} which leads to the identification of five alternative market definition scenarios:

- When the new technology merely improves the existing product, both will be included in the same market (i.e., the existing \textit{upgraded} product market).
- When the new technology aims at significantly changing the existing product or launching a \textit{new product}, the existing and new products will probably not pertain to the same market in the long run.
- When the new technology concerns a component of the existing product, the market will cover both the \textit{component and the existing related product}.
- When the agreement relates only to the creation of a new technology, then the market is the intellectual property that is licensed and its close substitutes; in that particular case, we find a specific \textit{technology market} complementary to the basic product / technology. The boundaries of that particular market need to be circumscribed according to the SSNIP test, which enables the identification of the range of competing technologies.
- When the new technology completely innovates the existing product such as to create a new demand, the market will be limited only to the new technology; in that particular case an \textit{emerging or innovation market} autonomous from the basic product / technology is recognized.

111. It must be noted, however, that, under EC competition law, not all IP rights are treated in the same way. According to Regulation 259/2000 on Joint Research and Development Agreements [the “R&D Block Exemption”], the licensing agreement to which the exemption applies (should the conditions for such exemption be fulfilled), refers to \textit{know-how} and standard-related licensing contracts.\footnote{Article 2(4) of R&D Block Exemption refers to research and development as “the acquisition of knowledge relating to products or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of}
112. Moreover, under the Guidelines on horizontal agreements, among the technology and innovation or emerging markets we also find another form of licensing agreements (i.e., the standardization agreements), which do not involve IP rights *per se* but rather “technology standards” whose subject-matter is “the definition of technical or quality requirements with which current or future products, production or methods may comply.” The relevant market may therefore amount to a technology standard.

113. It must be noted that the Technology transfer block exemption regulation (“TT Block Exemption”) only applies to licensing agreements of patents and know-how. Therefore, copyright, design rights and trademarks are not covered unless they turn out to be ancillary to the main patent and to know-how license agreements. This means that the ‘technology product market’ to which that Block Exemption refers solely, consists of the “initial manufacturing know-how of the necessary product and process patents, or both, existing at the time the first licensing agreement is concluded, and improvements subsequently made to the know-how or patents, irrespective of whether and to what extent they are exploited by the parties or by other licensees” (emphasis added).

Yet, product markets are not clearly discernible.

Some guidance may be found in the criteria used for identifying the licensee’s market share (which should be checked in order to assess whether the agreement may benefit from the Block Exemption which is necessary to verify if, pursuant to Article 7 of TTBE, the Commission may withdraw the benefit of the block exemption).

There we read that the licensee’s market share amounts to the “proportion which the licensed products […], which are considered by users to be interchangeable or substitutable for the licensed products in view of their characteristics, price and intended use, represent the entire market for the licensed products and all other interchangeable or substitutable goods and services in the common market or a substantial part of it” (emphasis added).

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48 Guidelines on horizontal agreements, para. 159.
49 Article 8(7) of TT Block Exemption.
50 In other words, the Commission may decide to not apply the block exemption to an agreement which in fact falls within the TTBE if it infringes article 81(3) and more particularly if “the effect of the agreement is to prevent the licensed products from being exposed to effective competition in the licensed territory from identical goods or services or from goods or services considered by users as interchangeable or substitutable in view of their characteristics, price and intended use, which may in particular occur where the licensee’s market share exceeds 40%” (Article 7(1) of TT Block Exemption (emphasis added)). Here the licensee’s market share must be calculated within a relevant product and geographic market. Moreover, the relevant market shall be identified also for the purpose of verifying whether a technology transfer agreement between competing undertakings may nevertheless benefit of the block exemption under Article 5(2)(1) – there the market share threshold is 20% of the licensed product market.
51 Article 8(9) of TT Block Exemption.
114. The recent EU Commission’s Evaluation Report of the TT Block Exemption proposes the introduction of a more economic-based methodology for applying the exemption. In particular, the EU Commission intends to introduce market share thresholds in line with the methodology used for the Vertical, R&D and Specialization agreements block exemptions (in the field of technology transfer agreements between competing undertakings in a joint venture).\(^\text{52}\)

At the same time, however, the Evaluation Report does not contain a specific proposal for the definition of the relevant market under the Regulation. Market share thresholds, which would determine whether the exemption applies (if they are maintained in the revised version of the TT Block Exemption), cannot be calculated with certainty unless the definition of the relevant market is clear.

1.1.2.4. **Time horizon**

115. Time factors are used in the market definition process, both from an *ex post* and *ex ante* perspective.

116. The *ex post* analysis involves the assessment of a past conduct; therefore, in competition law, this type of analysis is usually used in cases of infringements. The time horizon factor is used in order to assess whether the past state of the market has evolved or is likely to evolve. It seems, however, that from that perspective, it is not so much a “time horizon” factor as an “evolution over time” which is taken into account, in order to recreate the environment in which a past behaviour took place. The 1997 EU Notice (§ 12) does not appear particularly clear in that respect.

117. From an *ex ante* point of view (or forward-looking), time horizon seems, on the other hand, to be a genuine factor for determining the boundaries of the market. Indeed, the temporal factor enables the competition authorities to draw forecasts about the likely evolution of the market, and thereby to take into account emerging market and potential competition (see above). It is therefore a factor likely to widen the market definition.

118. This factor, however, may only be considered in prospective analyses, in cases where the Commission tries to foresee the possible impact on the market – *i.e.* necessary medium-term assessment – of a given deal, which requires taking into account the likely state of the market in question in the coming years. This criterion is employed in merger review practice, where time horizon enables the Commission to analyse whether, after the structural change of supply (or because of cooperation aspects of a joint venture), the new entity or parties concerned may give rise to any anti-competitive concerns.

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\(^{52}\) See Evaluation Report, para. 138.
119. Forward-looking analysis is also the basis for regulatory appraisal. This time horizon idea is actually mostly borrowed from typical sector-specific measures. There, “(...) markets are defined prospectively.” National Regulatory Authorities ("NRAs") and the EU Commission are supposed to “take account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the relevant market review.”

Hence, for regulators, the practice of defining markets starts with an “overall forward-looking assessment of the structure and the functioning of the market under examination.” The relationship between sector-specific and competition law mechanisms of market definition will be further analysed in this Study in section 1.2. and the corresponding national sector-specific sections.

1.1.3. Differences according to the type of procedure

120. The main difference when proceeding to market definition relies, from our point of view, in the procedure at stake and, more particularly, as to whether the case in question consists in the appraisal of a notified agreement or operation (Form A/B or Form CO) or whether it is an infringement procedure under article 81 or 82 EU.

In general, most of the market definitions are found in merger cases, rather than in infringement ones, for two main reasons. The first one is that, statistically, there are more merger cases; the Commission therefore has more occasions to intervene in that type of procedures on market issues.

The second reason is that in a merger cases, one of the clue for the outcome of the decision relies in the very definition of the market, which therefore becomes the hart of the decision; however, even in merger cases, so-called second phase decisions are much more detailed and provide for a more thorough analysis of the market, since the concentration at case rose particular competition concerns; in any event, it should be borne in mind that such decisions are taken under considerable time pressure, due to the stringent time limits put on the Merger Task Force in the merger control appraisal. On the other hand, in many first phase decisions (article 6(1)b), the Commission did not have sufficient time to thoroughly analyse the markets at stake and may therefore decide to rely on previous cases or to leave decisions open, as the concentration at stake does not raise serious doubts as to its compatibility with the common market. Such decisions may therefore be considered as having a more relative value in terms of market definition.

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55 Ibidem.
56 Cf., in particular, the market definition model developed in U.K. according to both regulatory and competition law analysis.
In infringement cases, the issue at stake often relates more on the conduct under investigation, which means that the market definition may take a more secondary role, when appraising the effect of such infringement, even though this is less the case as far as abuses of a dominant position are concerned. However, even though there are less infringement cases, they often tend to be milestone ones, as the Commission had time to undergo an in-depth investigation on the behaviour at stake and on its consequences on the market.

1.1.3.1. The particularities of market definition resulting from a notification

(i) Starting point of the market analysis

121. In notifications, whether under Form A/B or CO, the notifying parties have an obligation to define the market. The analysis carried on by the Commission will therefore rely on this analysis as a starting point, and will then include its own analysis as well as comments emanating from third parties. The caution with which the Commission may take certain pieces of evidence provided or comments provided by parties or third parties has already been mentioned above. In any case, the followed approach is that there is a market definition that is provided and that will be confronted to the other evidence at the disposal of the Commission. Furthermore, the elements to be disclosed as well as the methodology to be followed are provided for in the notification forms.

(ii) The particularity of an ex ante assessment

122. Another striking feature of notifications of agreements or deals is that the issue at stake is to determine whether the proposed transaction is compatible with the functioning of competition in the common market. Therefore, the assessment at stake consists in determining, in the future, whether the structure of competition may subsist following the transaction or the agreement and whether it will still grant conditions for competition to develop.

This is particularly the case for mergers, where the rationale for the suspension obligation lays in substance in the requirement that the only concentrations that may be carried on are the ones which do not threat the functioning of competition. However, such is also the case for notified agreements – albeit in a less striking form – since the Commission will have to determine whether a particular agreement may proceed, or whether the parties should amend it or even put an end to it. Therefore, this analysis is purely ex ante, and the Commission will necessarily have to assess beforehand the likely evolution of the market, an evolution that it needs to take into account in its market definition assessment.

This fact was recalled by the Commission in its 1997 EU Notice on market definition notice where it held that, “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” (§ 12 of the Notice).

(iii) Market definitions left open

123. Within notifications, merger notifications hold a particular place in market definition. Indeed, the legal assessment carried on consists in examining whether the concentration will “create or strengthen 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” (article 2.2. of the merger Regulation). Therefore, in practice, market definitions will be a crucial part of the decision: the narrower the market, the more likely a dominant position is likely to be found and, consequently, the more likely the concentration at stake shall be deemed to create or strengthen such a dominant position.

124. As a result of this essential part of market definitions, notifying parties tend to submit a large number of possible market definitions, in order to demonstrate that, whatever the market definition finally upheld, the concentration is not likely to create or strengthen a dominant position. Consequently, any subsequent analysis as to whether there would be a risk for competition because of the very realisation of the operation may be avoided.

The Commission in its decisions follows the same path. Indeed, the Commission often re-states the market definitions proposed by the parties, or the ones that may be envisaged, in order to check that even on the narrowest possible market definition, the concentration would not be likely to create or strengthen a dominant position. The result is that, further to the enumeration/analysis of possible market definitions, the exact market definition is often left open whenever the concentration is not likely to raise competition issues.

This is the more true when the Commission often takes an art 6(1)b decision. Such a “first phase” decision is made after a quick examination of the case. Due to time pressure, detailed market analyses are, at this stage, not possible. “Second phase” decisions are indeed more important, although also made under time pressure.

125. This approach is all the more true in the media sector, considering the evolution of technologies and, consequently, the possible corresponding evolution of media market definitions. In this respect, the Commission tends to leave market definitions open, and therefore not to enclose the possible markets into a fixed pre-set definition.
126. Finally, market definition in the notified cases is closely linked to the assessment of the operation at stake. As mentioned earlier, the narrower the market definition and the more the operation may raise doubts as to its compatibility with the common market.

This is particularly true as regards merger cases, as shown by the very phrasing of article 2.2. of the merger regulation which states that “a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market” (emphasis added). There is therefore a causality link between on the one hand, the creation or strengthening of a dominant position and, on the other hand the impediment to competition.

127. As a result, market definition may be “goal-oriented” in so far as it is the key to the assessment of the anti-competitive effect of a notified operation is the creation or the strengthening of a dominant position on a given market. This feature will be examined more thoroughly in detail when reviewing the EU case law (part 2) and when commenting upon it (part 4).

However, it already appears that the fact of reviewing all possible markets in order to examine the effect of an operation may be questionable in terms of market definition methodology.

Indeed, one could consider that a market definition, even when proactive and oriented towards the future, consists in identifying supply, demand and other relevant characteristics that have common features and that correspond to a particular substitutability, whether or not there is any threat to competition.

On the other hand, the review of any possible narrowest “market” may correspond to subdivisions, created for the purpose of concentration appraisal, and that do not actually correspond to the exact substitutability between different types of services nor or products.
1.1.3.2. The particularities of market definition in case of infringements

(i) Starting point of the market analysis

128. Market definition approach in infringement cases is very different. In that type of procedures, the Commission is seized with an infringement to competition law and has to assess whether:

- The infringement may affect trade between Member States (articles 81 and 82) and
- the agreement or concerted practice at stake has as its object or effect the prevention, restriction or distortion of competition within the common market or
- if there is a dominant position held within the common market, the abuse of which may affect trade between Member States.

129. The starting point that triggers the procedure is therefore the infringement. Market definition will be then taken into account to set the boundaries of application of EU legislation, as opposed to national antitrust ones, and to qualify, in cases relating to article 82, the existence of a dominant position.

(ii) The particularity of an ex post assessment

130. The ex post assessment requires to take into account the state of the market as it was when the infringement was committed. However, provided that an abuse of a dominant position was established or provided it was reported that an agreement had an anticompetitive object or effect, one may even question the accuracy and usefulness of market definition in some infringement cases. This point was particularly addressed by the Court of First Instance in the Volkswagen case. The CFI held that:

“As regards the scope of the Commission's obligation to define the relevant market before finding an infringement of the Community competition rules, the Court points out that the approach to defining the relevant market differs according to whether Article 85 or Article 86 (now Article 82 EC) of the Treaty is to be applied.

For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, 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.

On the other hand, for the purposes of applying Article 85, the reason for defining the relevant market, if at all, 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 (Case T-29/92 SPO and Others v Commission [1995] ECR II-289, paragraph 74). Consequently, there is an obligation on the Commission to define the market in a decision applying Article 85 of the Treaty 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 (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 European Night Services and Others v Commission [1998] ECR II-3141, paragraphs 93 to 95 and 105).\(^\text{58}\)

131. Therefore, it appears that as far as article 81 cases are concerned, the main object of market definition is to evaluate the anticompetitive impact of a given behaviour on the common market. It may be considered that such an assessment does not pertain to market definition but to the analysis of the effect entailed by a given behaviour. Indeed, it may well be that the undertakings at stake are present on a given market but that their agreement has a wider object and result in impeding competition within the common market. Such finding does not necessarily mean that the market at stake is EU wide.

132. On the other hand the conclusion seems different for article 82 infringement cases. The dominant position is defined as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”\(^\text{59}\).

It seems therefore necessary to identify a company’s competitors, customers and consumers. In other terms, this approach consists in identifying demand and supply, and then to evaluate the perception of consumers.

The main “danger” therein is to identify narrow markets, where a dominant position is more likely to be held, and not to spot in itself a market as such, where conditions of competition are homogeneous and where products or services are actually interchangeable. This is all the more the case in article 82 decisions as opposed to concentration decisions that, in the former, the abuse already took place, whereas in the latter, the procedure is to prevent the possible creation of a dominant position which may lead to ulterior abuses.

\(^{58}\) § 230 of the judgement, emphasis added.

\(^{59}\) See the United Brands case, case 27/76, [1978] I ECR 207.
1.2. Comparison with the criteria upheld in regulatory focused sector legislation

133. The above developments that identify the criteria upheld in competition law for the market definition could be applied to virtually any industry or sector. The present section aims, however, at identifying the market definitions that exist specifically in the media sector and that are provided in sector focused legislation. As the Commission pointed out in its tender for the present study, “other regulatory (non competition) authorities will approach the media sector differently. From their own perspective and for their specific purposes, they create and use a regulatory framework that is not designed to take into account competition issues. However, these regulatory frameworks will affect the media markets and therefore will have effects on the work of a competition authority”.

134. For the purpose of this Report, the documents on which this analysis was focused are the following:

- Directive on electronic commerce, n° 2000/31
- Directive on the provision of information in the technical standards field (n° 98/48, amending Directive n°98/34)
- Directive on copyright in information society n° 2001/29
- Directive Television without frontiers n° 89/552, as modified by Directive n°97/36
- Directive on conditional access n° 98/84
- Directive on cable and telecommunications network n°99/64
- Directive on cable TV and liberalisation n° 95/51
- Directive on the use of standards for the transmission of television signals n° 95/47
- Directive on satellite communications n°94/84
- Directive on the coordination of certain rules concerning copyright and rights related to copyright, applicable to satellite broadcasting and cable retransmission n°93/83
- Directive on misleading advertising n° 84/450 as modified by directive n° 97/55
- Directive 2002/77/EC
- Decision No 676/2002 EC, Radio Spectrum Decision

The present Report also examined the telecommunication directives as resulting from the so-called new electronic communications package of 2002. However, considering that the present study related to the media environment and not to the telecommunications one, these Directives and decision have only been taken into account in so far as they relate to media.
135. The result of the analysis of most of these directives from a market definition point of view is annexed to the present report. Considering that these directives have different scopes and objectives, the present section aims at conducting (i) a presentation of the definitions contained in each directive and (ii) a cross-directive analysis, to highlight the common factors and differences that may exist between them.

136. As mentioned above, the present analysis also included the new regulatory electronic communications package of 2002. This analysis is examined under a separate heading, as the markets resulting thereof fall within a hybrid position, between EU competition and sector-specific regulation. Indeed, while setting the legal standards for defining the scope of application of the new regulatory framework (such as sector-specific approach), the new regulatory package also refers to EU competition general market definition criteria and dominance principles, especially concerning the opportunity of imposing *ex ante* obligations.

### 1.2.1. Market definitions in media focused legislation

137. Media focused legislation includes an autonomous and self-determining set of rules adapted to the peculiar trait of media activities. Only in very limited occasions do media regulatory provisions take competition law (national or EU) principles into consideration. This makes the sector sealed to competition law objectives and, consequently, to its methodology of analysis.

Moreover, the purpose of market definition in sector-focused legislation is very different from the purpose that prevails in a competition-law-based approach. Indeed, the market definition given in a directive, regulation or any other statutory instrument aims at defining its very scope; the market definition will therefore encompass all products/services that will be subject to the provisions of the directive. The approach is therefore *ex ante* and gives a straightforward definition of the markets, which is fundamentally different from competition law where, in theory, market definition is elaborated and adjusted progressively by using a set of criteria.

Furthermore, regulatory market definitions tend to be rather extensive in order to not exclude side or new products or services from the scope of the directive, which, once again, differs from the competition law approach where markets may be defined rather narrowly. Finally, because of this essential difference in the objective pursued, market definition in directives or other regulatory instruments does not rely on the basic and classic distinction upheld between

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60 Annex n° I.1, part 3. This grid of analysis takes most of these Directives, though some of them are only mentioned in the report itself.

61 One of the few examples is the Directive on copyright applicable to satellite broadcasting and cable retransmission of 1993.

62 See in this respect above, for practical examples of narrow market definitions in certain merger cases.
product and geographic markets in competition law, which is based on supply and demand criteria.

138. Considering these fundamental differences between (i) competition and sector focused approaches and (ii) between the texts themselves within the sector focused directives, we based our analysis of the market definition approach on the goal pursued by the directives at stake.

1.2.1.1. Competition law oriented market definition in media focused legislation

(i) Directives in the broadcasting sector

139. In the broadcasting sector, Directive TV without frontier and its several amendments included a few market-area definitions. In particular, the TV without frontier directive defines four types of services directly linked to broadcasting: television broadcasting, TV advertising, sponsorship and teleshopping\(^63\). These services represent the areas covered by the provisions of the directive.

140. The Directive defines the broadcaster as the natural or legal person who has editorial responsibility for the composition of television programme schedules, who transmits them or who has them transmitted by third parties. Therefore, at the general level, no distinction is made between broadcasters based on the type of programme they show or the mode of transmission they use. This absence of distinction is reflected in the definition of television broadcasting, which refers to the communication of programmes between undertakings with a view of relaying them to the public. The directive therefore essentially, if not only, focuses on the origin and destination of the programmes (between undertakings, to the public), and not particularly on the means of communication or transmission.

TV broadcasting includes initial transmission by wire or over the air, including by satellite, in non-encoded or encoded form; the condition for this type of transmission to qualify as TV broadcasting and to fall within the scope of the directive is that the programmes be intended for reception by the public. On the other hand, communication services providing items of information or other messages on individual demand, such as telexcopying, electronic data banks and other similar services, are not considered as TV broadcasting.

141. In the same way, the television without frontier defines television advertising as any form of announcement that is broadcast whether in return for payment or for similar consideration, or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade,

\(^{63}\) See the grid of analysis, Annex 1-1.
business, craft or profession to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment. Once again, the definition is extensive and encompasses virtually all forms of advertising on TV\textsuperscript{64}.

Moreover, the legal regime attached to advertising possibilities (duration and frequency) depends on the types of programmes. For instance, audiovisual works such as feature films and films made for television of more than 45 minutes may be interrupted once for every 45-minute period. This rule does not apply to series, serials, light entertainment programmes and documentaries. The regulatory regime thus makes a distinction between the types of broadcasted programmes, and the value that broadcasters may attach to them in terms of advertising possibilities\textsuperscript{65}.

142. The directive also defines “\textit{free television}” as the broadcasting on a channel, either public or commercial, of programmes that are accessible to the public without payment, in addition to the modes of broadcasting funding that prevail widely in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network). The free television criterion therefore is exclusively the absence of payment on behalf of the consumer, without any reference to means of transmission. As a result, this category is rather vast; however, as will be seen later\textsuperscript{66}, this dichotomy between free and pay TV has been constantly upheld in case law, and is indeed one of the corner stone distinctions in market definitions in the broadcasting sector.

143. The wide range of these definitions may be read in light of the various objectives of the directive, which are both politically and economically based. In this respect, it should be recalled that the TV without frontier directive was first drafted in 1989, a date at which it aimed at ensuring a transition from national markets to a common programme production and distribution market. The directive was therefore intended to establish the minimum rules needed to guarantee the freedom of transmission in broadcasting. This objective is clearly politically oriented towards the creation and integration of the internal market.

The directive also relied on a more economic basis, as it was supposed to establish the rules and define the economic implementation conditions of the entire broadcasting sector. The directive thus aims at establishing conditions of fair competition without prejudice to the specific public interest role, which is to be carried out by the television broadcasting services. More particularly, its goal is to ensure the free movement of broadcasting services and distribution of TV programmes in the internal market.

\textsuperscript{64} Except for “teleshopping” (direct offers broadcast to the public with a view to supply goods or services, including immovable property, rights and obligations, in return for payment) for which a special regime is set in the directive).

\textsuperscript{65} However, even though case law made distinctions within the broadcasting sector among the types of programmes, it seems that such distinctions were based more on the viewers’ perception of such programmes than on their value.

\textsuperscript{66} \textit{Infra} Part 1.3.1.1 on the case law on free and pay TV.
It should also be noted that the directive includes mixed objectives, such as the 
encouragement to the programme industry, which is both economic and 
political.

However different they may be, none of these objectives are based on 
competition. This probably explains why the TV without frontier directive 
makes distinctions based on whether the transmission is made to “the public”, 
without referring to any “demand” criterion. Therefore, the aim is not to 
identify a type of services that could be substitutable from a consumer’s point 
of view, but to define, *ab initio*, a type of services meant to be regulated as a 
whole, for the creation of a European industry.

144. The directive on conditional access contains a few precise technical 
definitions; whether these definitions correspond to actual markets in the 
competition law sense is unclear. The directive defines *conditional access* as 
any measure or arrangement whereby access to services in an intelligible form 
is made conditional upon prior individual authorisation. The directive 
provides for a legal protection to so-called protected services, which include 
television and radio broadcasting services, information society services as well 
as the provision of conditional access to these services, when considered as a 
service on its own.

In substance, it aims at approximating Member States’ legislations which 
prohibit the illicit devices⁶⁷ that give unauthorised access to protected services. 
The notion of protected services is probably too vast to be construed as a 
market definition, since it relates to the existence of a right on the content or 
service, thereby encompassing any form and content of transmission. 
Furthermore, the directive is focused on infringing activities, remedies and 
sanctions; therefore, the directive aims at setting situations on a case-by-case 
basis, rather than examining substitutability between services.

145. The directive also provides interesting guidelines for the objectives to 
be pursued by the implementation of *conditional access*. In this respect, the 
directive establishes that digital technology represents a means of increasing 
consumer choice and contributing to cultural pluralism. The preamble of the 
directive on conditional access expressly refers to the fundamental right of 
freedom of expression, as provided by cross-border broadcasting and 
information societies. The directive also provides that national barriers to the 
provision of conditional access services may be an obstacle to the free 
movement of goods and services.

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⁶⁷ Equipment or software designed or adapted to give access to a protected service in an 
intelligible form without authorisation of the service provider.
146. The cable and telecommunications directive aims at setting the framework for an optimal development of telecommunications and media markets. Markets are therefore not precisely defined at this stage. However, the directive considers that the development of these markets depends on four factors: service competition, infrastructure competition, infrastructure upgrade and other innovations. It therefore seems that the directive relies on the distinction between services and network markets, and also takes into account, as far as network markets are concerned, the possibility to introduce new innovation markets (market for technological improvement).

147. The directive establishes that a telecommunications organisation, which has special or exclusive rights to build and operate cable TV networks and which also holds a dominant position on the market for services using telecommunications infrastructure, will have not have an incentive to upgrade its network (narrowband for the telecommunications and broadband for the cable TV network) into a full service network capable of delivering voice, data and images at a high bandwidth. The directive therefore establishes that the separation into different legal entities of the ownership of the two networks in two companies is necessary to avoid conflict of interests and cross subsidies.

148. As a result of the above, the directive identifies a market for services using telecommunications infrastructure, as opposed to a market for services using high-bandwidth capacities. The same distinction also seems to be drawn in regards to networks; however, the conflict of interests identified in the directive tends to show that these two networks could be complementary, since the lack of innovation on one of them (low bandwidth) leads to the evolution of the other (high bandwidth). This analysis is therefore largely competition law based, as it considers the existence of neighbouring/secondary markets. In that perspective, the rationale for that directive is that the joint provision of telecommunications and TV services by one single operator creates an asymmetric starting position for dominant operators as compared to new entrants.

149. The distinction between services and networks, and, within networks according to capacity, has been upheld in case law. However, the directive does not expand on the criteria that lead to such market definitions, and that concern the characteristics of demand. Furthermore, the characteristics of supply (supply of different services by one and the same undertaking) do not seem to be taken into account for market definition purposes but rather for identifying potential structural abuses. The directive thus aims at ensuring, ex ante, that the conditions for effective competition are met both between neighbouring markets and, within one particular market, between incumbents and new entrants. This type of problematic is directly competition law oriented.

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See infra paragraphs under section 1.3.4.2
150. The 1995 directive on cable TV and liberalisation aims at abolishing all restrictions on the supply of transmission capacity between cable TV networks and at allowing the use of networks for the provision of telecommunications services other than voice telephony. The directive therefore sets a legal framework ensuring interconnection of cable TV networks with public telecommunication networks. This directive may therefore be considered as a good example of a “mixed” approach between competition law and sector focused legislation, as it aims at promoting the integration of services between one another, which, in the long run, leads to the development of competition between these services; moreover, it regulates access conditions to network, which is also an issue traditionally examined under competition law (whether under the angle of dominant position or essential facilities). However, it cannot be said to be exclusively competition law based as it does not exactly define markets\(^69\), which are at the core of any competition law based analysis.

151. The Directive aims at establishing common standards for the digital transmission of television signals whether by cable or by satellite or by terrestrial means as enabling element for effective free-market competition. Conditional access is seen as an important matter for the consumers, providers of pay television services and for the rights holders of programmes. In this respect, it is appropriate to make provision for transcontrol of conditional access at cable television network head-ends and for the licensing of conditional access technology to manufacturers. Furthermore, the inclusion of the common European scrambling algorithm in consumer equipment will ensure that all pay-television service providers can, in principle, provide all digital pay-television consumers in the European Community with their programmes.

152. Article 4 of the Directive specifies the conditions, which apply in relation to conditional access to digital television services broadcast to viewers in the Community:

- all consumer equipment shall allow the descrambling of digital television signals according to the common European scrambling algorithm and to display signals that have been transmitted in clear;

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69 The directive essentially mentions (i) the telecommunications services, which include transmission and/or routing of signals on a telecommunications network and (ii) cable TV network, which includes any wire-based infrastructure approved by a Member State for the delivery or distribution of radio or television signals to the public. It is not clear, though, whether these two should be defined as markets as such.
- the conditional access systems shall have the necessary technical capability for cost-effective transcontrol at cable head-ends;

- the operators of conditional access services to digital television services, shall, irrespective of the means of transmission, offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers authorized by means of decoders; and

- the granting of the licences by the holders of industrial property rights to conditional access systems to manufacturers of consumer equipment cannot be subject to the prohibition of the inclusion in the same product of a common interface allowing the connection with other access systems or means specific to another access system.

 Ÿ Directive on copyright applicable to satellite broadcasting and cable retransmission (nº93/83)

153. The directive aims at laying down some minimum rules to establish and guarantee “free and uninterrupted cross-border broadcasting by satellite and simultaneous, unaltered cable retransmission of programmes broadcast from other Member States, on an essentially contractual basis.” The Commission recognises the pace at which contractual, exclusive arrangements between content providers, broadcasters and program providers are shaping the sector. Exclusivity plays a pivotal role here in the structure of a competitive market, as copyrights and related rights contribute to the fostering of market power in the hands of sole right-holders. Contractual relationships should therefore be kept under control within the necessary minimum–without harming the principle of freedom of contract.

154. For probably the first time, copyright and its related rights are considered a form of restraint to competition law. The specific wording of the Directive takes into account both national competition laws and/or “the prevention of abuse of monopolies”, and article 81 and 82 of the EC Treaty. For the purpose of such analysis, the European media regulator defines the following broadcasting activities:

 Ÿ 'satellite' means any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of signals takes place must be comparable to those which apply in the first case ;

 Ÿ 'cable retransmission' means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from
another Member State, by wire or over the air, including by satellite, television or radio programmes intended for reception by the public.

155. It therefore strikes a balance between the need for harmonisation in the field of copyright and the collective administration of such rights, on the one hand, and the fostering of competition at the content level (in the market for the acquisition of broadcasting rights), on the other hand.\(^{70}\)

156. Moreover, it must be noted that the Directive aligns the protection therewith provided with the one stated for rights related to copyrights contained in the Directive 92/100/EEC of 19 November 1992 on “Rental right and lending right and on certain rights related to copyright in the field of intellectual property.” This implies that the IP rights to which the Directive at hand refers, correspond to the so-called “rights related to copyright” listed in articles 6 to 9 of Directive 92/100. In particular these are: (i) the fixation right; (ii) the reproduction right; (iii) broadcasting and communication to the public; and (iv) the distribution right.

(ii) Directives in the electronic communications sector

157. The directive on electronic commerce does not entail any market definition. It aims at establishing a minimum legal framework, to protect consumers and service providers from information society services. The definition of electronic commerce refers to the one contained in directive 98/34/EC, and includes any service provided at distance via electronic equipment for the processing and storage of data\(^{71}\); such services exclude broadcasting and radio, as they are not provided at the individual request of the recipient of electronic services. One could wonder about the accuracy of that definition in the light of the evolution of electronic services and broadcasting ones. It appears in this respect that new forms of broadcasting services enable viewers to have access on an individual basis, on request – though through their TV sets – to particular services. That conclusion may also be extended to some forms of teleshopping. Therefore, the distinction based on the recipient of the services may no longer be valid.

158. Article 6§3 of the copyright and information society directive defines "technological measures" as any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder

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70 See Value Chain in the Media Sector – a vertical perspective (Annex I.2.1).
71 See § 17 of the preamble; see also the 98/48/EC directive on electronic standards.
of any copyright or any right related to copyright as provided for by law or the _sui generis_ right provided for in Chapter III of Directive 96/9/EC. Under the directive, such technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or copy control mechanism, which achieves the protection objective. Therefore, the definition of technological measures is not market driven. It only refers to the technical means that aim at protecting access to the content protected by intellectual property rights.

159. Article 7 of the directive relating to the obligations concerning rights-management information\(^{72}\) requires Member States to provide for adequate legal protection against any person knowingly performing without authority "the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the _sui generis_ right provided for in Chapter III of Directive 96/9/EC.\(^{2}\). Therefore, again, the directive does not aim at defining market or market areas but merely at protecting the rights held by the right holder. The inclusion in this respect of any form of communication (broadcasting, communication, distribution) reveals the absence of market definition concerns.

160. Finally, it should be mentioned that the copyright issue has a specific relevance in the media sector, and especially as regards music. This problematic is particularly met in regarding the application of competition law to performing rights societies; however, solutions to that issue differ from one EU country to another, depending _inter alia_ on their degree of protection offered to authors. In a nutshell, rights are owned, exploited and managed by performing rights societies on a national basis: in particular, categories of rights and forms of utilisation are defined in each member state but the EU Commission may review if they are compatible with articles 81 and 82 of the EC Treaty. EU competition policy further acknowledges the legitimate need to protect the interest of authors, composers and publishers of music. However, considering the complexity of this issue, it will not be further elaborated in the present report.

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\(^{72}\) For the purposes of the directive, the expression "rights-management information" means any information provided by right holders that identifies the work or other subject-matter referred to in this Directive or covered by the _sui generis_ right provided for in Chapter III of Directive 96/9/EC, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.
161. The directive on misleading advertising defines 'advertising' as the making of a representation in any form in connection with a trade, business, craft or profession, in order to promote the supply of goods or services, including immovable property, rights and obligations. This directive is therefore drafted in too broad of terms to be considered as including any market definition. That scope is expressly stated in the preamble of the directive (§6), which states that it is desirable to provide a broad concept of comparative advertising to cover all modes of comparative advertising.

1.2.1.2. Policies pursued in media focused legislation

162. In a nutshell, the rationale behind applying competition law is that, whenever the logics of the market are not distorted (by anticompetitive abuses or by agreements), the market should finish by providing an adequate supply and meeting the demand needs, under “fair” conditions.

However simplistic this presentation may be, it nevertheless shows that, usually, the corresponding rationale for having a particular sector ruled by a specific piece of legislation may be of two kinds: either (i) the markets or sectors at stake lack effective competition or (ii) the goals pursued are broader than the mere realisation of a competitive place, and therefore need intervention to protect values that may otherwise not be fully tackled by competition tools only. In both cases and in application of the fundamental principle of subsidiarity, the existence of EU legislation reveals that the issue at stake is considered to require a supra national framework.

In this respect, it appeared from the analysis of the directives that they pursue indeed other forms of goals that purely ensuring a fair competition throughout the EU. We therefore decided to arbitrarily divide the market definitions contained in the directives under two different headings.

One the one hand, the directives aimed at promoting the freedom of circulation of goods or the provision of services; even though they relate to fundamental liberties of the treaty, they also ensure at ruling the market conditions and providing fair and competitive conditions for players thereon, throughout the EU.

On the other hand, we also identified directives aimed at promoting the integration of the common market, an objective which may be qualified as a “political” one. We are well aware that this division may lack sophistication, particularly as it may rely on a subjective reading of the directives. However, a full and more objective reading can be found in the attached grids of analysis.
(i) The protection of the freedom of circulation of goods or of provision of services

163. The Directive on electronic commerce aims at ensuring free movement of information society services by coordinating certain national laws and clarifying certain legal concepts. It is to be read in light of the directive on the provision of information in the field of technical standards, which provides for a system of notification of standards.

164. The global definition of information society services may not be considered as a market definition since it does not take a position on the substitutability between the electronic form of the service in question with other services, albeit provided under other means.

165. Nevertheless, the fact that such services are subject to the specific regulations established in the directive may render them “different” from the others that are outside its scope; this may lead to the conclusion that they belong to a specific separate service market. Therefore, should any market for electronic services be inferred from the directive, its existence would probably rely on the existence of specific regulatory constraints imposed by the directive, and not on the definition of such services. Such regulatory constraints could probably lead to the identification of a distinct market, if they are considered as barriers to entry or as sufficiently constraining, and thereby resulting in competition conditions that substantially differ from other types of activities.

(ii) The integration of the common market

166. The directive on satellite communications provides a good example of the legislative tools that can be used to pursue the goal of integration of the common market. The directive gives a legal framework which aims at eliminating the national systems of special and exclusive rights and national licensing / authorisation procedures or fees that are not based on objective, transparent and non-discriminatory criteria. Considering the goal, which is to suppress artificial or unjustified barriers to entry to a market, the market at stake is defined as the satellite services, which is subdivided along the following lines:

- the provision by satellite operators of space segment capacity of national, private or international satellite systems,
- telecommunications services
- satellite network services
- satellite communication services.

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73 Any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient.
167. These divisions, whether or not they are considered as separate markets, are drawn along the lines of the network/service (or content) division\textsuperscript{74}. The directive also makes factual distinctions between special and exclusive rights. However, the existence of such rights and their importance as barriers to entry to a market for instance, is duly taken into consideration under competition law.

Therefore, even though the directive does not necessarily use tools equivalent to those existing in competition law (particularly demand/supply and market/geographic), the result obtained may not be fundamentally different to the one reached, with a different procedure, in competition law.

168. Probably the most explicit directive regarding the market integration objective is the directive on misleading advertising, which aims at reducing the differences between the laws of the Member States, which are considered to hinder the execution of advertising campaigns beyond national borders and therefore affect the free circulation of goods and services. This goal falls within the even more general objective of protection of consumers and professionals against misleading advertising and the damageable consequences that may result.

Such a public policy goal therefore justifies that the directive does not distinguish between the types of commercial communications nor media used, and remains rather vague in terms of market definition. It defines, however, the notion of advertising, which it distinguishes from misleading or comparative advertising. These definitions may probably not be considered as “market definitions”, but rather as descriptions of a broad type of professional activity.

1.2.2. Market definitions in the new electronic communications framework

169. Due to the above mentioned “hybrid” nature of the electronic communications framework (i.e. both sector focused and based on competition law principles), we identified for the purpose of market definitions (i) the definition of the legal standard provided by the regulation and then (ii) the market definition criteria as provided for by EC Competition law (this second part of the analysis being more focused on the Guidelines on Market Definition and SMP\textsuperscript{”}).

1.2.2.1. The major network/services division

170. The first and probably most important division is most likely the one between networks and services, which existed previously in the 1998 Notice on Access Agreements in Telecoms. Both purely telecom and media activities

\textsuperscript{74} As will be seen further below in the case law analysis, that division has traditionally been made in competition law cases, particularly in the telecommunications field.
may fall within either market (e.g., cable operator provides both network access services and cable programming).

171. For the purpose of identifying an “electronic communications” network or service, the new regulatory framework imposes looking at specific “qualifying technology”. As far as networks are concerned, market definition will rely on the identification of the electromagnetic means that permit the transmission of signals. Electronic communications networks include transmission systems through which signals are delivered (by wire, radio, optical or other electromagnetic means). This encompasses satellite networks, fixed and mobile terrestrial networks, electricity cable systems; and networks used for radio, TV broadcasting and cable TV, irrespective of the type of information conveyed.

On the other hand, electronic communications services are described as the conveyance of signals on electronic communications networks (i.e., telecommunications services and transmission services in networks used for broadcasting). It will therefore include radio, TV broadcasting and cable TV in general, irrespective of the type of information conveyed.

172. The identification of markets is largely related to competition law. In this respect, it is particularly interesting to note that the new package aims in substance at providing a transitional system, from sector-focused legislation to purely competition law. Therefore, market definition that results from this package cannot fundamentally differ from the one carried out from a purely competition law based point of view.\textsuperscript{75}

Competition law was introduced particularly in regards to networks and services, since ex ante obligations (i.e., sector focused obligations) will only be imposed within the relevant market (defined according to general competition law principles) if an undertaking has a dominant position. The new package therefore creates a shift from the notion of “significant market power” (from the telecommunications sector) to the concept of “dominance” (under general EC competition law) (see particularly the Framework Directive, article 14 and 15).

On the other hand, purely content markets remain within the current sector-specific framework.

\textsuperscript{75} This is however not always true as the EU Commission in its Draft Recommendation on Relevant Product and Service Market notes that “markets identified in the Recommendation, while based on competition law methodologies, will not necessarily be identical to markets defined in individual law cases” (Draft Commission Recommendation on Relevant Product and Service Market, chapter 3.1., p. 7).
1.2.2.2. *The other criteria*

173. Within the electronic communications activities, the *new Access Directive* identifies an *access market*. This is the provision of facilities and/or services to another undertaking, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communication services. It covers access to:

- network elements and associated facilities;
- physical infrastructure (buildings, ducts, masts);
- relevant software systems;
- number translation;
- fixed and mobile networks;
- condition access systems for digital TV services;
- virtual network services.

174. Identification of this access market is necessary to assess the level of competition on it, to impose obligations if necessary, and to ensure sustainable competition, interoperability of electronic communication services and benefits to the consumers. In this respect, the new regulatory package provides for specific behavioural measures to be applied, in the event that there is no effective competition in the network upstream market.

175. Finally, it appears from a parallel reading of the new telecom regulatory package and the 1998 Notice on Access Agreements in Telecoms, that a *secondary market* must be defined, both (i) upstream and (ii) downstream from the access market itself, and which shall respectively include (i) the provision of access to the network and (ii) the provision of services and/or information conveyed over the network. This division has been upheld in case law.

1.2.3. *Respective impacts of sector-specific regulation and competition law on one another*

176. The paragraphs above expressed the main differences between sector focused legislation and competition law, by highlighting the differences in approaches, goals and content. These differences are reflected in the grids of analysis on which the present study is based and which reveal that, literally, the criteria established for market definition in sector focused legislation are so different that they could not fit on the same grid of analysis.

The objective of the present section, however, is to show the extent to which these two parallel sets of legislation may interfere with one another.
1.2.3.1. From sector focus to competition: the appraisal of barriers to entry

177. The main subject within competition-law based market definitions where the existence of specific sector-focused legislation is taken into account relates to the appraisal of barriers to entry. In this respect, sector focused legislation may impose specific obligations on the undertakings operating within a certain field of activities, which enables the identification of (i) existing supply and (ii) the possibility to enter the market.

178. Sector focused legislation may be used to identify supply and thereby, to determine the market. However, it should be noted that, as expressed above, supply is only taken into account at a later stage during market analysis, and is not usually an essential criterion thereof.

We also believe that legal obligations should, within the appraisal of supply, be considered as a factor, though certainly not the decisive one, for the purpose of product or service market definition. Indeed, it may well be – particularly in the media industry – that various technologies are substitutable to one another, from the consumer’s point of view, even though suppliers do not face comparable obligations. It results therefore that legal obligations imposed by sector legislation should, from our point of view, only be considered as one piece of evidence to circumscribe product market definition but not the conclusive one.

On the other hand, these obligations may have a much greater impact as far as the geographic market is concerned as they tend to show that, from one region/Member State to another, supply conditions differ substantially.

179. Sector focused legislation may also be used to evaluate the existence of barriers to entry into a particular field of activity, and is duly taken into account by competition authorities for that purpose. This point was mentioned earlier and therefore will not be further elaborated on.

1.2.3.2. From competition to sector focus: the opening of markets to competition

180. The essential pieces of legislation where a competition focus is taken into account are the ones that are mentioned above under section 1.2.1.1. These directives are already listed in that section, together with the market definitions they contain.

181. In substance, it appears that directives take into account competition concerns from a market definition point of view, when the sector at stake is about to shift from specific legislation to competition law. The market definitions that are then upheld are based on competition law criteria, and aim at assessing whether it is still necessary to impose ex ante obligations on

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76 See in this respect our comments above on the copyright directive, paragraph under 1.2.1.1
operators holding a dominant position. This supposes, however, that the sector at stake may be governed by competition law principles. On the other hand some sector-focused legislation does not aim at imposing competition law principles to an economic sector, but points towards other types of goals not linked to competition law and which are often broader. In such cases, it appears that the impact of competition law on sector-focused legislation is extremely limited. This point has been developed in greater detail in the above section 1.2., to which we refer.

1.3. Practical implementation of the criteria in media sector cases

1.3.1. Broadcasting and TV

182. The broadcasting sector comprises a multitude of relationships. For the purposes of market analysis, a clear understanding of the value chain is fundamental since market definition can vary depending on where the competition issue impacts the value chain. Criteria such as demand-side and supply-side substitution must be observed from the point of view of the correct party, be it advertiser, ultimate viewer, broadcaster, infrastructure / network owner, or rights-holder.77

Such a perspective relies on the subjective presumption that the very existence of a market requires the meeting of supply and demand, which thus supposes a form of contractual or trade relationship. It is true that this assumption may be challenged, as some may take the view that markets exist without any trade. Discussing that line more thoroughly would however get out of the scope of the present Study.

183. The present section will examine market definitions upheld under both a product and geographic point of view. The geographical coverage of these markets presents a particular feature, as it is strictly related to the nature of the services or products supplied and vice versa. As it will be demonstrated later in this chapter, the standards for defining the relevant product market are often set by the characteristics of a certain geographic area.78 However, it must also be noted that markets in this sector remain largely national or comprise a single language area, for example the U.K. and Ireland,79 or Germany and Austria.80 In other instances, however, as with the broadcasting rights market of sporting events, the Commission has identified a ‘pan European’ and/or ‘trans-national’ market81.

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77 For instance, the broadcaster provides services to viewers, advertisers and cable operators. Cable network operators, in turn, provide wholesale network services to broadcasters.
78 See, for example, Commission Decision, Deutsche Telekom / BetaResearch, IV/M.1027, 27 May 1998 (for the definition of the market for cable network services).
79 See, for example, BSkyB / Kirch Pay TV, COMP/JV.37, 21 March 2000.
80 See, for example, Commission Decision, MSG Media Service, IV/M.469, 9 November 1994 and Deutsche Telekom / BetaResearch, cit.
81 This point will be developed further on in this section.
184. It appears that three general categories of relevant markets may be identified in the broadcasting sector. They depend on the nature of the relationship that exists between the parties. There is thus an (i) upstream / wholesale market of ‘raw content’; (ii) another upstream / wholesale / access market to the infrastructure; and (iii) a downstream / retail market.\footnote{Particularly clear in this respect is the Commission’s decision \textit{Universal Studio Networks / De Facto 829 (NTL) / Studio Channel Ltd}, COMP/M.2211, 20 December 2000. There, the markets upheld were distinguished on the basis of the above-mentioned tripartition: (i) a market for the production and supply of programming for television; (ii) a market for the wholesale supply of basic-tier pay-TV channels to pay-TV operators; and (iii) a market for the retail distribution of pay-TV channels to the final customers. As one can see, the three-fold definition refers to the pay-TV market and not to the broadcasting sector in general.} The following analysis therefore relies on the structure of the value chain\footnote{See Annex I.2.1. of the present Report.}, so as to cover a set of markets classified on the basis of the party’s perspective taken into consideration. For the purpose of the present analysis, we tried to draft a value chain, which would take these various factors into account. This value chain is represented hereunder.
1.3.1.1. Within the downstream / retail category

(i) The viewers market: the broadest definition

The Commission has identified a global “viewers market”, holding that to a certain extent all television broadcasters compete with one another for audience share. Under this umbrella, pay TV competes with free-to-air television. The existence of such market thus supposes the existence of a global demand from the viewers, who then enter into relationships with broadcasters, which makes all broadcasters compete to a certain extent.

The criteria adopted on the demand-side are rather simplistic; they are not based on the SSNIP test but on the identification of an a priori general market for “television broadcasting”. It should, however, be noted that this market was upheld in article 6(1)(b) merger cases, i.e. in cases where market definition analysis aimed at verifying that the concentration does not raise serious doubts as to its compatibility with the common market, without going into further detail.

On the supply-side, instead, the Commission stressed the need to distinguish further between a market for TV advertising, on the one hand, and a market for pay-TV, on the other. In the former, broadcasters compete for advertising revenue, whereas in the latter, pay-TV suppliers compete for subscriptions. It was also considered in the RTL/Veronica/Endemol decision of 1996 that the dominant position of Endemol in the Dutch market for independent production was linked to the market for TV advertising, which explained why the Commission held that the structural link existing between the largest Dutch TV producer (Endemol) and the leading commercial broadcaster reinforced the already dominant position of Endemol. On the other hand, the structural remedies offered by the parties put an end to that concern.

84 See in particular Commission Decision Kirch / Mediaset, IV/M.1574, 3 August 1999 and Commission Decision Bertelsmann / CLT, IV/M.779, 7 October 1996. These merger cases were decided under article 6(1)(b) of the ECTR, and left open the question of whether there was a viewers’ market.


87 Case IV/M.553 of 17 July 1996.
188. However, in an article 81 case, *Screensport/EBU members* of 1991, the Commission stressed the need to further specify the existence of different markets depending on the role and status of the players, within the broadcasting viewers’ market. In this sense, it distinguished between a “public broadcasting market” and a “commercial broadcasting market”. More specifically, this definition was achieved by referring to the position of public broadcasters and commercial broadcasters in the market as related to the allegedly restrictive agreement. There the aim was to define a product market that could ascribe the ‘object’ or ‘effect’ of the agreement, not to evaluate whether it leads to/strengthens a dominant position.

One may wonder, in the light of other later decisions identifying narrower markets in the broadcasting sector (see below) whether that definition is still of relevance. Even though it is true that some other smaller markets may describe with more accuracy the actual competitive strengths in the broadcasting industry, one may nevertheless consider that there may well be a global market for all viewers, including therefore, on the supply side, all broadcasters. Indeed, the degree of penetration and success of pay TV for instance depends, to a certain extent, on the quality of free TV and on whether such free TV meets most viewers’ needs.

However, it may also be considered that viewers do not represent a market but one of the possible measurement units in the broadcasting industry, *i.e.*, the reference tool to assess the market share held by a party.

### Geographic Market

189. According to the Commission, the geographic scope of the viewers’ market is **national** because of the “different regulatory regimes, existing language barriers, cultural factors and other different conditions of competition prevailing in the various markets (e.g. the structure of the market for cable networks).” The applied criterion focuses on the specific “nature” of the broadcasting sector. No SSNIP or substitutability test is therefore developed.

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89 *Ibidem*, para. 40.
90 *Ibidem*, para. 39.
92 See also *MSG Media Service, cit.*, para. 46; *RTL / Veronica / Endemol, cit.*, para. 25; *Kirch / Richemont / Multi Choice / Telepiu’, IV/M. 584, 5 May 1995, para 17.
Part 1 - EU Market definition in the media sector: a comparative analysis

(ii) Supply of pay-TV subscriptions to end users: pay-TV vs. free-to-air TV

Product Market

At this level of the value chain, the market definition process is aimed at ascertaining whether different channel providers compete with one another in provisioning viewers with their respective channels. Therefore, the adopted perspective is always that of the viewers or advertisers.

The market generally upheld is the provision of pay-TV (subscription), as opposed to free-to-air television.

The analysis is then based on the conditions existing on behalf of the channel providers (both pay-TV and free-to-air broadcasters), by taking as a parameter the type of trading-relationship that exists between the channel provider and its revenue-provider. For pay-TV, the trading relationship exists between the broadcaster and the ultimate subscriber, whereas for free-to-air TV, the trading relationship is between the broadcaster and the advertisers (i.e., no direct contact with the ultimate viewer). It therefore appears that the existence of trading relationships and the identification of the parties thereto may be a relevant criterion to define the boundaries of product or of services markets. A further issue would however be to determine whether such should not systematically be the case, as one could conceivably argue that the very existence of a market should be inferred from the meeting of supply and demand and hence, from the existence of a trading relationship.

Different forms of funding were also considered as conclusive. For pay-TV broadcasters, revenues come directly from the subscription fees, whereas, for free-to-air TV broadcasters, they come from the provisioning of advertising airtime space to advertisers. That criterion was particularly raised in the Kirch / Richemont / Telepiu’ case, where the Commission noted that “pay TV is primarily financed by subscription fees whereas free-access television is financed by public authorities and/or by advertising revenue”.

93 It corresponds to the last portion of the Value Chain « Retail market for the provision of TV channels » (Annex I.2).
96 Case n° IV/M.410 of 02/08/1994 at paragraph 15.
97 It should be noted that the decision does not go into any market distinction between public or private broadcasters.
Therefore, in the case of pay TV, demand emanates from subscribers, who pay the access fee, whereas in the case of free TV, demand stems from advertisers.

194. However, the Commission mostly seems to have undertaken a comparative evidence as the determinant test. One reason for this approach is probably that pay-TV and free-to-air TV were considered as being “related” markets, which rendered the normal substitutability test impracticable.\(^{98}\) However, notwithstanding a possible relationship of complementarity between the two forms of broadcasting, the Commission did not entail a secondary market analysis – which would have involved a more economic-based approach (such as the SSNIP test).\(^{99}\)

195. It is interesting to note that at the national level, for example in Italy and the U.K., the respective NCA’s reached the same outcome (pay-TV as opposed to free-to-air TV), although by means of a thorough two-step economic-based analysis: the first step consisted of applying the ‘hypothetical monopolist’ test for both demand and supply; the second, in applying a more factual-based analysis \(i.e.,\) by looking at the product characteristics) as a ‘safe-net’ to compensate for the first criterion’s possible inaccuracy.\(^{100}\)

196. As the free-access TV is financed by advertising revenue, the Commission considered in the *CLT / Disney / Super RTL* decision\(^{101}\) that there was a market for advertising in television broadcasting. The Commission further mentioned that there could be a market for advertising in the children-oriented programmes, which did not appear to exist at the time of the decision but which may be developing in the future. In any event, advertising programmes remain mainly national or regional, due to linguistic, cultural and regulatory barriers.

197. Within the pay-TV market, the issue was examined as whether particular innovative traits of digital TV could lead to the identification of a distinctive market. That issue was definitively resolved with the *MSG Media Service*\(^{102}\) case, and was then further confirmed with an article 81 decision in *BiB/Open*.\(^{103}\) In both decisions, digital pay-TV services were not considered

\(^{98}\) These two markets are dependent on each other, since the value of the pay-TV depends directly on the alternative viewing possibilities offered by free-to-air TV \(eg.,\) the growth of the pay-TV market decreases where the programs provided over Free-access TV are more varied). See, for example, *Kirch / Richemond / Telepiu’, cit., para. 16 ; MSG Media Services, cit., para. 32.

\(^{99}\) Indeed, the Commission acknowledged an existing dependency between free-access-TV and pay-TV in the fact that “[…] some substitutability exists between pay-TV and free access television, since the value of the former depends directly on the alternative viewing possibilities.” *Kirch / Richemond / Telepiu’, cit., para. 16.

\(^{100}\) For a more detailed analysis of the U.K. NCA’s reasoning in the field, infra chapter 3.3.1. of this Report. As for Italy, infra chapter 5.3.1.

\(^{101}\) case n° IV/M.566 of 17/05/1995.

\(^{102}\) *MSG Media Services, cit., para. 33.*

\(^{103}\) *BiB/Open, cit., para. 25.*
as a separate market since they were considered to be, even in the long run, a “further development” of all analogue transmissions.\textsuperscript{104}

Notwithstanding the different competition law procedures, (MSG as a merger case and BiB/Open as an infringement case), the Commission reached the same conclusion. Therefore, in both types of cases, the competition authority took into account a time horizon factor, considering that digitalisation is and would become in the long run, only a further specification of the current transmission technology.

\section*{Geographic Market}

198. The pay-TV subscription services market is national in scope. The test was first employed in the MSG Media Service case. There, the Commission endorsed a thorough market definition analysis for the purpose of completing its second phase appraisal of the concentrative joint venture (under article 6(1)(c) of the ECMR). The Commission concluded that the “\textit{conditions of competition} for pay-TV suppliers are, at present and for the foreseeable future even after digitalisation of the means of transmission, considerably different in the individual Member States.” (emphasis added).\textsuperscript{105}

199. The factors considered to be determinant for limiting the geographic market to the national territory are: (i) language; (ii) cultural preferences; (iii) regulatory barriers; (iv) specific content of certain feature films; and (v) price differentiation among different Member States because of the use of a decoder.\textsuperscript{106} All these features give a specific trait to the “competition” condition of pay-TV suppliers. It was furthermore considered that this conclusion could not be affected by time horizon implications, as digitalisation of the pay-TV signals could not affect (in terms of broadening) the geographical reach of the relevant market because of the same reasons raised for the relevant product market.

200. Sometimes, however, the Commission left open the definitive scope of the geographic market, embracing only one Member State or language because a wider or narrower geographical market would not affect the substance of the judgement.\textsuperscript{107} These conclusions are reached in Phase I concentration cases.

\begin{flushright}
\textit{Ibidem}, para. 50. See also the definition of a potentially separate digital TV market (which was never upheld) BSkyB / Kirch Pay TV, cit., para. 26; Bertelsmann/ Kirch / Première, COMP/M.993, 27 May 1998, para. 18; and TPS, cit. para. 26.\textsuperscript{104}
\textbf{MSG Media Services, cit.}, para. 18.\textsuperscript{105}
\textit{Ibidem}, para. 46–49.\textsuperscript{106}
\textit{Bertelsmann/ Kirch / Première, cit.}, para. 22. The issue of the market definitions as “left open” is discussed supra in chapter 1.1.3. of this Report.\textsuperscript{107}
\end{flushright}
201. It is important to note that in the *Universal Studio Networks / De Facto 829 (NTL) / Studio Channel Ltd* case, the EU Commission upheld a national market for retail distribution of pay-TV services to end-consumers on the basis of a national decision. Indeed, by reference to the U.K. Competition Commission’s merger decision *NTL Incorporated and Cable & Wireless Communications Plc* of March 2000, the EU authority endorsed the same reasoning of a national competition authority.

\( \text{(iii) A market for each method of transmitting the signals: cable, DTH satellite, digital terrestrial} \)

\( \text{Product Market} \)

202. Until the 1994 Commission’s decision *MSG Media Service*, no further segmentation of the broadcasting retail market was upheld with respect to the different transmission paths (e.g., cable network, DTH satellite, digital terrestrial TV) used or delivery technologies employed to transmit the service (pay-per-channel, pay-per-view and video-on-demand).

203. That decision upheld (and supported in subsequent decisions) that pay-TV channels and TV channels that do not broadcast encrypted signals belong to separate product markets. In other words, “regardless of whether the form of transmission is analogue or digital, television can be broadcast via terrestrial frequencies, satellite or cable networks.”

204. The underlying criterion is essentially the fact that “[...] there are considerable differences between the three means of transmission, as far as the technical conditions and financing are concerned.” The main rationale is thus that, while consumers should pay to watch programmes broadcasted via pay-TV channels, no such payment is necessary to watch programmes transmitted by other stations.

205. In addition to such a factual-based test (focused on the mere technical and financial characteristics of each transmission platform), the Commission also endorsed a somewhat more economic-based criterion. In particular, it considered at the demand-side level whether viewers and programme suppliers would migrate to another platform as a result of an increase of their respective costs. More particularly, whether viewers would not switch from cable to satellite or vice versa given the “lock-in effect” implied with the ultimate device necessary for each platform (set-top box for cable transmission and a specific receiver for satellite or direct-to-home transmission). In addition,
the Commission considered whether substitutability might occur from the broadcaster/programme supplier’s point of view.\textsuperscript{113}

206. In Nordic Satellite Distribution (a phase II decision), the Commission further noticed that each type of transmission platform operator had a distinctive marketing strategy.\textsuperscript{114}

207. There are cases, however, where the Commission denied legitimacy to the practice of upholding a separate market for each transmission path used. In the TPS I case for example\textsuperscript{115}, the Commission investigated whether a number of pay-TV broadcasters infringed article 81 of the Treaty. As opposed to more ‘goal-oriented’ proceedings (i.e., merger review), the \textit{ex post} review gave greater scope to the role and status of the players in the market. The market definition methodology employed in that case therefore reflects the differences according to the types of procedures. Indeed, the TPS I case is an infringement case, which therefore does not require the Commission to identify \textit{ex ante} all possible markets on which parties may hold a dominant position but, on the contrary, aims at delineating the market(s) on which the behaviour of the parties may have had an effect.

Therefore, as in other jurisdictions, market definition analysis endorsed in ‘restrictive agreement’ cases appears to focus more on the single agreement or practice under review. The Commission’s concern in these cases is to verify whether the subject matter or effect of the agreement is restrictive of competition. In TPS I, the issue was therefore to see whether the pay-TV operator’s coordination could substantially affect any given market.\textsuperscript{116}

The Commission concluded here that no distinction should be found between pay-TV services \textit{via cable, satellite or digital terrestrial means}, as they were substitutable to one another. In particular, the Commission underlined that “the fact that the penetration of satellite in cabled areas is low or very low tends, on the contrary, to prove that, where cable pay-TV exists, it is 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 terminal.”\textsuperscript{117} That reasoning was referred to in the later

\textsuperscript{113} Ibidem, para. 42.
\textsuperscript{114} See Nordic Satellite Distribution, cit., para. 36. There, the Commission distinguished between a market for the “distribution of satellite TV transporter capacity to broadcasters”, “distribution of encrypted TV channels to direct-to-home households” and the “operation of cable TV networks”.
\textsuperscript{115} See TPS I, cit.
\textsuperscript{116} A similar reasoning, which highlights the difference between market definition in article 81 cases from other types of procedures, was endorsed in the Commission Decision, UEFA’s broadcasting regulations, Case 37.576, 19 April 2001. There the Commission noted that “for the purpose of […] measuring the effects of the broadcasting regulations [which is the allegedly restrictive agreement] on the broadcasting market” it is not necessary to analyse the free-TV or pay-TV markets separately “since all types of broadcasting of football fall within the scope of the broadcasting regulations.” UEFA’s broadcasting regulations, cit., para. 25 (emphasis added). This decision will be commented on further in this Report in the section dedicated to upstream content markets.
\textsuperscript{117} Ibidem, para. 30.
TELIA/Telenor case\textsuperscript{118} where the Commission did not infer the existence of separate markets from the parallel broadcasting of analogue and digital TV services. The Commission noted in this respect that there would be a migration from one to the other, and that, in this context, the existence of a large customers basis would represent a key factor for the success of digital services.

At first sight, this difference in approach might seem rather striking. However, such an approach reflects the consideration given by the Commission to the differences amongst Member States as regards for instance cable penetration or the availability of data with regard to migration. Indeed, the Commission relied heavily on the French specific characteristics of the pay TV market, taking into account the low penetration rate of the cable in France (the ratio of cable subscribers / households with TV being of 10\% in 1999, i.e., at the time of the decision). For that purpose, it is also interesting to note that the Commission relied on data communicated by the NRA, i.e., by the French Audiovisual Council.

208. In the same year, another article 81 decision – the BiB/Open\textsuperscript{119} case – further overturned the MSG’s market definition based on transmission paths. With respect to the TPS I case, the market definition analysis focused on a more economic-based methodology. In particular, the Commission stated that, “it is not appropriate to distinguish between pay-television markets on the basis of their mode of transmission.”\textsuperscript{120} According to the Commission, the use of set-top boxes for pay-TV does not create a “lock-in effect” so that customers can easily switch from one transmission path to the other. In addition, it was noted that similarities in the price and composition of the services indicate that investment in hardware (the set-top box) did not prevent customers from abandoning their subscription after a certain period. The lock-in argument resembles the more economic-based reasoning applied to network industries where switching costs plays a decisive role in determining the scope of a given market.

209. This reasoning was followed in subsequent merger decisions, such as Universal Studio Networks / De Facto 829 (NTL) / Studio Channel Ltd.\textsuperscript{121}

210. However, in the SDLE/ NYL/ MSCP/ Noos decision\textsuperscript{122}, the Commission noted that upgraded cable networks could have a competitive technological and commercial advantage over other digital delivery systems in the future because of the “triple play”. Triple play consists in interactive digital TV, high speed Internet access and telephony. Whereas in this case, the issue of determining whether triple play constituted a separate market was left open, in the Microsoft / Liberty Media / Telewest case, the Commission identified an

\textsuperscript{118} Op cit., see at § 261 seq.
\textsuperscript{119} See BiB/Open, cit.
\textsuperscript{120} Ibidem, para. 26.
\textsuperscript{121} Universal Studio Networks / De Facto 829 (NTL) / Studio Channel Ltd, cit., para. 14.
\textsuperscript{122} Case COMP/M.2137 of 16/10/2000, at paragraph 24.
emerging market for digital TV, including entertainment, education, news and e-commerce as well as digital TV programmes.\textsuperscript{123}

It is worth noticing that triple play does correspond to the frontier between Internet access and broadcasting, and is therefore the exact example of a new market resulting from convergence.

\textbf{Geographic market}

\textbf{211.} For the purpose of defining a relevant geographic market for each method of transmitting the signals, the Commission noted that (for the definition of a “cable networks” market) the market should be \textbf{national} as “\textit{the structure of the cable markets in most Member States is subject to different conditions in terms of geography, marketing and legislation.”}\textsuperscript{124} The factors used include the incumbent’s monopoly position.

\textbf{212.} The \textit{Deutsche Telekom / BetaResearch} decision added an additional element to the market definition appraisal: there the specific trait of the German market affected the definition of the relevant product market. Under the demand-side (and the broadcaster’s point of view), the transmission of programmes via cable and via satellite is not interchangeable in Germany because they have “\textit{completely different reaches}” (in terms of households and geographic spread).\textsuperscript{125}

\textbf{(iv) A distinctive market according to the typology of pay-TV services (pay-per-channel, pay-per-view and video-on-demand, digital interactive broadcasting)}

\textbf{213.} Until now, no distinction has been made between the different typologies in pay-TV servicing. Pay-per-channel, pay-per-view, near-video-on-demand and video-on-demand all consist merely of a specification of the pay-TV service offering. Only digital interactive broadcasting, pay-per-view and, to a limited extent, video-on-demand were capable of assuming an independent feature and thus falling within a separate product market.

\textbf{214.} It was in MSG Media Services that both interactive TV and \textbf{video-on-demand} services were first analysed as possible markets distinct from pay-TV (either digital or analogue). The question, however, was left open as not corresponding to the state-of-art scenario.\textsuperscript{126}

\textsuperscript{123} No formal decision has been adopted yet, and the Commission has only issued a Statement of Objections; see \textit{Press Releases} IP/00/287 and IP/00/733.

\textsuperscript{124} \textit{MSG Media Services}, cit., para. 54 and \textit{Deutsche Telekom / BetaResearch}, cit., para. 24.

\textsuperscript{125} \textit{Deutsche Telekom / BetaResearch}, cit., para. 20.

\textsuperscript{126} See \textit{MSG Media Services}, cit., paras. 38 and 53.
215. Time horizon considerations coupled with a ‘first-screen’ SSNIP test were finally endorsed in the BiB/Open to uphold a distinctive market for “digital interactive television services”. The Commission there applied the more economic-based criterion of demand-side substitutability (between traditional pay-TV and digital interactive services). The SSNIP test, however, merely represented a ‘first step’ of analysis, to which more factual-based criteria were added. In fact, the Commission moved to a comparative analysis and description of characteristics of the available products.

216. The Commission first noted that a major characteristic of digital interactive services is the different role of operators of digital interactive TV, on the one hand, and of content providers (i.e., those who provide the services purchased by the end users), on the other hand. One may wonder, as the decision is an article 81 case, whether the Commission focused essentially on the status and role of the players/parties in the joint venture agreement for the purposes of defining the relevant market.

217. Among the other factual traits taken into consideration, the Commission included the fact that digital interactive TV is more “largely transaction or informational”, whereas pay-TV is essentially ‘entertainment-oriented’.

218. Another factor worth noting is the comparison made between digital interactive TV and high-street retailing. The distinguishing factors are the involved economies of scope, prices, and the nature of the goods sold on either platform.

219. Finally, the distinction made between interactive services delivered via PC and those delivered via the TV screen is very interesting. For this purpose, the Commission relied on a national sector-specific provision. This supports our conclusions that there is an increasing tendency at both the EU and national levels to cross-refer to one another’s’ measures, and thus to increase the reciprocal awareness of market definitions in order to enable the

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127 BiB/Open, cit., paras. 11-23.
128 It is arguable that the Commission found the SSNIP test to be impracticable because of the inherent innovative nature of the products in question.
129 The test used here is for “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.” BiB/Open, cit., para. 13 (citing ECJ judgements, Oscar Bronner GmbH Co. KG v Mediaprint, Case C-7/97 [1998]; L’Oréal v De Nieuwe AMCK, Case 31/80 [1980]; and AKZO v Commission, Case C-62/86 [1991]).
131 It should be noted for instance that in the Canal+/Lagardère/Liberty Media case JV 47, 2000, the parties proposed satellite-broadcast interactive services, though not Internet ones.
132 In particular, where such national sector-specific measure highlights the differences both in purchase prices of televisions and personal computers and in their characteristics of use. See BiB/Open, cit., para. 21 (referring to the British Departments of Trade and Industry and of Culture, Media and Sport, Regulating Communications: approaching convergence in the Information age, of July 1998, paras. 1.13-1.15.
creation of a uniform set of rules for market definition methodology (in line with both sector-specific and competition law approaches).\textsuperscript{133}

220. The same rationale was adopted in \textit{BSkyB / Kirch Pay TV} (concentration case where the Commission appraised the creation of a new JV between the undertakings), where the SSNIP (on the demand-side) test was more strictly applied, in particular, for the purpose of distinguishing between TV and PC interactive services.\textsuperscript{134}

221. Notwithstanding the nature of the proceedings (merger decision under article 6(1)(b)), the Commission further adds to the BiB/Open reasoning an additional distinguishing criterion: it found that pay-TV services and digital interactive TV were ‘complementary’ to each other. In other words, the Commission declared that, “pay TV, whilst being in a separate market, is likely to be a “driver” for digital interactive television services. This is because pay TV offers premium and exclusive programmes which enables digital interactive services operators who carry this service to attract a high number of above average income viewers.”\textsuperscript{135}

222. Finally, among the different typologies of pay-TV services to end users, pay-per-view offering may be a possible distinctive product market. This identification was upheld in the \textit{Universal Studio Networks / De Facto 829 (NTL) / Studio Channel Ltd}. Merger decision (under article 6(1)(b)).\textsuperscript{136} The Commission did not distinguish between the retail and wholesale levels, but upheld a market for the provision of pay-per-view channels and/or films as opposed to “premium pay-TV film channels” and “basic-tier pay-TV channels”. The pay-per-view pay-TV offering as defined in this decision is linked to the type of content therewith provided (\textit{i.e.}, films), but neverlethess is a form of pay-TV service.

223. In the same case, the Commission went through a rather detailed economic-based analysis for the purpose of defining the pay-per-view pay-TV market. On the supply-side, it examined whether the services at hand would be substitutable with basic-tier pay-TV channels offering and the premium film channels offering. Two factors corroborated the lack of substitution: (i) the novelty of the content; and (ii) the fact that pay-per-view films were licensed “\textit{on a per-film basis}.” On the demand side, the consumers would not be inclined to switch because of the distinctive payment system, which is “\textit{on a per-channel or per-film basis}.”

\textsuperscript{133} See infra chapter 3.1.2. of this Report.
\textsuperscript{134} See \textit{BSkyB / Kirch Pay TV}, cit., paras. 30-40.
\textsuperscript{135} \textit{Ibidem}, para. 32.
\textsuperscript{136} \textit{Universal Studio Networks / De Facto 829 (NTL) / Studio Channel Ltd}, cit., para. 14.
(v) Emerging / developing / future markets: still at an ‘embryonic’ stage

Product market

224. As shown in the foregoing analysis, time horizon and innovation were also taken into account as further variables to be included in the market definition process. However, innovation as such was used to define a new and separate ‘developing’ market only in very limited cases. Indeed, time horizon did not play a determinant role in the Commission’s assessment of a separate digital interactive TV market\textsuperscript{137}: had innovation been considered in the long-term, the product market might have encompassed a common digital platform for both entertainment and informational services. In the Commission’s reasoning, however, some ‘linkage’ between the pay-TV and interactive TV markets was found (\textit{i.e.}, complementarity), which does not exclude \textit{a priori} a possible future convergence.

225. A possible explanation of such approach may be found in the fact that, for example in the BIB/Open case, the infringement procedure was solely aimed at verifying the impact of the agreement on the market to obtain an article 81(3) exemption. One may wonder whether the outcome would have been different, had the issue arisen in a concentration case, particularly given the characteristics of the U.K. market. Indeed, and as mentioned above (chapter 1.1.3.), the assessment under merger regulation tends to take into account time considerations in a broader perspective, with a view to assess whether, considering the likely evolution of the market in the short run, the operation is likely to create competition threats.

The key factors in this respect seem to relate to the ‘likeliness of emergence’ (\textit{i.e.}, evolution), as well as to the ‘time horizon’ for such emerging technology to become viable / used. In the present case however, it should be noted that even though BIB/Open was an article 81 case, it was a notification case, which therefore entails an analysis comparable to the one undertaken under a concentration case, albeit under different time pressure conditions. Nevertheless, it remains difficult to appraise, in the current state of case law, whether emerging markets may be taken into account for market definition processes.

226. Another developing market consideration was the one raised with respect to pay-TV and free-access TV. In MSG Media Services, the Commission considered that “\textit{the distinction between the two markets could, however, become blurred in the case of pay-TV programmes that are financed from a mixture of sources. Such programmes can be expected in various countries in future.}”\textsuperscript{138} Here, time horizon and evolution relates to the form of financing and does not rely solely on technology considerations.

\textsuperscript{137} See in particular, BIB/Open, cit. and BSkyB / Kirch Pay TV, cit.
\textsuperscript{138} MSG Media Services, cit., para. 32.
227. In the same case, moreover, the Commission examined whether a future market for **non-media related communications services** provided by Deutsche Telekom could raise competitive concerns in the already existing marketplace. However, it should be noted that this future offering – as defined in the case – was not included in the list of relevant markets, but was part of the subsequent market power appraisal.\(^\text{139}\)

228. In *Telia / Telenor* (concentration case)\(^\text{140}\), the Commission greatly considered the impact of future markets. There it was recognised that the alleged distinction between cable and DTH (direct-to-home satellite) is likely, in due course, to become less relevant in the new digital environment.\(^\text{141}\) Parallel to this development, the TV distribution, Internet and telephone sectors are also widely expected to converge.\(^\text{142}\) However, once again, these considerations, far from having a legal or economic significance, fall among the decision’s *obiter dicta* and, as such, did not influence the market definition finally upheld.

229. The Commission seems to be undergoing an increasing recognition of “emerging multimedia markets”. First, in the *Microsoft / Liberty Media / Telewest* case\(^\text{143}\), the Commission upheld the existence of an emerging market for digital TV including entertainment, education, news and e-commerce as well as digital TV programmes. Not much information can be found as to the elements on which the Commission based its finding, since it has not yet adopted a formal decision but only issued a statement of objections.

Then, a few months later, in the *UGC / Liberty Media* merger decision (under article 6(1)(b) of the ECMR) of 2001,\(^\text{144}\) the Commission defined a potential market for “**triple-play services**” on the sole basis of their technological characteristics (also defined as “broadband services”).\(^\text{145}\) However, the weakness of such definition was also acknowledged because it does “*not address the issue of consumer demand, in particular whether there is a distinct demand for such a combination of services that would allow a cable operator to target particular consumers.*”\(^\text{146}\) The market definition question was in the end left open.

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\(^{139}\) *Ibidem*, para. 59.

\(^{140}\) *Telia / Telenor*, cit..

\(^{141}\) See *Ibidem*, para. 276.

\(^{142}\) See *Ibidem*, paras. 262 and 275. In particular, the Commission observed that “in the near future, in the above-mentioned context of convergence, Newco would, if the proposed concentration was approved, offer a package of services such as voice, fast Internet access, digital pay-tv and digital interactive services.” *Ibidem*, para. 275.

\(^{143}\) *Microsoft / Liberty Media / Telewest*, see Press releases IP/00/287 and IP/00/733.

\(^{144}\) *UGC / Liberty Media*, COMP/M.2222 of 24 April 2001.

\(^{145}\) The Commission noted that “an upgraded cable network is the only network that would be able to provide simultaneously broadcast TV (analogue and digital), high-speed data in both directions (therefore high speed Internet access), interactive TV services and telephony.” *Ibidem*, para. 15.

\(^{146}\) *Ibidem*, para. 15.
However, as mentioned above, the Commission identified in the Microsoft/ Liberty Media/ Telewest case, an emerging market for digital TV, including entertainment, education, news and e-commerce as well as digital TV programmes. The criteria upheld for the definition of such market are still not entirely clear, as no formal decision has been adopted up to now.\textsuperscript{147}

Finally, the triple play issue does reveal the existence of a possible separate market which would combine digital TV, high speed Internet access and telephony. The existence of such market has however been left open in the Commission decision SLDE/ NTL/MSCP/Noos.\textsuperscript{148}

\textit{Geographic market}

No particular consideration is given to the geographical scope of developing markets: it related more to a time horizon and innovation type of assessment, which does not involve the definition of the territorial reach of these new services.

\textit{1.3.1.2. At the upstream / wholesale market for ‘raw content’}

The following issue is to determine whether a distinctive market exists with respect to each type of raw content provided at the wholesale level for the packaging of pay-TV channels. In other words, this issue aims at assessing whether there is (i) a market for wholesale ‘premium’ content as opposed to a basic-package offering; (ii) a market for sports broadcasting rights (and its further segmentations); (iii) a market for film broadcasting rights (and its further segmentations); and (iv) a market for the sole acquisition of rights to transmit TV-channels.

The perspective adopted is the one of the broadcaster. Demand substitution is therefore assessed, with respect to the broadcaster’s ultimate choice between different content offerings in the event of a permanent non-transitory price increase operated by a hypothetical channel-provider in a monopoly position.
(i) A market for premium channels vs. a market for basic package channels

Product Market

234. The first question that should be asked is whether there is a priori a ‘premium’ market. The most complete and exhaustive decision concerning this issue is the BiB/OPEN one. There the Commission distinguished a wholesale market for the supply of premium films and sports channels for pay-TV from another wholesale market, for the supply of “other content” in non-premium offerings. It was generally accepted, however, that “films and sports are pay-TV drivers” in the sense that the corresponding broadcasting rights are sufficiently attractive to persuade a potential subscriber to pay for receiving television services – that is the rationale behind premium offerings.149

235. According to the EU authority, the SSNIP test revealed that there was no demand substitutability between premium content and other channels (thematic or general interest) delivered for pay-TV.150

236. Among the evidence used, the Commission sought as relevant, inter alia, the following factors151:

- Premium channels attracted very high viewing rates; and
- Premium channels are funded by charging individual fees for each film or sporting event televised, whereas thematic or general interest channels for pay-TV are supplied as part of a package normally paid at a flat rate.

Geographic market

237. Notwithstanding the alleged commonality between film and sports premium offerings, the Commission in BiB/OPEN noted that, “national preferences, in particular with regard to sporting events, would point to a national service market.”152 The question, however, of whether the market is the United Kingdom or whether it also covers Ireland, was left open because it was not pertinent to the legal assessment of the joint venture agreement.

149 See for all BSkyB / Kirch Pay TV, cit., paras. 42-44.
150 See, BIB/Open, cit., paras. 28-29.
151 Ibidem.
152 Ibidem, para. 43.
(ii) A further segmentation within the ‘premium’ channel offering: premium sports channels vs. premium films channels

Product Market

238. Once a distinction has been made between a premium and non-premium offering, the following issue is to determine whether premium films and sports content can fall into separate markets.

239. Under EU case law, that question was left open. In Bertelsmann / CLT (1996)\(^{153}\), the Commission again acknowledged a difference between these types of premium content on the basis of three factors:

- popular sports may achieve high audience ratings;
- popular sports are particularly suited to carrying advertising; and
- TV rights for sports must be acquired in advance of the event because of their ‘perishable’ nature.

240. A narrow market definition in this field was purported by national courts, in France, the U.K. and Italy. Particularly in the U.K., as it will be further discussed in this Report in chapter 3.3.1., the national competition authority supported a distinction between different premium content on the basis of a detailed and in-depth consideration of the industry variables, among which were standard commercial practice, competitors’ view and advertisers’ preferences. The market definition analysis, however, also involved the scrutiny of viewers’ behaviour, which better enables one to foresee whether demand-side substitutability was possible. Particularly enlightening in that sense is the British Office of Fair trade [“OFT”] opinion, as stated in Director General of the OFT’s Review of BskyB’s Position in the Wholesale Pay TV Market of December 1996.

241. A few years later, in the 1999 BiB/OPEN case, the Commission disregarded the U.K. NCA’s ruling and opted for a broader market definition encompassing a general wholesale offer of both sports and premium films channels. That market definition may therefore question the outcome of the one previously held at national level, which shows the difficulty in holding analogous conclusions and methodologies throughout the EU.

242. In the Kirch / Richemont / Telepiu decision\(^{154}\) (concentration case under article 6(1)(b) of the ECMR), the Commission noted that pay TV offered a more specialised programme-mix in order to meet the requirements of its target audience. This programme-mix includes both sports and films. However, the Commission gave further precisions as to films, noting that pay-TV broadcasters had the right to broadcast films only after they have been on

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\(^{153}\) Commission Decision, Bertelsmann / CLT, cit.  
\(^{154}\) Case n° IV/M.410 of 02/08/1994 at para. 15.
general release on cinemas, which showed their specificity when compared to free-TV.

243. In another recent article 81 decision, TPS I, the Commission found that it was universally acknowledged that films and sporting events were the two most popular pay-TV products, and it suggested that there might be a separate **market for rights to broadcast sporting events**. It is interesting to note that the issue was raised in the context of measuring the relevant **geographic market**, as the Commission noted that in the field of sporting events broadcasting, the geographic market might be broader than the one for the broadcasting of films (the latter, indeed, involves cultural and language barriers).

244. Soon after, in the *Eurovision* decision (another infringement case), the Commission found that there could be separate markets for the acquisition of **major sporting events that do not take place regularly** but from time to time, most of them international, such as the football World Cup. The Commission found that sports programmes had particular characteristics; they are able to achieve high viewing figures and reach an identifiable audience, which is especially targeted by certain advertisers. The Commission concluded again, however, to not uphold any given market, as it was not necessary for the purposes of the appraisal of the parties’ behaviour.

245. The *Eurovision* decision led the way to a market definition approach based on the assumption that “the attraction of sports programmes and hence the level of competition for the television rights varies according to the type of sport and the type of event.” This idea was further elaborated in the **UEFA’s broadcasting regulations** case, which represents a cornerstone for understanding both the peculiarities of an infringement case market definition and the definition of a wholesale **upstream market for the acquisition of broadcasting rights to football events**.

246. Indeed, in view of “[...] measuring the effects of the broadcasting regulations [which is the allegedly restrictive agreement] on the broadcasting market”, the Commission rigorously applied the SSNIP test. In particular, it examined “to what extent [...] a specific type of programme can regularly attract high audience numbers, specific audiences or provide a brand image, which cannot be achieved by other programmes.” Brand image (in terms of audience loyalty), the regularity of the broadcasting and the specific target audience corroborated the ultimate definition of a narrow market for the

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155 TPS I, cit. Cf., however, TPS II, where the Commission did not specify further that broadcasting rights for sporting events might be regarded as an autonomous market. There the market for the acquisition of broadcasting rights invariably covered both films and sporting events. See TPS II, cit., paras. 18-22.

156 TPS I, cit., para. 43.


158 Ibidem, paras. 40-41.

159 Ibidem, paras. 40.

160 UEFA’s broadcasting regulations, cit., paras. 24-42.

161 Ibidem, cit., para. 25.

acquisition of broadcasting rights to football events played regularly (e.g., national first and second league and cup events) as opposed to a market for the acquisition of broadcasting rights to football events which do not take place on a regular basis (e.g., Football World Cup).

This was confirmed in the Canal+ / RTL / GJCD case, the first sports rights venture to have been notified in the EU for regulatory clearance. In this case and even though the text of the decision is not yet available, the Commission seems to have identified a market for the acquisition and re-sale of rights played annually and another one for the acquisition and re-sale of football broadcasting rights to events that are played more intermittently, such as the FIFA World Cup and the European Championships.

\[ \] Geographic market

247. Notwithstanding the absence of the language barrier (as observed in the TPS I case), the Commission has continually defined the upstream market for the acquisition of sporting events as national or, at the largest, language-based.

248. Moreover, it was pointed out that some sporting events rights were acquired either on an exclusive basis for the whole European territory and, regardless of the technical means of transmission to be resold thereafter by country, or on a national basis. In the former BSkyB / Kirch Pay TV case, the Commission noted that these major sporting events (i.e., acquired for the whole European territory), such as the Olympic games, had a pan-European interest from the viewers’ perspective. Accordingly, the market could have been (though left open) European-wide.

249. This trend was later reversed to the benefit of a more narrow market definition that corresponds to the national territory. The Commission recently concluded that, irrespective of the scope of the licences, ‘the preferences of viewers can significantly vary from country to country depending on the type of sport and the type of event and, therefore, the conditions of competition for the television rights can vary accordingly.’

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163 Canal+ / RTL / GJCD, 13 November 2001, no text of decision is already available but see Press Release IP/01/1579.
164 BSkyB / Kirch Pay TV, cit., para. 46.
165 Eurovision, cit., para. 46. The same conclusion was reached in the UEFA’s broadcasting regulations, cit., para. 44.
(iii) A market for the licensing of pay-TV film drivers: a distinction on the basis of timing, windows and type of content

Product Market

250. In *Kirch / Mediaset*, the Commission upheld the existing opposition between “film and other fiction”, on the one hand, and sports rights, on the other hand. The issue was then further developed to determine the scope of the expression “film and other fiction.”

251. In *Seagram / Polygram* (merger decision under article 6(1)(b) of ECMR), the Commission upheld that within the market for the production of films, it was possible to distinguish between “mainstream films” and “art-house films”, on the basis of their respective factual and financial characteristics.

252. Soon after, in *Vivendi / Canal + / Seagram* (a second phase merger decision under article 6(1)(c) of ECMR), this distinction was further implemented for the purpose of defining a separate market for broadcasting rights for sporting events, on the one hand, and a market for broadcasting rights for films, on the other hand – the latter was in turn segmented into broadcasting rights for “Hollywood films” (i.e., which is comprised of mainstream films) and broadcasting rights for non-mainstream films.

253. In the same decision, such pay-TV ‘drivers’ were also further classified into first-window and second-window broadcasting rights markets. This time the Commission endorsed a more economic based approach, by considering both demand and supply-side substitutability. Substantial weight was given to the timing of the theatrical release (in order to compare it with the timing of the pay-TV services), and to the ‘window’ status of the film.

254. Again, by applying the SSNIP test, a further segmentation was made between a market for broadcasting rights for feature films and a market for broadcasting rights for ‘made-for-TV’ programmes. Corroborating factors are the level of consumer attractiveness, the different economic value of the content and, most interestingly, the geographical reach, the latter being a standard for distinguishing amongst different cultural content.

255. Finally, in the *Métropole television (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) vs. Commission* case, the European Court of First Instance upheld that a separate market for “the
provision of special interest channels/programmes” exists as an essential input for pay-TV services.¹⁷²

Gay Geographic market

256. In all aforementioned cases and with regard to the various market specifications, the upheld geographic market corresponds to the national territory or to the language-area. Indeed, as far as the market in the distribution of special-interest channels is concerned, it was noted that both foreign and national channels are distributed, negotiated and organised mostly at the national level.

257. As regards the geographic market for the acquisition of broadcasting rights (independently from their further segmentation), the Commission observed that although rights can be sourced from anywhere in the world and some operators acquire rights for more than one territory at a time, these rights are nevertheless acquired mainly on a national basis or, at the most, by language area.

258. In Telia / Telenor, the Commission, though leaving the issue open, sought for a broader geographic reach of the upstream wholesale markets. There time horizon considerations lead to the location of a “Nordic” relevant market, “in view of the transition to digital services, in combination with the trend towards pan-Nordic contracts for distribution rights.”¹⁷³

(iv) The market for the acquisition of TV-channels as opposed to the licensing of individual content

Gay Product market

259. In contrast to the foregoing analysis, in Telia / Telenor (a second phase merger decision), the Commission distinguished between the buying of rights to transmit TV-channels and the buying of rights for individual content (i.e., films, sporting and other events).¹⁷⁴ Though both belong to the same upstream/wholesale category, the European authority considered it “appropriate” to separate the two types of offerings on the basis of a purely factual-based analysis, which was far from entailing demand-side or supply-side substitutability considerations.

¹⁷² See Court of First Instance, Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) vs. Commission, Case T-112/99 of 18 September 2001 (upholding the EU Commission Decision, TPS I).
¹⁷³ Telia / Telenor, cit., para. 285.
¹⁷⁴ Ibidem, para. 277.
260. However, in the *Mezzo/Muzzik* case\(^\text{175}\), the parties submitted to the Commission the existence of a broad market for the edition and commercialisation of thematic TV channels, which should not be further segmented into sub-markets according to the subject of the channel (e.g., cinema, documentaries, youth, sport, music etc).

The parties relied on a *demand-side analysis*: the distributors (cable or satellite operators) decide to include a thematic channel in their offer because of its capacity to attract a large number of consumers; the taste of the viewers varied according to the time at which they watched TV, which means that thematic channels are somehow interchangeable. The Commission did not take position as to that market definition.

The Commission did the same in the *Vivendi/ Hachette/ Multithématiques* case, in which it based its reasoning on the foregoing decisions without deciding on any further segmentation of the market\(^\text{176}\).

\[ \text{Geographic market} \]

261. The same reasoning upheld for the definition of the relevant geographic market for content acquisition rights also applies here.

1.3.1.3. *At the upstream level: access market to the infrastructure, either wholesale and retail*

262. This section focuses on the definition of access upstream markets. They inevitably entail a secondary market analysis, and therefore often end up being rather broad or narrow depending on whether the ‘related’ downstream market falls within its realm.

\(^{175}\) Commission Decision *Mezzo / Muzzik*, Case N°IV/M.2550, 6 December 2001..

\(^{176}\) See *Vivendi Universal / Hachette / Multithématiques*, cit., para.11.
(i) **The narrowest possible market in EU case law: administrative and technical services for pay-TV**

Product Market

263. Again, a rather narrow market definition approach was held in *MSG Media Services* in the field of endorsed upstream access markets. Here, the Commission offered a factual-based methodology (i.e., relying on the technical and financial characteristics of the services) for distinguishing between different “services” being secondary and complementary to the use of pay-TV. The upheld market, however, still moves away from the legal standards defined in sector-specific regulations with respect, for example, to conditional access provisions.

264. Here, the **market for administrative and technical services for pay-TV** covers all special technical infrastructures, such as the provision of an adaptor for decryption (decoder), conditional-access technology and a subscriber management system. They are provided both at the retail (the offering of smart cards or subscriber management systems is directed to final users) and wholesale level (the making available of decoders, the handling of conditional access and the settlement of accounts are usually provided to programme suppliers and/or broadcasters – though it is not excluded that, for example, decoders are directly sold to the subscribers).

265. Both in *Bertelsmann/ Kirch / Première* and *Deutsche Telekom / BetaResearch* (both second phase merger decisions), the Commission acknowledged that despite the fact that satellite and cable transmission methodologies corresponded to separate markets, a corresponding subdivision of the market for technical services for pay-TV into two independent sub-markets was not necessary. Similar conclusions were upheld in *TPS I*.

More recently, however, a separate sub-market for the cable sector seems to have been referred to by the Commission, as can be inferred from the

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177 The functionality of the administrative and technical services to pay-TV is more clearly specified in *Bertelsmann/ Kirch / Première* where the Commission states that “the operation of pay-TV requires a special technical infrastructure in order to encrypt the television signals and to decrypt them for the authorised viewer.” *Ibidem*, cit., para. 19 (emphasis added).

178 Under EU sector-specific regulation, technical and administrative services are further segmented according to the specific device and/or technology used for managing the pay-TV system. Therefore, a conditional access system refers to a legal standard per se and amounts for regulatory purposes to a market definition. See Directive 98/84 on conditional access services, article 2 (b) and (d).

179 *MSG Media Services*, cit., paras. 20-31.

180 *Bertelsmann/ Kirch / Première*, cit., para. 22.

181 *Deutsche Telekom / BetaResearch*, cit., para. 18.

182 This conclusion evidently clashes with the restrictive approach adopted therewith according to which each transmission path shall constitute a separate relevant product market. Cf. supra chapter 1.3.1.1. (iii) of this Report.

183 Cf. *TPS I*, cit., paras. 32-33.
Statement of Objections issued in the *Microsoft/ Liberty Media/ Telewest* case. However, the actual existence of such market still remains all the more unclear that the notification was withdrawn.

\[\text{Geographic market}\]

266. According to the same case law, the assumption that technical services for pay-TV are “closely bound up with the supply of pay-TV” also leads to the conclusion that the relevant geographic market should correspond to the one upheld for the provision of pay-TV services.

\[(ii) \quad \text{The broadest possible market: technical services for both digital interactive and pay-TV}\]

\[\text{Product market}\]

267. The question here is whether technical services for accessing a particular infrastructure may be further distinguished, on the basis of the type of services provided or the encryption technology used.

268. In *BiB/OPEN*, the Commission once again opted for a broader approach to market definition: this definition in fact considers that the technical services (as specified in the *MSG Media Service* case) are the same for both pay-TV and digital interactive TV. This conclusion clashes with the one supported at the national regulatory level, in particular by the U.K. There, as it will be explained further in this Report, sector-specific measures tend to distinguish among various technical services, depending on whether they fall within the notion of “access control service” or “electronic programming rights”.

In the present case, notwithstanding the potential applicability of the ‘legal standard’ offered in the U.K. Joint Oftel and DTI Notice and Consultation of July 1997 on conditional access service, the EU Commission chose not to distinguish between a separate market for digital interactive television services and a market for pay television.

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184 See footnote 110.
185 See, in particular, *Deutsche Telekom / BetaResearch*, cit., para. 23 (emphasis added).
186 See, *BIB/Open*, cit., paras. 30-32.
Part 1 - EU

Market definition in the media sector: a comparative analysis

Geographic market

269. In accordance with the MSG Media Service decision (which, however, did distinguish between a pay-TV and digital interactive television at the product level), the Commission upheld a national geographic market because national is the pay-TV offering.\(^{187}\)

270. In addition, major importance was given to the role of national sector-specific regulation (the U.K. in this case) and its distinctive character among other Member States.\(^{188}\)

Access to infrastructures market

Product market

271. This product market may overlap with the one found earlier in this Report concerning the different transmission paths used to deliver television services (cable, satellite or DTH).\(^{189}\) Indeed, the access to the infrastructures market has a double dimension: it is either a retail or wholesale offering depending on the commercial policy and structure of the supplier. In this chapter we consider both dimensions, which in turn may be allocated upstream or downstream of the value chain.

272. The market for the provision of satellite TV transponder capacity and related services to broadcasters was upheld in Nordic Satellite Distribution. There, a mere technical and factual-based analysis was employed for such a definition.

273. At the retail/downstream level is a market for customer access infrastructure for telecommunications and related services. These services basically belong to the telecommunications realm and, as the Commission notes, "require two-way communication capability by definition."\(^{190}\) Therefore, on the basis of pure technological standards, the European authority included in such a definition all copper-based, public, switched telecommunications networks and more recent alternative access mechanisms, such as cable TV networks and wireless networks.

Geographic market

274. The geographic market here is always national given the strictly territorial reach of such services. These are in fact linked to the physical infrastructure and to licensing regulatory measures that usually cover a certain national territory.

\(^{187}\) Ibidem, para. 44.
\(^{188}\) Ibidem, paras. 45–49, where it mentions all the national sector-specific regulations in the field.
\(^{189}\) Cf. supra chapter 1.3.1.1. (iii) of this Report.
\(^{190}\) See, BIB/Open, cit., paras. 28–29.
1.3.2. Music & Copyrights/ Radio

275. The initial editorial line of the Report was to examine the radio sector. However, case law study showed that there were no published cases dealing specifically with that type of medium, which explains the reason why the present section is focused on “music-related” cases. The list of most of the cases mentioned hereunder, as well as a detailed analysis thereof, is attached to the present report in a grid of analysis.

1.3.2.1. Product market according to the type of music, the activities involved and the form of distribution

276. In its early cases, the Commission considered that the music sector was to be divided into three product markets covering (i) classical music, (ii) light music and (iii) pop music, on the basis of which it further went on to identify a market for the distribution of light music in the EU (then the EC). The distinction between pop music and classical music remained throughout the years.

277. However, the Commission went on to identify markets according to the types of activities linked to the music industry. Therefore, a market for music recording (signing-up, recording and promotion of artists) and music publishing (promotion of a composer’s song and the administration and collection of the royalties) appeared. Even though these activities were based on one particular artist’s performance, there was no need to sub-divide these markets according to individual artists or individual songs, as it appeared that retailers (customers of the record companies) did not view the market in that way. The Commission therefore, once again, based its approach on demand-substitutability.

278. In its Seagram / Polygram decision, the Commission stated that the music recording and publishing market can be divided into sub-markets, on the basis of the publisher’s revenues (mechanical rights, performance rights, synchronisation rights and sheet music scales). However, in that case, the market definition was left open as the case was a concentration case and no competition concerns were found in this respect.
The Commission further developed its market definition in the *Time Warner / EMI* case\(^{198}\), where it supported the existence of separate product markets for music publishing, according to the exploitation of the different categories of rights, based on supply-side considerations but equally on demand-side considerations (the different types of rights present different characteristics and relate to different customers needs, the licensing of one type of right not being a substitute for the licensing of another). This was confirmed in the *Bertelsman / Zomba* case.\(^{199}\)

279. The music industry’s specific features (heterogeneous nature, short-life cycle, constant change in consumer preferences) are not taken into account for the purpose of market definition but, at a later stage, for the competitive assessment of the operation/behaviour at stake; changes in fashion may in this respect be considered as a potential constraint.

280. Finally, in *AOL / Time Warner* (second phase merger decision) a distinction was made based on the type of distribution. The decision identifies an “emerging market” for traditional or on-line music (which may be further subdivided into downloading or streaming).\(^{200}\) In that case, the Commission classified on-line music as “narrow-band content.” On the other hand, “broadband content”, which in turn addresses video-related on-line distribution, comprises a separate market for “paid-for-content other than music”. That product market appears identifiable as such because of specific demand features (consumers can access or buy and receive music immediately from any computer with Internet access, with special software) and supply features (different form of sales and distribution). Furthermore, the Commission noted that the price and volume of CDs had not decreased as a result of the offering of music downloads, which tends to show that these markets are indeed different.

281. Merger review gives substantial significance to time horizon factors: the appearance of this emerging market, which is deeply linked to convergence concerns, raised the issue of potential dominance on a secondary market of technical standards. In the particular case of music, the Commission identified a danger that the new entity imposed its technology or formatting language as the industry standard for delivering music over the Internet. By releasing all its music on proprietary codes or formats, the new entity could prevent its huge music content from being downloaded or streamed through competing technologies, which could in turn strengthen AOL’s Internet distribution strength in the United States.

282. Furthermore, this concern also appears in the upstream market of content, since the importance of the new entity’s music catalogue could reinforce its market power, through which it could refuse to license its rights, or impose high or discriminatory prices and other unfair commercial conditions on its customers wishing to acquire such rights (such as Internet

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\(^{198}\) Case n°: COMP/M.1852  
\(^{199}\) Case n°: COMP/M.2883 of 2 September 2002  
retailers offering music downloads and streaming). This potential threat is all the more aggravated with the network effect: the more content AOL acquires and the bigger its community of users, the less reason for a subscriber to abandon AOL’s walled garden and the more reason for potential Internet users to join AOL.

At this upstream level, the difference between the activities of professional music publishers on the one hand and self-publishing authors on the other, can even potentially lead to the identification of two separate markets. In this respect, in the Bertelsmann/ Zomba case, the Commission argued that there were two main differences between these types of publishers. On the acquisition side, the Commission noted that music publishing companies seek to sign a large number of authors, whereas self-publishing authors only administered their own works. As regards the exploitation of the rights acquired, music companies could offer a wide variety of musical material whilst self-publishing authors could only offer their own material. However, the exact definition of the publishing product markets was left open.

The Commission also examined the distribution of music, particularly in the Sony / Time Warner / Cdmow case. In that case (appraisal of a JV under the ECMR), the parties had submitted that, in terms of distribution, there was one large market including the retail sale to end-consumers of music products and the retail sale and retail to end-consumers of home-video products. That market included not only “bricks and mortar” music and video stores, department stores, discount stores, consumer electronic stores, book stores and “big box” retailers but also Internet services, record clubs, direct mail, telephone sales and “hybrid” retailers. The Commission left the product market definition open. It seems however that the submission of the parties is rather vast compared to the types of markets the Commission usually upholds.

In the radio sector itself (YLE/TDF/Digita case), the Commission considered, on the basis of its “investigations” (which supported the parties’ submissions) that terrestrial transmission of high/low power frequency programmes and TV programmes constituted markets which were different from cable and satellite transmissions. However, it appears that this conclusion may be specific to Finland, which has a special topography (large and sparsely populated country with very cold climatic conditions). It further upheld, though without expanding much on the subject, that there would be a market for the acquisition of broadcasting programmes, viewers and/or listeners. That market delineation may be read in parallel to the one that has been upheld in the TV sector, where the Commission also upheld the

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201 In this respect, it appeared unclear as to whether collecting societies or publishers held the exploitation of on-line music rights. The Commission noted that there were no legal barriers for publishers to withdraw certain categories of rights from the collecting societies.
202 Case n° COMP/M.2883 of 2 September 2002
203 Case n° COMP/JV.25 of 21/12/1999.
204 Case n° COMP/M.2300 of 26/06/2001.
205 See paragraph 39 of the decision.
206 See above, section 1.3.1.
existence of an upstream market for the acquisition of TV broadcasting programmes\(^{207}\) and a global market for viewers\(^{208}\).

### 1.3.2.2 Geographic market

285. As further confirmed in Seagram / Polygram (an article 6(1)(b) of ECMR, which in turn refers to the Thorn EMI / Virgin Music first phase decision), pop and classical music markets are held to be Community-wide, as principal competitors are present in each national territory and there is no substantial cross-border trade\(^ {209}\).

In the Mezzo / Muzzik case\(^ {210}\), the parties submitted that should there be a separate market for classical music channels, this market would be Community-wide since (i) those channels have a trans-national vocation, (ii) the right to distribute classical music is often acquired on a multinational basis and (iii) the majority of classical music channels can be heard in different Member States. However, in that particular case, it was not necessary to precisely define the market, the definition of which was thus left open.

286. On the other hand, the market for national pop music is by definition national in scope, and the Commission noted in this respect that national artists are present inside their own territory and not outside of it. This assumption was contested in the Seagram / Polygram case\(^ {211}\), where parties and competitors held that the distinction between national and international pop had lost relevance, as the language was losing relevance, to the benefit of melody, rhythm and popularity. This assumption was rejected by the Commission, which noted that unquestionably, some pop music was marketed only nationally\(^ {212}\); however, the Commission admitted that this music could thus represent a separate category and, possibly, a separate market. The geographic scope of the market for national music is thus still left open.

287. It may also well be that all music related markets are national, since, on the supply-side, the characteristics appear deeply national (distinct repertoire policies, growth rates, structure of the retail business (all retailers purchase their requirements from local outlets of the record companies), record distribution, pricing policy). The Commission considered, however, in the Thorn EMI / Virgin Music case, that the exact definition of the geographic market could be left open since, even on a narrow market definition, the operation would not create or strengthen a dominant position.

288. Nevertheless, in the Seagram/Polygram case\(^ {213}\), the parties held that the recording and distribution market were national in scope, because of

\(^{207}\) See above, section 1.3.1.2.
\(^{208}\) See above, section 1.3.1.1.
\(^{209}\) See Seagram / Polygram, cit., paras. 18-22. (but also Thorn EMI / Virgin Music cit).
\(^{210}\) See Mezzo / Muzzik, cit., paras. 24 – 25.
\(^{211}\) Seagram / Polygram, cit., para. 15.
\(^{212}\) Ibidem, para. 18.
\(^{213}\) Case n°: COMP/M.1219 of 21 September 1998, Seagram / Polygram.
specific supply-side features. It is interesting to mention in this respect that the parties noted that there was no market integration, and that parallel imports were still very low.

1.3.3. Market definition in the books and publishing sector

289. The present analysis shall examine the EU cases relating to books and publishing. It appears in this respect that all cases have been rendered within a limited time period, i.e., between 1988 and 2001. The list of the cases, as well as a detailed analysis thereof, is attached to the present report in a grid of analysis.

1.3.3.1. Books

Product market

290. The first EU case in the books sector was decided under article 81 of the EU Treaty. There the Commission identified a market for books of general interest, noting a difference from the demand-side between general interest books (also called consumer books) and highly specialised ones. However, the case does not define the exact scope of the general interest in terms of books, as opposed to specialised ones.

291. The Havas/ Bertelsmann/ Doyma case (a concentrative joint venture case under the ECMR, decided in the first phase) may prove to be a good example of highly specialised books, as it concerned the creation of a joint venture active in the sector of medical publishing, covering all kinds of medical publications and related products in all formats, such as for example books, periodicals, brochures and CD-ROMs. The specificity of the product at stake entailed a very targeted source of readers (from a demand-side, the customers are general and specialist medical practitioners, other medical professions and students) and, correspondingly, a targeted type of advertisers (specialised advertising channels in magazines or journals for suppliers of medical products, like pharmaceutical companies).

The allegations of the parties that the overall market for medical publishing could be subdivided into (i) the medical books segment and (ii) the advertising in the medical press segment was neither upheld nor denied by the Commission. It is also interesting to note that the specificity of the content blurs the other criteria relating to the type of products (books, periodicals, brochures etc).

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216 See Commission Decision, Bertelsmann / Havas / Bol., COMP/M.1459 of 6 May 1999
The “quality” of the books may also lead to the subdivision of the consumer books into several sub-markets including respectively, (i) the market segment for the publishing of all soft-cover and paperback editions (excluding only hardcover editions), (ii) the market segment for the publishing of paperback editions (excluding only soft-cover and hardcover editions, but including kiosk editions, newspaper editions, books on sale and club editions) and finally, (iii) the market segment limited only to paperback editions. This submission was made by the parties to the concentration at stake but was neither confirmed nor denied by the Commission, as the operation did not raise competition concerns and was decided in the first phase. However, slightly later, in another merger case decided under article 6(1)(b) of the ECMR, the Commission considered the existence of a specific publishing market for paperback editions.

A further delineation of the market may be made out according to the type of distribution of the books. In Bertelsmann / Havas / Bol (merger decision under article 6(1)(b) of ECMR), the Commission found that there may indeed be, from the supply-side, 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 on-line sales of consumer books via the Internet can be identified.

These divisions do not seem to be relevant when the publishing sector is examined from the supply-side. The Commission used that criterion to identify markets in the professional publishing sector, particularly through the Bertelsmann/Wissenschaftsverlag Springer and Wolters-Kluwer / Reed Elsevier cases. The Commission noted that, 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 consumer’s point of view. Relying on a demand-side substitution for market analysis is thus inappropriate, as it would lead to very narrow market definitions.

The Commission thus relied on supply and examined the conditions in which an editor could launch a publication to certain category of professional users. The criteria relied upon in this respect include the editor’s expertise in that

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220 See Bertelsmann / Havas / Bol., cit.
221 See, however, Commission Decision, Bertelsmann / Koooperative Förbundet (Kf) / Bol Nordic, COMP/JV.45; of 12 May 2000, where the parties supported the distinction between distant sales, on the one hand, and Internet sales, on the other hand, on the basis, inter alia, of the existence of "meta search engines" which lead to the comparison of prices for specific books across multiple online bookshops.
222 This finding is not particularly clear though, as the Commission has identified competition between competing publishers, independent distributors and specialised retail stores.
field of activity, its reputation and brand image (precision, reliability, completeness of information), copyright protection and knowledge of the distribution circuits to address this particular category of users. The Commission further considered that the “quality” of the book criterion was not relevant as editors could easily switch from one type of publication to another.

On that basis, the Commission identified a market for academic publishing (e.g. medical), which may be sub-divided according to the characteristics and requests of specific professional users; national markets for teaching and training (school teaching); national markets for professional publishing which could be divided according to whether the publication targets practitioners exclusively or include researchers as well; national markets for legal publishing (including electronic distribution); national markets for publications in the tax field and in the accountancy one; national markets for the publishing of bilingual and monolingual dictionaries.

Two comments should be drawn from that approach. The first one relates to the methodology employed in market definition as regards the publishing sector. Indeed, in that sector, the Commission essentially – if not exclusively – relied on a supply-side analysis, contrarily to the methodology (i) recommended in the 1997 market definition Notice and (ii) applied in the vast majority of cases.

The second and more substantial one relates to the outcome of such a change in methodology. It appears in this respect that market analysis from a supply point of view results in the upholding of rather narrow market definitions. Indeed, two competing products or services are rarely entirely substitutable, especially from the supplier’s point of view. However, the very aim of market analysis is to apprehend those of the substitutes – albeit imperfect – that may be considered as interchangeable from the consumers’ point of view. In this perspective, a given market does not aim at exclusively encompassing identical products but products that may have analogous characteristics and which may therefore be substitutable. Therefore, it seems that the test endorsed by the Commission results in a particularly narrow definition, which may be at odds with some of the rather large conceptions of substitutability adopted in other media areas.

However, one could wonder whether the books publishing activities do actually pertain to the same logics as the other forms of media. Indeed, the value chain, which has been developed in the media sector may not be directly transposable to the book environment: the bottleneck in the acquisition of content does not exist to the same extent since, precisely, upstream raw content varies from one edition to another and is not as standardised as in other media. In the same way, the financing sources do not split between advertisers on the one hand and viewers/ subscribers/ listeners on the other. Finally, the digitalisation process of books seems less likely to

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225 In the U.K., but this is not the case in France and Italy where legal publishing include tax publishing.

226 See annex 1.2.1.
replace the “old fashion” printed form in the short term. The adoption of a different test may therefore be a piece of evidence that, actually, books form a separate category within the media environment. However, whatever the rationale, it nevertheless remains that the use of a supply-side oriented test seems questionable in terms of market definition methodology.

### Geographic market

295. From a geographic standpoint, the Commission first identified a market on the **language basis** and not on a strictly country basis. This finding is particularly interesting as it is different from the one held in the broadcasting sector, where it has been noted that, even though neighbouring geographic areas shared a common language, they did not necessarily share a common culture and could not therefore be held to pertain to the same geographic market.

296. Very specialised books hold a specific place within the books sector. Indeed, the Commission noted that from the demand-side, the geographic reach of such books was either national or even wider (the language area) and that, from the supply-side, it tended to be larger and international as multinational publishers increasingly offered multilingual publishing or publications in English language to reach a broader clientele.

297. As far as book distribution is concerned, the so-called publishing and retail sales are held to be **national** in scope. On the other hand, Internet sales of books may have a wider scope than traditional book club or mail order sales and would be **world-wide** because of the international accessibility of the Internet.

However, the Commission considered that for the purposes of the case, the exact determination of the geographic scope of the market could be left open, as the operation did not lead to the creation or a strengthening of a dominant position.

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227. See *VBBB / VBVB, cit.*, where the Commission identified a geographic market covering the Dutch speaking area, including the Flemish-speaking regions in Belgium and the Netherlands.


229. See *Bertelsmann / Havas / Bol, cit.*

230. Cf. however *Bertelsmann / Kooperative Förbundet (KF) / Bol Nordic, cit.* where the parties held that even though sales could be addressed to customers on a worldwide basis, national subsidiaries were still necessary both for purchasing and distribution, as on-line sales need a national logistic system of storage and next-day delivery. Therefore, they considered the market to be national. The Commission did not take a position on that assertion. (*Ibidem*, para. 18).
1.3.3.2. Publishing

(i) Product market

Global market for publishing activities

Initially, in 1995\(^{231}\), the Commission identified a **global market for publishing activities**. The Commission, however, did not expand much on the reasons for such a finding, considering that in the case at stake, there was no need to further define the relevant product market and to decide whether publishing would include several different markets (including market of readers and market of press advertising), since the proposed operation did not raise serious doubts as to its compatibility with the common market (under article 6(1)(b) of ECMR). The Commission nevertheless already relied on the demand-substitutability, both from a readers’ and advertisers’ point of view.

(ii) The upstream market for content

In the Magill case\(^{232}\), the Commission identified an upstream market containing the raw material for publishers in order to create TV guides. These findings were then upheld by the European Court of Justice in its judgement *Radio Telefís Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*.\(^{233}\) Indeed, demand characteristics demonstrated the existence of two types of demands, one for advanced or weekly broadcasting guides and the other for individual listings. The Court, here, affirmed that though belonging to distinct offerings, these two markets were complementary to each other for the purposes of finding dominance.

Among the factors taken into consideration for market definition purposes, the Court gave special consideration to the existence of a copyright protection over the listings. IP rights proved a legal monopoly, but also a distinctive legal regime that characterised such a market. It might therefore be considered that notwithstanding the existence of IP rights on that upstream market (which was the core of the Magill decision), an upstream market for

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content may be upheld – similar to the situation found in terms of broadcasting. The issue is, however, to determine along which lines that market should be divided.

(iii) Readers and contents

302. As far as readers are concerned, the Commission considered, in a concentrative joint venture case decided in the first phase of the merger review, that magazines are to be considered as pertaining to a different product market than that of daily papers (difference in the types of news and coverage). Within magazines, it appears that different product markets are upheld according to the subject they cover (for instance, computer magazines or women’s magazines). In this respect, two magazines could be substitutable when they shared the same readers, published the same information and were edited in very close presentation. The Commission also referred in the Time/IPC decision to its previous practice according to which the general magazine publishing market could be further subdivided into sub-markets according to topics and category of readers the magazines aim at. The Commission thereby rejected the assumption of the parties that there would be a consumer (as opposed to industry or trade) magazine publishing market, which could be divided into markets for readership and advertising.

303. The Commission also held in the Magill case, that the demand characteristics showed the existence of two types of demands, one for advanced or weekly broadcasting guides and the other for individual listings. These two markets were considered as complementary, though it appears that this link was upheld in the appraisal of the behaviour (assessment of dominance) and not for the market definition process.

304. In another first phase merger decision (Newspaper Publishing), two product markets cover respectively (i) popular tabloids and (ii) quality newspapers. That distinction was made relying on the demand-side substitutability, and the Commission noted that from the end-consumer point of view, these two types of papers corresponded to price differences, differences concerning the type of analysis carried out, and differences concerning the range of news items covered (e.g. inclusion of international news), and therefore corresponded to different types of readers.

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236 See CEP / Groupe de la Cité, cit.
237 Case n° COMP/M.2572 of 12/10/2001.
238 See Magill TV Guide / ITP, BBC and RTE, cit.
305. Within quality papers, a further delineation in three markets was made by the Commission, which identified respectively general information papers, sports papers and financial daily papers. Once again, that finding was purported on factual demand characteristics, and the Commission noted that general information papers covered a wide range of sections (international news, opinion, national political news, environment, culture, society, science, education, a local news section or insert, sports pages, economic pages, TV programmes, etc.). On the other hand, sports and financial papers met a need for more focused information.

306. From the supply-side, the Commission mentioned that this division also corresponded to differences in prices and selling patterns. In any event, the market definition was “left open,” as the concentration could have been decided under article 6(1)(b) of ECMR and thus no further investigation was necessary.

(iv) Distribution

307. Contrary to the solutions held in the books sector, it does not appear for the time being that any division should be made depending on the type of distribution of the papers or magazines. Indeed, it was often stated that further sub-markets for magazines and newspapers exist “according to the topics and the category of readers it aims at” and not also according to the way used for distributing them.

(v) Advertising

308. In a first-phase merger decision, Hearst / VNU, the Commission raised the need to distinguish, within the publishing market (in this case the market for women’s magazines), between the market for readers and the market for advertising space. The criterion therewith adopted, according to the Commission, reflects the same principles applied for the readers’ market.

309. The Recoletos / Unedisa decision (merger under article 6(1)(b) of ECMR) also addressed the issue of whether a first distinction needs to be carried out between advertising in the press and in other forms of media. Indeed, from a supply-side, written press addresses the most educated segments of society, and its target public is more specific than the public that can be reached through TV or radio advertisements. Press is therefore considered as a single product market from the demand-side.

241 See for all Hearst / VNU, cit., para. 13.
243 Ibidem, para. 15. See also See CEP / Groupe de la Cité, cit., para. 9.
244 See Recoletos / Unedisa, cit.
245 See also Commission Decision, Gruner+ Jahr / Financial Times / JV, COMP/M.1455, 20 April 1999, where the Commission possibly admitted the existence of sale of a market for advertising space in the written press, departing from the views of the parties, which
310. Nevertheless, these findings may conflict previous findings where the Commission based its reasoning on the differences of readers, i.e. of consumers, between the tabloids and the quality papers, to consider that these two product markets were also different from the advertisers’ point of view, as each of the two segments offered different channels through which different socio-economic groupings of readers could be reached.\(^{246}\)

311. The principle according to which advertising activities should not be distinguished, according to the media employed to convey the message, was ultimately upheld in two first-phase merger decisions (\textit{Havas Advertising/Media Planning}\(^{247}\) and \textit{Havas / Tempus}\(^{248}\)). There, the Commission identified a separate relevant product market for \textit{media buying} within the advertising sector. On the sole basis of \textit{supply-side substitutability}, indeed, it was stated that “\textit{media buying activities cannot be divided in several markets according to the media in question}” (emphasis added).\(^ {249}\) This is because there are no specialised agencies for one specific media, but agencies normally carry out buying activities for all media channels.\(^ {250}\)

312. The relevant adopted market definition criterion focuses on the \textit{SSNIP test}: on the demand-side, media buying activities are deemed to satisfy a particular customer demand, “\textit{which can be performed separately from the creation of advertising campaigns}.”\(^{251}\) From the supply point of view, it was found that no substitutability existed between “creative advertising” and “media buying”, as some agencies “\textit{do not have the resources or skills to provide both}”.\(^ {252}\) However, it was also recognised that other advertising agencies provide both services together.

**(vi) Periodicity**

313. In the \textit{Magill} decision\(^ {253}\), the Commission held that advance weekly listings are distinguishable from daily listings, as demand (see above concerning content) was different in the two cases. In \textit{CEP/Groupe de la Cité} decision\(^ {254}\), the Commission also noted, albeit in succinct terms, that two magazines published with the same periodicity could, from the advertisers’ point of view, be substitutable.

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246 See \textit{Newspaper Publishing, cit.}
249 \textit{Havas Advertising/Media Planning, cit.}, para. 12 and \textit{Havas / Tempus, cit.}, para. 9.
251 \textit{Ibidem}, para. 11. Cf. also \textit{Havas / Tempus, cit.} where the Commission also distinguished between “media buying” and “marketing communications services”. \textit{Ibidem}, para. 10-12.
252 \textit{Havas Advertising/Media Planning, cit.}, para. 11.
253 See \textit{Magill TV Guide / ITP, BBC and RTE, cit.}
254 See \textit{CEP / Groupe de la Cité, cit.}
1.3.4. Market definition in the Internet related sector

318. In 1991\textsuperscript{260}, the Commission made the distinction between content and access, identifying a so-called network/facility market, including consumer electronic hardware (consumer audio and video equipment) as opposed to the content market (also called “consumer electronic software market”), including (i) motion picture films for theatre, television, pay television, cable and home video and (ii) manufacturing and distribution of recorded music. The Commission then identified the link between these two markets in a primary / secondary market scenario, in order to assess whether on the future video equipment market, and taking into account the development of new HDTV technology, consumers would be willing to buy new “hardware” products relating to the availability of new “software” products. The Commission then

\footnotesize{\textsuperscript{255} Ibidem.  
\textsuperscript{256} See Newspaper Publishing, cit.  
\textsuperscript{257} See Gruner+ Jahr / Financial Times / JV, cit.  
\textsuperscript{258} Cf. for instance Newspaper Publishing, cit.  
\textsuperscript{259} See Magill TV Guide / ITP, BBC and RTE, cit.  
\textsuperscript{260} See Commission Decision, Matsushita / MCA, IV/M.037, 10 January 1991.}
considered whether any link between these two markets existed so that a position on one of them could be leveraged over the other, and thus create a situation of significant competitive advantage.

319. This distinction and mode of reasoning proved to be particularly true and accurate in the light of the following development of the Internet, where that distinction has been upheld and elaborated.

320. The following analysis covers both product and geographic markets at the same time.

1.3.4.1. Internet content market

(i) Internet content

321. In terms of content dispersed on the Internet, the Commission started by isolating a market for paid-for content (games, special news services)\(^\text{261}\). That market is national in scope, as the services proposed have a national or local scope and other similar companies offer similar services in neighbouring countries. This definition was also upheld in a second phase merger decision, such as the \textit{AOL / Time Warner} one. There, paid-for content other than music was classified as a “broadband content” market. In that instance, the Commission observed that bundled audio/video content dispersed via the Internet formed a single product market because of the complementarity relationship existing among such products. Complementary goods are therefore seen as such because of falling within the same market, not because of their substitutability.\(^\text{262}\)

322. An interesting issue is to determine whether on-line services are substitutable to off-line “traditional” ones. That issue has already been addressed for TV, music distribution, and books and publishing in the above sections. As far as non media-content sectors are concerned, the Commission found in the \textit{Bertelsmann / Burda / Springer} decision\(^\text{263}\) that the market for closed medical online services for professional users was not substitutable to other sources of information, from the users’ point of view.\(^\text{264}\)


\(^{262}\) See \textit{AOL / Time Warner}, cit., para. 35.


\(^{264}\) For example, specialist magazines and conferences are not a sufficient alternative to the complete offer and the communication possibilities of an online service. A distinction between off-line (such as films and TV programs offered via TV) goods and on-line ones was also supported in the \textit{AOL / Time Warner} decision at paras. 35-36.
(ii) Internet advertising

323. As early as 1997, in an article 6(1)(b) of ECMR decision, the Commission identified a market for advertising opportunities on the Internet.\(^\text{265}\) It went on to further elaborate on that market in the Telia/Telenor/Schibsted decision\(^\text{266}\), where it distinguished that market from the paid-for content one.\(^\text{267}\) Indeed, the Commission noted that the two activities generated revenue in different ways and from different sources (advertising from the advertisers and paid-for content from the subscribers), that they were carried out by different undertakings and that they required substantially different inputs.\(^\text{268}\)

324. From a geographic standpoint this market is national\(^\text{269}\), as demonstrated by the fact that publicity campaigns need to be adapted when they are used on different national markets.

(iii) Website production

325. In the Telia/Telenor/Schibsted case, the Commission identified a market for web-site production, noting that this activity was sufficiently technical, that it required design and computer skills, and that it was specialised enough to be considered a separate market.\(^\text{270}\)

(iv) Internet portals

326. The Commission first identified a specific market for Internet portals\(^\text{271}\), after which it decided in its Vizzavi case that it could be subdivided into (i) a market for portals having a broad (horizontal) focus and (ii) a market for having a narrow (vertical) focus.\(^\text{272}\) Since the Vizzavi portal will exist on a variety of access mechanisms and will be delivered over mobile phones and digital TV set top boxes as well as over PCs, this portal will serve a distinct customer demand and was therefore characterised as a horizontal portal. The existence of a distinct market for horizontal portals has been

\(^\text{266}\) See Telia/Telenor/Schibsted, cit., para. 15.
\(^\text{267}\) In this sense, see also the first-phase merger (full-function joint venture) decision, @Home Benelux B.V., IV/JV.11 of 15 September 1998, where the Commission distinguished among various Internet activities on the assumption that they earn revenue in different ways and from different sources (i.e. Internet access is paid for by the subscribers to the access provider, advertising is paid for by the advertiser to the providers of web-sites, paid-for-content is paid for by the subscribers to the content providers). See ibidem, para. 15.
\(^\text{268}\) See also UGC / Liberty Media, cit. and AT&T / MediaOne, cit., para. 21.
\(^\text{269}\) See Cegetel/Canal + / AOL / Bertelsmann, cit.
\(^\text{270}\) See Telia/Telenor/Schibsted, cit., para. 16.
\(^\text{271}\) See UGC / Liberty Media, cit.
\(^\text{272}\) See Vodafone / Vivendi / Canal + (Vizzavi), COMP/JV 48, 20 July 2000, Press Release IP/00/821 (No decision available).
1.3.4.2. Internet access market

327. Internet access services in general have been defined by the Commission as consisting of the supply to subscribers of an Internet address, the provision of the relevant software to enable messages to be sent and received in the correct electronic format used for Internet traffic, and the guarantee of “connectivity” (i.e., access to all other networks which together make up the Internet). Additional features of an Internet access package may include search engines, gateways and content services, as well as the hardware, software, network configuration, customer support and billing services which are necessary for customers to make full use of their Internet access.

(i) Narrowband Internet access services

328. In the BT/AT&T case of 1999, the Commission had identified a market for Internet access, covering both dial-up and dedicated access. In the Telia/Telenor case, however, the Commission identified a market for dial-up access to the Internet, which consisted essentially of (i) the supply to subscribers of an Internet address, (ii) the provision of the relevant software to enable messages to be sent and received in the correct electronic format used for Internet traffic, and (iii) 'connectivity', which corresponds to access to all other networks which together make up the Internet. The Commission noted that other features could also be supplied as part of an access package, such as 'search engines', or gateway or content services. A distinction could potentially be made among the lower usage customers between residential or small business customers.

329. Internet access can be split into four different markets, namely (i) the market for dial-up access via a personal computer modem, (ii) the market for dedicated (private/leased lines) connections, (iii) the market of access services offered to large businesses and (iv) the market of access offered to residential and small businesses. From a demand perspective, the Commission concluded that dial-up access and dedicated access do not appear to be substitutable services because dial-up access is predominantly targeted at lower usage residential and business customers (i.e., small and medium-sized enterprises), while dedicated access is requested mainly by large corporate

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275 See Telia/Telenor/Schibsted, para. 17.
277 Case n° IV/JV.15 of 30/03/1999.
278 See Telia/Telenor/Schibsted, cit.
279 See UGC / Liberty Media, cit.
customers. Therefore, from the demand side, the Commission concluded that dial-up and dedicated access appear to be separate product markets.

330. Moreover, the Commission indicated that it might be possible to distinguish between the provision of dial-up access to residential and business (small and medium-sized) customers. In AOL/Time Warner and BT/ESAT, the Commission considered that such a distinction for dial-up access might be possible because the provision of business dial-up access involves more sophisticated dial-up mechanisms than residential dial-up access ones. In both cases, the Commission did not find it necessary to reach a definitive conclusion as to whether residential and business dial-up access constituted separate relevant product markets, even though the former was a phase II decision and the latter a phase I one.

331. Finally, the Commission suggested that a distinct market might be developing for dial-up access to the Internet via mobile telephones (whether or not WAP-enabled). More particularly, the Commission found that users of second generation (i.e., GSM or DCS) mobile networks and WAP handsets have the ability to access the Internet and send emails. This ability will be further developed with the future implementation of technological advances such as GPRS, and the rollout of new 3G networks will further enhance the range of service provision.

However, given the rather limited size and capabilities of mobile handset screens and the current, limited, data transmission capacity of mobile networks, the Commission found that accessing the Internet via mobile phones was unlikely at this stage to be a substitute for existing methods of accessing the Internet through a personal computer.

332. From a geographic standpoint, this market is national. Indeed, ISPs still depend on national telecommunication and cable infrastructures. For example, in the Telia / Telenor case, the Commission noted that the Internet services offered by the joint venture at stake would be offered in the Swedish language, for private and business users in Sweden. Therefore, even though access to Internet content in Sweden is available from outside Sweden, this does not widen the market definition as the content offered is aimed specifically at consumers in Sweden. It therefore appears from that finding that the respective definitions of access and content markets related to the Internet are deeply linked to one another.

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280 See Commission Decision, BT/ESAT, COMP/M.1838 of 27 March 2000, para. 7; Telia/Telenor/Schibsted, cit., para. 17; UGC/Liberty Media, cit., para. 12; AOL/Time Warner, cit., para. 33.

281 See AOL/Time Warner, cit., para. 33; and BT/ESAT, cit., para. 7.

282 See UGC/Liberty Media, cit., para. 12; BT/ESAT, cit., para. 7.

283 See BT/ESAT, cit., para. 8; and AOL/Time Warner, cit., para 33.

284 See UGC/Liberty Media, cit., para. 12; Commission Decision, Vodafone/Vivendi/Canal+, IP/00/821, 20 July 2000. Again, in both Decisions the particular facts did not require the Commission to reach a definitive conclusion on this issue.

285 See Vodafone/Vivendi/Canal+, cit., para. 32.

286 See Cegetel/Canal +/AOL/Bertelsmann, cit..
(ii) Broadband Internet access services

333. In AOL/Time Warner and UGC/Liberty Media, the Commission identified the developing demand for residential (and small business) broadband Internet access (i.e., via xDSL and cable modem). The criterion used for distinguishing this type of offering is mostly based on factual and comparative evidence.

334. On the demand-side, the Commission concluded that these different access platforms are generally substitutable from the end-user’s perspective. However, in the AOL/Time Warner Decision, the Commission did not find it necessary to decide whether DSL, cable, and other forms of high-speed Internet access belong to the same relevant product market.

335. With regard to the geographical scope of these services, the Commission has not yet given any clear-cut definition. With respect to residential or small business broadband Internet access services, it was, however, concluded that the market appears to be essentially national in scope or possibly narrower (the relevant cable franchise area), based on the need for the installation of a physical connection (i.e., telephone line for xDSL, cable for cable modem) between the customers and the ISP. However, based on the particular assessments in each decision, the Commission has not found it necessary to reach any definitive conclusions on this issue.

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287 See AOL/Time Warner, cit., para. 38; UGC/Liberty Media, cit., para. 13.
288 With respect to broadband Internet access via xDSL and upgraded cable networks, the Commission has highlighted the fact that broadband access through these technologies is not yet widely available in Europe and is generally more expensive than dial-up access. See AOL/Time Warner, cit., para. 39.
289 See UGC/Liberty Media, cit., para. 13.
290 See AOL/Time Warner, cit., para. 41. As already noted in chapter 1.3.1. above, the same conclusion was reached in UGC/Liberty Media, where the Commission also left open the question of whether the provision of broadband services or a “triple play” of digital services (i.e., broadcast TV (analogue and digital), high-speed data in both directions and interactive TV services) provided over cable networks constitutes a separate relevant product market. See UGC/Liberty Media, cit., para. 15.
291 See AOL/Time Warner, cit., para. 41; UGC/Liberty Media, cit., para. 13. More specifically, in AOL / Time Warner, the aim was to verify any creation or strengthening of dominant position under article 2(3) of the ECMR, whereas in the UGC/Liberty Media decision, the Commission only considered whether the concentration might raise serious competition doubts so as to open a second phase procedure.
(iii) **Gateway services**

336. In the *Telia/Telenor/Schibsted* decision\(^{292}\), the Commission also mentioned the gateway services. These services correspond to web-sites that host several different services or groups of services, some or all of which may be provided by third parties. However, in that decision, it is not clear whether such services can be considered as a separate services market, particularly since they lack the “economic” or “financial” side of it.\(^{293}\)

Indeed, gateway services are generally financed through advertising rather than subscription income, and most of them are supplied free of charge to Internet subscribers by Internet Service Providers (ISPs) as part of the access package\(^{294}\). The market was upheld as national\(^{295}\).

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\(^{292}\) See *Telia/Telenor/Schibsted*, cit., para. 14.

\(^{293}\) *Ibidem*.

\(^{294}\) *Ibidem*, para. 17.

\(^{295}\) *Ibidem*, para. 19.
2. FRANCE

337. For the sake of clarity, in the present section we followed the same outline as the one previously set at the EU level between the so-called (i) standard approach to demand and supply, on the one hand, and the (ii) more elaborated criteria on the other, and then concluded with (iii) the differences in market definition approaches, according to the type of procedure.

However, it should be noted that the French competition law approach to market definition in France has not been carried out by successive additions of different “layers” of pieces of legislation, each of which would have a specific legal value, such as has been the case under EU law. Indeed, from a regulatory point of view, French competition law is made up of a rather clear-cut set of rules, all of which are newly incorporated in the Commercial Code (the “Code de commerce”), as redrafted following its recent modification in 2001.

338. Therefore, the distinction between the “traditional” and “more sophisticated” criteria does not correspond to particular pieces of legislation, but to our analysis of the criteria upheld in competition law at the French level for the purpose of market definition, both from a regulatory standpoint and as a result of a global analysis of the practice of the competition authorities.

2.1. Origin and criteria for market definition in French competition law

339. In France, the only institution that applies competition law, apart from the Competition Council (the “Conseil de la concurrence”), which is the National competition authority in charge of applying French as well as EU competition law, are the courts of justice. This trait is not particular to the French system, and therefore will not be elaborated.

340. French Competition law is thus essentially applied by the French Competition Council, the appeal jurisdictions being the Paris Court of Appeal (“Cour d'Appel de Paris”), and then the Supreme Court (“Cour de Cassation”). The Competition Council was established by the Ordinance of 1 December 1986, which laid down the general principle of freedom in pricing and competition. The intention of the drafters of the 1986 Ordinance was to make the Council an independent authority, responsible for analysing and regulating market competition.

296 It should be noted that we also referred to the Consumption Code (“Code de la consommation”). However, our analysis did not reveal any information about market definition in these two latter parts, and we therefore concentrated our analysis on the competition texts stricto sensu exclusively.
The Council’s role is to advise Government, Parliament and legal entities who represent the public interest on various matters, including concentration. As a body specialising in regulating competition, the Council only intervenes if the market mechanism is affected. It does not have powers to curb practices that are considered unfair or pernicious trade practices, which fall within the jurisdiction of Civil or Criminal Courts. It is also not involved in disputes between contending parties, which fall within the jurisdiction of the Civil Courts. However, if market competition is distorted, the Council has jurisdiction no matter whether the firms involved are private or state-owned.  

The competition law texts we relied on for the purpose of the present analysis were the only two French texts regulating competition, namely:


- The decree of application of the NRE, and particularly the 30 April 2002 decree;

We also consulted the annual reports published by the French Competition Council, and particularly those from 1997 to 2001, as they provide a summary from the National Competition Authority of the cases it dealt with throughout the previous year. We also consulted the annual report for 1992, which provides some interesting guidelines regarding the approach followed by the Council as regards market definition.

Pursuant to Article L.410-1 of the French Commercial Code, application of competition law and, therefore, any market analysis, is ab initio limited to activities of production, distribution and services, whether carried out by a private entity or by a public body, in the context of a so-called delegation of public service (“delegation de service public”). The application of competition rules is thus determined by the economic nature of the activity and not by the quality of the operator (private or public).

The boundaries of the notion of “economic activity” are regularly subject to interpretation by the courts. For instance, it has been found that the supply of meteorological information for the exclusive destination of aircraft pilots does not constitute an economic activity, whereas the edition of a phone book

297 A more detailed presentation of the Competition Council is in Annex II.6.
298 Therefore, competition rules apply to public bodies acting as economic operators when, for instance, it supplies services having industrial and commercial characteristics. On the contrary, they do not apply to activities operated by a public body that fall into the scope of its prerogatives of public authority, such as security services or the management of social welfare.
299 Cassation com. of 12 December 1995
cannot be considered as belonging to the mission of public service activity attributed to France Télécom.

Therefore, before defining the relevant market, one must verify whether the activities at stake qualify as economic. Then, the next step is to identify the economic sector to which they belong. The understanding of the activities in a global context entitles the Competition Council to take into account the particularities of a sector when analysing a competition law issue.

2.1.1. The standard approach of demand and supply

343. In its reports, the Council defines the market as follows:

“The market, in a competition law meaning, is the place where supply and demand for a specific product or service meet. In theory, on a given market, the unities offered are perfectly substitutable one to another for consumers, who can then arbitrate between suppliers, provided there are several of them, which implies that each of such suppliers is submitted to price competition from the others. On the contrary, a supplier on a market is not directly pressured by price strategies from the suppliers on different markets, since these suppliers commercialise products or services that do not respond to the same demand and that do not therefore, from the consumers’ point of view, constitute substitutable products. As it is rare to observe a perfect substitutability between products or services, the Council considers as substitutable and as pertaining to the same market the products or services that one may reasonably think customers would consider as alternative means between which they may arbitrate to satisfy one and the same demand”.

344. As the Council noted in its 2001 Report, this definition is largely analogous to the one held by the European Commission in its 1997 Guidelines and in the various Regulations issued by the Council. The Council also noted that this definition is, on the other hand, rather different from the one held by the US antitrust authorities, which tend to concentrate on the market power held by an undertaking.

2.1.1.1 Product market

345. Annex 1 to the decree of 30 April 2002, which establishes the information to be provided for notification of concentrations, defines the relevant product market in identical terms to the ones set at EU level.

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300 Decision of the Competition Council n°96-D-10 of 20 February 1996 (office des Annonces / France Télécom)
302 Paragraph 3 of Annex 1 to the 30 April 2002 decree: “A relevant product market comprises all products or services that the consumer considers as interchangeable or substitutable because of their characteristics, their price and their intended use”.
However, the decree expressly mentions that some products “that are not considered as substitutable [in the EU understanding] may be considered as pertaining to the same market when they require the same technology for their manufacturing and when they belong to a range of products likely to characterise such market”.

It therefore appears that product market definition is essentially centred on the consumer’s perception, i.e. on the demand-side substitutability. This approach is largely similar to the one explained above as regards EU market definition.

(i) Demand

346. In its Reports, the Competition Council states that “the market, as understood in competition law, is defined as the place where offer and demand for a specific product or service meet. In theory, the unities offered are perfectly substitutable one to another for consumers, who can then arbitrate between suppliers, provided there are several of them, which implies that each of such suppliers is submitted to price competition from the others”\(^ {303}\). This definition is largely identical to the EU one.

347. This definition is the French standard for market definition since, as mentioned above, the French regulation is rather straightforward in terms of regulations. However, it can be sustained that in practice, the examination of the characteristics of demand as proceeded to by the Competition Council relies on a descriptive approach, including the examination of the actual characteristics of the products at stake, the nature or the function of the products, and their intended use.

\[\text{Prevailing importance of demand over supply}\]

348. The Council considers that the characteristics of demand are of greater importance than those of supply, when defining the relevant product market. In this respect, the Council noted in its 1998 Report that, “the appreciation of substitutability between two products, which is necessary for the delineation of relevant markets, occurs particularly by reference to the behaviour from the demand-side”\(^ {304}\).

In the same way, the now “classical” meaning of the relevant market defines it as “the place of meeting between supply and demand for products considered by buyers as substitutable between them but not to other goods offered”\(^ {305}\). Prevailing reference to the demand-side is thus the constant line of analysis, followed by the Competition Council\(^ {306}\) and the Court of Appeal.

\(^{304}\) Report for 1998, p. XXIX.
349. This line of analysis seems to follow the same path as the Commission, which also gives prevailing importance to demand when defining markets. However, this line of analysis is much more accentuated in the French approach since, as will be seen below in further detail, supply literally has a secondary and complementary use in the market definition process. In its judgement of May 22, 2001\textsuperscript{307}, the French Supreme Court (“Cour de Cassation”) expressly confirmed the importance of the analysis of the demand-side when defining the market and recalled that the criterion of substitutability from the customers’ point of view was highly decisive.

\[\text{Nature, physical and material characteristics of the product}\]

350. The nature, physical and material characteristics of the products are usually perceived in a homogeneous way by all consumers, which explains that the Council considers that a presumption of substitutability exists between goods of the same kind\textsuperscript{308}. This approach may be qualified as “descriptive”, as it merely aims at taking into account existing characteristics of the products, without going into any more sophisticated investigation.

351. Identity between the characteristics relating to the nature of the products represents strong evidence of their substitutability. The Council held that standardisation regarding the composition of the products\textsuperscript{309} or the abidance by certain products to mandatory standards, is strong evidence that the products at stake belong to the same product market. Returning to the analysis of the media sector, one may wonder whether the composition of the products or the standards to which they may correspond would represent a valuable criterion for the identification of a relevant product market.

\[\text{The function and usage of the product}\]

352. The function and usage of a product are also demand-based factors, as they focus on the consumers’ perceptions of the products. Therefore, differentiated products that have the same usage or function may be considered as substitutable from a demand point of view, whereas similar products that do not have the same usage shall be considered to not pertain to the same market\textsuperscript{310}. It should be noted that, for the appraisal of that criterion, the Council may not only consider objective characteristics but may also take into account the consumer’s subjective perception concerning the goods at stake\textsuperscript{311}. The Council, for instance, considered that electronic video games, electronic video games on PCs and electronic video games for a collective usage were not considered as belonging to the same product market since they

\textsuperscript{307} Cass, Com 22 May 2001, pourvoi n°99-14.716, Société Routière de l’Est parisien (REP),
\textsuperscript{308} 1987 Report, p; XX.
\textsuperscript{309} See e.g. decision 94-D-13 of 22 February 1994.
\textsuperscript{310} See Opinion 01-A-10 Boeing / Jeppensen.
\textsuperscript{311} See the decision n°99-D-45 on Barbie dolls where the Council took into consideration the psychological perceptions of the consumers.
corresponded to differences in the functions and needs to which they responded.

Different technical usage conditions may therefore render two products non-substitutable, even though these two products correspond to identical needs. Thus, in the TV sector, technical conditions for broadcasting between cable and satellite were considered as not substitutable to free-to-air TV\(^{312}\). The Council also included software that was intended to be used on PCs and software that was intended to be used on work stations in the same product market, on the basis that the functionalities of the software were identical\(^{313}\).

In the same way, the Council seems to have used the criterion relating to the actual use of the services to delineate the boundaries of the market for the purchase of advertising space. The Council indeed considered\(^{314}\) that in the advertising sector, “the nature of the space advertising purchase activity does not fundamentally differ depending on one media or another; in all cases, it is a function of negotiation and purchase of space advertising at wholesale conditions”.

However, the existence of a “partial substitution” is not considered as enough to characterise the existence of a sole product market\(^{315}\). In the absence (to our knowledge) of any further developments on that particular issue, it is difficult for us to further elaborate on the extent of that evaluation of the Council.

To the best of our knowledge, the criterion on the actual usage of the product has been used rather cautiously by the Council, as there may be some products that have the same intended use but that, on the other hand, correspond to different characteristics or conditions of use. The latter criterion would tend to consider that they do not pertain to the same market. Therefore, this criterion must be assessed in light of the other characteristics of the products or services at stake.

\(^{312}\) Decision n°99-D-14. It should, however, be noted that in this decision, the usage cost of the product was also duly taken into account to infer the absence of substitutability.

\(^{313}\) Decision n° 96-D-76 of 26 November 1996, Société Autodesk, concerning CAD/CAM software, where the Council held that the software at stake which operated both on PCs and work stations was “the same product with the same functionalities, albeit in different versions; therefore, the relevant market is the one for “generalist” software for CAF professionals (…)”.

\(^{314}\) Decision n° 93-D-59 of 15 December 1993 and decision n°96-D-44 of 18 June 1996.

\(^{315}\) That point was particularly raised in the 1999 Report, commenting on decision 99-D-85 (TF1), where the Council considered that, due to special characteristics specific to each type of media and in reference to its 96-D-44 decision, the price differences existing between advertising space available on each type of media lead to the identification of several product markets. It should, however, be noted that for that conclusion the Council also relied on the existence of specific regulatory regimes applied to the advisers.
(ii) Supply

355. In its Reports, the Competition Council noted that the supply-side characteristics are only rarely taken into account for market definition purposes. Indeed, in its 2001 Report, the Council mentions that characteristics relating to supply correspond most of the time to the conditions of entry on the market, and corroborate the analysis carried out from the demand-side. In exceptional cases, the Council has considered that the demand-side substitutability criterion was not conclusive and consequently favoured the supply-side one.

356. It therefore seems that the French tendency is to consider the characteristics of supply not so much as a criterion for market definition but rather at a later stage, as one of the factors to assess the existence of barriers to entry to a market. Such an analysis may indeed be quite understandable, since the examination of substitutability from the supply point of view could consist of a rather uncertain appraisal: that of appraising the potential behaviours of suppliers, on the basis of events that have actually not happened but that could potentially happen.

357. The Council does reckon that this approach differs from the one upheld at the EU level, since supply-side substitutability is an important factor of market delineation for the European authorities.\(^ {316} \)

358. Notwithstanding the above, recent case law tends to show that supply-side substitutability is not totally excluded by the French competition authorities for the purpose of market definition. Thus, in 1998\(^ {317} \), the Paris Court of Appeal indicated in a case relating to the delineation of the relevant market for data transmission services that, “from the supply-side, substitution implies that suppliers may re-orientate their production towards the relevant products or services without cost or insupportable risk to substitute themselves to the preceding supplier; it should be noted that should substitution require heavy investments or strategic modifications, it shall not be taken into account in the market definition”.

359. For that purpose, we presume that the Council would take into account the cost of adaptation to switch from one product to another, identify the importance of ‘sunk costs’ as well as indicate the time required for such adaptation.

360. It should also be noted that the Council indicates that the supply-substitutability is limited by the time horizon taken into account in the delineation of the relevant market. In a 1998 case, the Court of Appeal recalled that\(^ {22} \) “under directive n°97/C 372/03, the relevant market has to be assessed at the time of the facts under review; potential competition cannot be taken into account as the conditions under which it may actually represent a

\(^{316}\) 2001 Report, part II, Title I, § 1.2., where the Council quotes the Continental Can case of the ECJ and the and Nestlé decision to recall the importance of supply assessment at the EU level.

competitive constraint depend on the analysis of certain factors and circumstances that relate to the conditions of entry”. The Council noted in its 2001 Report\textsuperscript{23} that this consideration is all the more true in cases of infringements, which aim at determining the market power of the supplier at the moment of the facts of the case.

2.1.1.2. Geographic market

361. Few developments are found under French competition law as regards the definition of the geographic market. This may be because the geographic application of French competition law is by nature limited to practices that have an impact on the French market. In this respect, article L. 420-2 (the French equivalent to article 82) prohibits abuses of a dominant position held “on the interior market or a substantial part of it”.

362. Besides, Annex 1 to the decree of 30 April 2002, which sets the information to be provided for notification of concentrations, defines the relevant geographic market in terms that are identical to the ones set at EU level\textsuperscript{318}.

363. Our investigation showed that in its decisions, the Competition Council took into account the weight or volume of the products at stake in order to delineate the geographical boundaries of the market. This point will, however, not be further elaborated as it is of little relevance in the media context.

364. In the services area, the Council took into account the importance of the proximity factor for consumers. These assessments were conducted in cases relating to department stores, where the Council actually considered the quality of the road network, the attractiveness of the shop or the infrastructures attached to the shop (such as parking areas, other shopping centres)\textsuperscript{319}.

The Council may also consider the characteristics of the services, in light of the activity of the undertakings (e.g. the management of cinemas), the existence of regulatory or legal constraints, or the existence of language barriers. However, our analysis of French case law tended to show that the smaller definition of a geographic market than national does not correspond to a standard application of certain criteria. It seems, however, that when the

\textsuperscript{318} Paragraph 3 of Annex 1 to the 30 April 2002 decree: “A relevant geographic market is a given territory on which are offered and demanded goods and services and on which conditions for competition are sufficiently homogeneous and that can be distinguished from neighbouring geographic areas as, in particular, conditions of competition therein differ to an appreciable extent”.

\textsuperscript{319} Opinion n° 96-A-14 of 19 November 1996 concerning the project of the acquisition of control of Souliers by Otis (production of lifts), Opinion n° 98-A-06 of 5 May 1998 concerning the acquisition of TLC Béatrice Holding France SA by Casino-Guichard-Perrachon and Decision n° 01-D-12 of 12 April 2001 concerning the complaint of Chépard SA against alleged anti-competitive practice of Auchan in the area of Avignon and Cavaillon
market is held to have a national dimension, the supply structure is the prevailing criterion.

365. As a whole, and considering the lack of information available concerning the factors actually taken into account by the Council for that purpose, no further developments will be brought to that particular issue.

2.1.2. The introduction of more elaborated criteria

366. Considering the synthetic nature of French competition law, we encountered some difficulties in identifying the so-called “more elaborated criteria” upheld by the Council for the purpose of market definition. We therefore divided these criteria between, on the one hand, the factors mentioned at the regulatory or legislative level (2.1.2.1), and on the other hand, the ones we found in case law and which relate in substance to the importance of economic factors (2.1.2.2).

2.1.2.1. The legal or regulatory criteria

(i) The existence of barriers to entry

367. Annex 1 to the decree of 30 April 2002, which sets the information to be provided for notification of concentrations, requires the parties to provide information concerning the factors that are likely to have an incidence on access to the markets, and mention particularly in that respect the existence of: regulatory provisions, conditions of access to raw materials, importance of R&D or advertising expenses, existence of standards, licences, patents or other rights, importance of economies of scale, and the specific character of the implemented technology.

368. These criteria seem to correspond to the ones upheld at the EU level. In this respect, the Council seems to consider factors such as the existence of a specific legal norm, which may have an influence on the products’ price, quality or perception held by consumers thereon. For instance, the Council upheld the existence of a market of public national general free-to-air channels, distinct from the one of private general channels, on the grounds that public channels had legal constraints in terms, to which private ones were not required to abide.\footnote{Decision n°99-D-14.}

369. However, returning to the list of criteria established in the above-mentioned 2002-decree, one must take into account the very recent nature of the text at stake, and the corresponding absence of case law on that matter; it is therefore difficult to further elaborate thereon at the present stage. Nevertheless, it seems that these criteria have an ambivalent nature, as they can be used both for the purpose of market definition and for the purpose of market power.
(ii) **Neighbouring markets**

370. Article L. 420-1, which is the French equivalent to article 81, prohibits agreements that have the purpose or may have the effect of barring, restricting or distorting the play of competition “in a market”, particularly if they aim at: (…) “(2°) Limiting other companies’ access to the market or free exercise of competition by other companies, (3°) Limiting or controlling output, outlets, investments or technological progress; (4°) Sharing out the markets or sources of supply (…).”

371. The Competition Council also mentioned that it takes into account the existence of a specific legislation, which entails a particular operator with the exploitation of a given service27.

372. Finally, for the purpose of the identification of the relevant related market, the mode of commercialisation of the products at stake is considered in the market definition processes, to a small extent. Indeed, case law shows that the identity of distribution methods may be a piece of evidence, though it does not amount to a conclusive factor for the purpose of product market definition. For instance, the Council already considered that “*disks sold by different means of commercialisation may be considered to pertain to the same market*”321.

(iii) **International competition**

373. In the field of mergers, article L. 430-6-II provides that concentrations that “*may undermine competition, especially through the creation or reinforcement of a dominant position or through the creation or reinforcement of purchasing power creating economic dependence at the supplier’s expense*” shall be prohibited. However, for the purposes of the competitive assessment, “*the Council takes account of the companies’ competitiveness in the light of international competition*”. Considering the extremely recent nature of these texts, it is still unclear whether international competition shall be taken into consideration for the purposes of market definition or, at a later stage, for the competitive assessment of the operation concerned. It nevertheless appears that if an international “competition” is deemed to exist, it means that the competitors on the French market and the international ones do operate, to a certain extent, on the same market. Otherwise they would not be competitors.

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321 See 1998 report, though that criterion was mentioned concerning airports and funeral services, chapter III, 1, 1 of the report.
2.1.2.2. The case law more elaborated based criteria: economic analysis

374. Case law tends to show that the importance of price within the market definition process i.e., used for the purpose of establishing substitutability between two products, relies on (i) the existence of similar prices between two products or the similar evolution of prices between two products, and on (ii) the cross-elasticity of price. On the other hand, (iii) economic statistics provided by the parties have a lesser value.

375. The Council takes into account price similarities. It thus indicated in the Coca-Cola decision\(^\text{322}\) that the substitutability between two products could also be held on the basis of a lasting similarity in prices. The duration for the lasting period to be met was not set, though one may reasonably think it should extend past a year.

376. Correspondingly, the Council also takes into account price differences to assess what products pertain to different markets. For instance, in the advertising sector, the Council considered that even though TV was generally in competition with other media, “this potential competition is not enough to characterise the existence of one and the same market because, in particular, of the characteristics specific to each medium and to the price differences existing between the advertising spaces available on each of these media”\(^\text{323}\). Price differences or similarities do not, however, seem to be conclusive criterions in market definition, contrary for instance to the use of the characteristics of the products.

377. Similar to EU competition law, French competition law considers cross-elasticity to price variations between two products as serious evidence that the two products at stake belong to the same product market. As stated by the Council\(^\text{324}\), “on the same market, the units offered are substitutable for the demand; the demand can thus arbitrate between suppliers when there are several of them, which implies that each of the supplier is under price competition with the others, which means that substitution effect will come into play: the price increase of a product will lead to an increase in demand for the other products. In such a case, the competition authorities shall examine the demand cross-elasticity to bring together products belonging to the same market and thus likely to compete with one another”. This test is

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\(^{322}\) Decision n° 96-D-67 of 29 October 1996.

\(^{323}\) Decision n° 99-D-85.

therefore the classical SSNIP test\textsuperscript{325}. However, practice shows that the Council rarely has sufficient time or available data to proceed to such tests.

378. This approach, which aims at researching the actual substitutability between products, is based on the classical SSNIP test that enables the evaluation of the outcome of price variations of one product over the consumption of another.

379. It should, however, be noted that to the best of our knowledge, this approach is not (yet) extensively endorsed by the Council. This may be the case because, as will be seen below, the Council did not have a compulsive jurisdiction over concentrations until last year. Indeed, notifications were only optional, and the Council was only required to give consultative advice, since the final decision pertained to the Minister of finance.

380. In this respect, it appears to us that the SSNIP test can prove to be of greater relevance in the case of mergers, since it consists of examining, \textit{ex ante} and from a theoretical point of view, the reaction of consumers to an estimated price increase. This type of test seems perfectly in line with the \textit{ex ante} appreciation of concentrations, which aims at assessing the possible effects of a concentration, whose actual realisation is still pending during this examination. On the other hand, cases of infringements to competition law and, more particularly in terms of supply-side substitution, cases of abuses of a dominant position, relate to actual past or on-going behaviours. The use of a hypothetical price increase test, such as the SSNIP test, may then prove to be of less relevance.

381. However, it seems that the SSNIP test has been used with an \textit{ex post} perspective, to analyse the past evolution of prices and quantities sold, in order to assess whether the increase or decrease in prices of one product had consequences on the increase/ decrease in prices of another\textsuperscript{326}.

The Council nevertheless considers that the availability of data and statistics is problematic, and thus suggests using the data of the French national institute of statistics (“INSEE” and “ENSAE”). The Council indicates, however, that this method should be used with care, and that \textit{“all necessary precautions [should be taken] to make sure that the eventual increase in demand for the second good is not due to factors that are totally external to the increase in price of the first good\textsuperscript{327}.”} We did not, however, find the criteria used by the Council to verify whether this condition is fulfilled.

382. The Council therefore does not reject the SSNIP test, but seems to limit its use to a particularly rigorous approach.

\textsuperscript{325} \textit{Small Significant Non transitory Increase in Prices.}
\textsuperscript{326} See Report for 1992, p. 54.
\textsuperscript{327} Report for 1992, \textit{opcit.}
383. As a conclusion on the relative reluctance of the Council to use the SSNIP test, it may be useful to refer to the 2001 Report, in which the Council noted the following:

“A reliable measurement of the demand variation to a good following the relative variation in the prices of another requires the estimation of demand functions on the basis of observed series of prices and quantities on a long enough period of time. This type of data is difficult to gather at a level precise enough to the one needed for a competitive analysis. For instance, measurement of cross-elasticity is not symmetrical. Therefore, one can obtain a strong demand cross elasticity for A in relation to the price of B and a weak demand elasticity for B relating to A. In these conditions, should the competition authorities try to evaluate the potential (profitable) increase of A, then the relevant market shall be defined as comprising that product only, whereas should the competition authorities consider the increase price potential for B, they would define the relevant market as including A and B. Moreover, cross price-elasticity is rarely constant and depends on the level of the goods considered”.

(…)

The application of the [SSNIP] test poses in acute terms the issue of availability of data, since it requires to estimate not only the functions of demand but also the functions of supply and cost of the undertakings concerned.

Finally, the use of this test presents a particular difficulty, known under the name of “cellophane fallacy” as it was perceived for the first time in the delineation of the relevant market in the case that opposed Du Pont de Nemours to the American Department of Justice. Indeed, whenever an undertaking has market power, it tends to set a very high price, which is above the competitive price, just above the level beyond which other products that are not real substitutes would become so for the consumers. The assessment of the effects of a 5 to 10% increase results in a significant demand shift. Thus, an important cross elasticity, which indicates the existence of substitutes to the price prevailing on the market at the moment of the enquiry, may only be the result of the implementation of a market power. In other terms, applying the SSNIP test from a price which is already supra competitive leads to artificially enlarging the market and at underestimating the real market power of the undertaking”.

(iii) The limited value of economic analysis provided by the parties

384. The economic value of economic analysis submitted by the parties to assess the existence of a particular market is not mentioned as such in regulatory instruments but is referred to in its 1999 Report, when commenting on the 99-D-85 decision. In this respect, the Council noted that the data shown in that particular case was not convincing and presented methodological inaccuracies, as it aimed at measuring cross-elasticities that were not relevant for the case at stake. This approach is, again, similar to the one expressed by the EU Commission, and shows that economic data provided by the parties should be treated cautiously.

385. It may be noted that this analysis applied particularly to an infringement procedure; however, and considering the new powers devoted to the Council as far as concentrations are concerned, it may be expected that it will also apply to other types of procedures, and particularly to concentrations.

2.1.3. Different approaches according to the type of procedure

386. The former content of the French competition legislation, prior to the 2001 Act, makes a comparison between the approaches of the French competition authorities and market definitions in concentration cases or infringement cases rather difficult. We will therefore examine the reasons why few merger cases were actually examined by the Council (2.1.3.1), before trying to nevertheless draw a comparison of approaches between these two types of procedures (2.1.3.2).

2.1.3.1. Presentation of the legal regime for the appraisal of concentrations: the difficulty to find a string of merger cases

(i) The legal regime prior to the 2001 modification

387. Prior to the 2001 Act, article 38 of the 1986 Ordinance provided for an optional review of “any concentration which is liable to restrict competition, in particular by the creation or strengthening of a dominant position”. However, the concentration had to meet two conditions: (i) a market share threshold, which was met if the undertakings in question had “collectively more than 25% of the sales, purchases or other transactions on a national market for substitutable property, products or services or on a substantial part of such market”, and (ii) a turnover threshold, requiring a total turnover of more than 7 billion francs, provided that at least two of the party undertakings to the concentration had a turnover of 2 billion francs (article 38 § 2 of the Ordinance).
388. The difficulty of assessing the differences or similarities between the two review types therefore arises from the optional nature of the notification. This nature was accentuated even further by the fact that one of the thresholds was expressed in terms of market shares, which, in cases of hesitations about the possible market definition, provided for a possible ground for opting-out from the notification.

389. Furthermore, under that regime, the notification was made to the Minister of the Economy and not to the Competition Council. The Minister then had the option to refer the matter to the Competition Council for its opinion. The Council therefore could not take the initiative to review a concentration.

In cases of referral, article 44 of the Ordinance established that the power of the Council was to issue a reasoned opinion, which was to be subsequently published with the ministerial decision. The opinion of the Council expressed whether it considered that the operation at stake should or should not be approved and, as the case may be, the measures that should be taken.

In any case, the final decision was entirely under the discretion of the Minister of Economy, after having received the Council’s opinion. Even though the Council’s opinion was merely advisory, its publication gave it a certain legal importance, and in practice, it tended to strongly influence the Minister.

390. Aside from the legal part, practice also tended to reduce the number of concentrations actually appraised thoroughly from a competition law point of view. Practice indeed showed that the economic administration had the tendency to set up arrangements with the undertakings, so as to remove the competition concerns from the operation at stake.

391. The somehow rather secondary role played by the Council in concentration assessment, together with the optional nature of the notification, lead to the result that relatively few concentrations were actually assessed by the Council, particularly when compared to the number of concentrations appraised at the EU level.\(^{328}\)


(ii) The new regime further to the 2001 modification

392. Pursuant to article L. 430-2 and 3 of the French commercial code, concentrations now must be notified to the Minister of the Economy, provided, however, they meet the following thresholds: (i) the combined aggregate worldwide turnover of all the undertakings concerned exceeds € 150 million and (ii) the aggregate France-wide turnover of each of the undertakings concerned is more than € 15 million and (iii) the operation does not fall within the scope of the European Merger Control Regulation.
Upon receipt of the notification, the Minister transmits it to the Competition Council. The new legal regime provides that the Council shall be formally consulted by the Minister if the latter considers that the operation is likely to hinder competition, particularly by the creation or strengthening of a dominant position or by the creation of a purchasing power likely to place providers in a position of so-called “economic dependency”.

In cases of formal consultation, the Competition Council issues an opinion, which, in the same way as what was provided before the modification, remains advisory and therefore does not bind the Minister. However, the opinion of the Council is transmitted to the parties of the operation, who may then propose undertakings likely to remove the competition concerns that may have been identified by the Council, as the case may be.

This new regime became effective and started running when the implementing decree of 30 April 2002 came into force. At the present stage therefore it is too early to precisely identify the actual consequences that it will have upon the appraisal of concentrations.

Nevertheless, it may already be noted that this new regime substantially modified the previous one, particularly as it made notification compulsory. However, even though the procedure for consultation of the Council is now set in clearer terms and will probably lead to a greater involvement of the Council in the appraisal of mergers, this involvement is still not automatic. Therefore, from a strict market definition point of view, it will probably remain rather delicate to identify the line followed by the Council in merger cases and to distinguish it from the one upheld in infringement cases.

2.1.3.2. The approach held by the Council in merger cases as opposed to infringement cases

Our analysis of the approaches followed by the Council in the market definition process for infringement cases when compared to concentration ones, tends to show a global consistency in the two approaches, though a few striking differences in the criteria examined as well as in the methodology followed should be underlined.

(i) The global consistency of the two approaches

The first striking point when comparing the merger and infringement cases approach to market definitions is the overall consistency between them. Indeed, in both cases, the Council takes into account the factors identified above to reach an appropriate market definition. Furthermore, as stated by the Council in its 1999 Report, the competition appraisal of the operation requires that the behavioural modifications likely to be entailed by such operation be
taken into account; the Council thus constantly keeps in mind the interaction between the two sets of procedures 329.

396. The Council also makes cross-references in its decisions to former decisions rendered in similar or analogous sectors. However, contrary to what happens at the EU level, this cross-reference appears more in merger cases in which the Council refers to infringement ones, rather than the other way around. This may simply be the case due to the imbalance in the number of cases rendered under each of these procedures: as there are “more” infringement cases, it is more logical that they provide for guidelines and inspiration.

397. However, beyond that global trait, a number of differences appear.

(ii) A difference in the importance given to some criteria?

398. The first difference between the two sets of procedures comes from the use in concentration cases of criteria that are barely or at least rarely used in infringement cases. In this respect, it should first be noted that the Council does refer to the supply structure in the concentration cases, whereas, as mentioned above, it considers such criteria of “secondary” use in cases of infringements.

399. It is not clear, however, whether the Council followed that path because, in these precise cases, the examination of the demand structure did not lead to a market definition or whether, more fundamentally, the appraisals of the effects of a concentration require the examination of the modifications in the supply structure. The reading of the 2001 Report tends to support the former, since the Council expressly noted the inappropriateness of the demand-side substitutability in the construction sector for the purpose of market definition 330. Our analysis therefore concludes that the frequent mentions of the supply structure in concentration decisions are made in the later context of the competitive assessment of the operation, i.e., in order to determine whether the change in the market structure resulting from the concentration is likely to substantially hinder competition.

400. A second trait of the merger cases is that the Council does make quite a few references to barriers to entry 331 on the market and neighbouring markets. For instance, in the Havas/Vivendi concentration 332, the Council thoroughly

329 See for instance opinion n° 01-A-03, BASF/Takeda, where the Council noted that, in the particular sector at stake, it had already in the past examined recurrent issues of agreements between the main operators and thus considered that the operation at stake, which reinforced the oligopolistic structure of the market, also reinforced the risks of collusion. See also opinion n° 01-A-08, GTM/Vincy, where the Council noted that the operation was likely to increase the lack of transparency of the market and favour collusive behaviours.

330 2001 Report, chapter VIII, § 2.1. and 2.1.2.

331 Opinion 01-A-02, Proma/Leitner, in the ski-lifts sector or opinion n° 01-A-08, GTM/Vincy.

analysed the horizontal and vertical effects of the operation, thereby analysing the upstream and downstream markets.

However, again, it appears that this kind of analysis is related not so much to the market definition (though it necessarily entails a form of market definition) but to the effects of the operation, i.e., its competitive assessment. Taking into account this type of criteria also pertains to the very logic of the appraisal of concentrations, which is an *ex ante* approach that must consider likely evolutions of the market. However, it results from our analysis that these likely evolutions are appraised at the stage of the competition assessment and not so much at the market definition level.

**(iii) A difference in the accurateness of market definition**

401. Actually, the most striking difference between concentration and infringement cases in the market definition process relies on the accurateness of the market definition upheld, depending on the procedure.

402. In both procedures, the starting point in French competition law is the existence of “production, distribution and service activities”, as stated under Article Art. L. 410-1 of the French commercial code333. The first starting point for French competition law (and therefore for any subsequent market definition in that perspective) relates to the identification of an “economic” activity, as opposed to a non-economic one. Without going into much detail, it can be pointed out that this distinction may be considered as “utterly French”, since two sets of legislations and corresponding courts (namely common law and administrative) co-exist334. This step is systematically carried out in both infringement and concentration procedures, although the problem is actually more often raised in the former.

403. Once this preliminary stage has been passed, the Council begins to examine the sector at stake. Taking into account an economic sector before delineating, in a second stage, the boundaries of a given market seems to be a characteristic of the French approach to market definition. This is where infringement and concentration procedures differ substantially.

404. Indeed, in infringement procedures, the “standard” outline of a Council decision is (i) to thoroughly proceed to the description of the sector, then (ii) identify the alleged infringements and, finally, (iii) examine the legal qualifications thereof and their impact on the market.

The Council reckons in this respect that it uses a progressive approach, consisting of delineating and gradually adjusting the market definitions335.

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333 Which sets the scope of application of French competition law.
334 The requirement of an economic activity for the purposes of market definition will be further developed in section 4 below. It is nevertheless interesting to note that at that stage this prerequisite is not formulated as explicitly in EU law.
335 See particularly in the 1999 Report, the reference to the 1999-D-14 decision concerning *Telediffusion de France*, where the Council stated that, “as regards the broadcasting of
This analysis may take the form of a definition of “families” of products\(^{336}\), before defining the proper market at stake. Finally, that gradual procedure is based on the various pieces of evidence that are gathered during the procedure, in cases of infringements; in cases of conflicting evidence, the Council shall combine the various elements at its disposal\(^{337}\).

Therefore, most of the time the actual market analysis falls within that later stage (phase (iii) identified above). There is thus often a “gap” between the analysis of the sector and of the market, which frequently lacks precision.

405. On the other hand, concentration procedures imply an actual definition, not only of the sector but also of the market. This was particularly the case as the notifiable character of the operation was also triggered by a market share threshold. The exact definition of the market was thus necessary to verify that the operation actually fell within the scope of the Ordinance and within the jurisdiction of the Minister and, as the case may be, the Council.

406. This necessary precision in market definition also represents a significant difference from the European Commission’s approach in its concentration decisions. Indeed, the Council simply does not have the option to identify a series of potential markets on which a dominant position may be held, without actually upholding a precise definition. It is true that it may do so at the later stage of the competition appraisal (e.g., to state that the operation could have an impact on a possible market, the definition of which would be left open). However, that possibility still requires that beforehand, the market on which the parties operate and on which they had a 25% market share (legal threshold), has been identified.

A possible evolution of that line of analysis is nevertheless possible, since the existence of a market share threshold has now been removed from the French regulation on the appraisal of concentrations.

2.2. Comparison with the criteria upheld in regulatory sector focused legislation.

407. The present section aims at outlining the criteria upheld for market definition in the sector focused legislation, by looking at the media sector rules (2.2.1) and then the telecommunications ones (2.2.2). No such thing as a global electronic communications framework exist in France.

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\(^{336}\)See in this respect decision n°99-D-32, which concerned the definition of stationary products.

\(^{337}\)See also decision n°99-D-45, though concerning Barbie dolls, where the Council considered that the demand cross-elasticity test produced by one party should be taken into account, though not in a exclusive fashion, considering that other pieces of elements were also at the disposal of the Council. See also decision n° 00-D-67, concerning the advertising sector in the media.
2.2.1. Market definitions in media focused legislation

2.2.1.1. Texts and Regulatory Authority

408. For the purpose of the present analysis, the texts regulating the media sector that we examined were the following:


The Code of the cinematographical industry

Press: The Act of 29 July 1881, as amended (the "1881 Act")

Article D 18 of the Code of Posts and Telecommunications (CPT)

The Act n°86-897 of 1st August 1986

General: Act n° 78-17 of 6 January 1978 on informatics, files and freedom.

409. The Regulatory Authority that is active in the media sector in France is the Audiovisual Council (the “Conseil supérieur de l’audiovisuel” or “CSA”), which is in charge of regulating the media sector.

The CSA is an independent administrative authority that was created by the Act of 17 January 1989338 to guarantee broadcasting freedom in the conditions laid down by the modified 1986 Act. The essential tasks of the CSA are as follows: nomination of the Presidents of state-owned radio and television stations, issuance of broadcasting licences to AM and FM radio and private television companies, deliverance of opinions on government bills339 on broadcasting, management of the frequencies for radio and television and review of the quality of programmes, monitoring compliance with advertising rules, and monitoring production and broadcasting obligations. It also has

338 Before the CSA, the audiovisual sector was successfully run by the Haute Autorité de la communication Audiovisuelle and the CNLC.

339 For example, on draft audiovisual legislation and international negotiations (article 9 of the 1986 Act); setting rules applicable to radio and cable or satellite TV’s (article 33 of the 1986 Act); adoption of obligations relating to radio, TV advertising, film and audiovisual productions broadcasting, financial contribution of broadcaster to production and independence of producers vis-à-vis broadcasters (article 27 of the 1986 Act); obligations of public radio and TV broadcasters (article 48 of the 1986 Act); setting of technical specifications applicable to cable networks and to over-the-air and satellite TV signals (article 12 of the 1986 Act). A more detailed presentation of the Competition Council is set in Annex II.6.
authority over radio and television services broadcasted by satellite and/or distributed by cable.\(^{340}\)

410. The CSA is also generally in charge of supporting free competition and non-discriminatory relationships between operators.\(^{341}\) The means, however, of the CSA to exercise such powers remain unclear, except for the situation in which the 1986 Act expressly describes its powers.\(^{342}\)

411. As far as competition is concerned, its most important function is to be consulted by the Competition Council on anti-competitive practices and mergers on the media market. In that respect, it should be noted that before the modification of the 1986 Act by the law of 1 August 2000, the CSA had exclusive jurisdiction to examine merger issues in the media sector,\(^{343}\) even though the Competition Council had retained some jurisdiction for certain merger operations between companies operating audiovisual communications. Such was the case when the operation required the analysis of markets that were upstream, downstream or related to the market of audiovisual communications \textit{stricto sensu}, (e.g. the market of TV and radio advertising or the market of broadcasting rights).\(^{344}\)

The law of 1 August 2000 Act, which amended the 1986 Act, put an end to the exclusion of the Competition Council’s jurisdiction for mergers in the media sector and, as noted above, the CSA only has a consultative function for the Competition Council. The CSA remains in charge of monitoring ownership aggregation limits and cross media ownership restrictions.

412. It is very difficult, however, if not impossible, to have detailed information about the CSA’s in-depth analysis of competition issues: its opinions are confidential (as belonging to the procedure pursued by the Competition Council), and very few cases have been submitted to its review. Nevertheless, some (cursive) comments about the opinions given can be found in the CSA’s annual report. For instance, the CSA’s 2000 annual report mentions the opinion given on the merger between Canal+/Vivendi/Seagram, with special focus on the conditions to be respected by Canal +, as a pay TV, to preserve its independence vis-à-vis Seagram and Vivendi.

The lack of publication of these opinions explains why the present report nearly exclusively focuses on media market definition from a competition law analysis, as any comparison with the NRA’s approach is hardly feasible.

\(^{340}\) A more detailed presentation of the French audiovisual Council is set in Annex II.8.

\(^{341}\) Article 1 of the 1986 Act.

\(^{342}\) \textit{e.g} : article 17 of the 1986 Act provided that the CSA may address recommendations to the Government in view of developing the competition in the media industry.

\(^{343}\) Articles 38 to 41 of the 1986 Act, as amended by the Act no\(^{89-25}\) of 17 January 1989


\(^{345}\) Article 41-4 of the 1986 Act
2.2.1.2. Market definitions

413. In the media sector, we carried out our analysis by distinguishing among the different sectors of media activities, which correspond to different sets of rules, namely broadcasting (i), cinema (ii), radio and music (iii), press/publishing (iv) and media and cross media ownership rules (v).

(i) Broadcasting

414. In terms of broadcasting, three types of distinctions may be made, depending on the product or service at stake, whether an undertaking acts as a distributor or editor of broadcasting products or services, and lastly the category of the broadcaster at stake.

Broadcasting products or services

415. As for the product or service that is the object of the broadcast, the 1986 Act defines on the one hand, the audiovisual productions and audiovisual works and, on the other hand, the cinematographic one. Each of these two categories benefit from specific funding obligations provisions, as well as from broadcasting obligations that are imposed on broadcasters (such as quotas for independent production and French speaking audiovisual works). Analogous provisions are found in most Member States and therefore do not represent as such, a particularly distinctive criterion of the French legal system. Yet, the way such obligations have been applied in France is distinctive. In effect, whereas production and broadcasting conditions are imposed on all broadcasters, the latter are subject to different requirements depending on whether the channels are free to air or Pay TV, broadcast over the air in analogue or digital mode, or by cable or satellite.

416. Nevertheless, and even though these production categories are not apprehended from a market definition point of view, the differences between their respective regimes may be an element which concludes the existence of different product markets.

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346 Article 27, 33, 70 of the 1986 Act.
347 Decree n°90.66 of 17 January 1990 “fixant les principes généraux concernant la diffusion des oeuvres cinématographiques et audiovisuelles par les éditeurs de services de télévision”
348 On the subject, please refer to the study on the provisions existing in the member States on behalf of the European Commission carried out in May 2001 by the European Institute for the Media.
349 Decree of 2001-609 of 9 July 2001 “relatif à la contribution des éditeurs de service de télévision diffuses en mode analogique au développement de la production d’œuvres cinématographiques et audiovisuelles”
350 Decree n°2001-1332 of 28 December 2001 “fixant la contribution des éditeurs de services de télévision diffusés en mode analogique dont le financement fait appel à la rémunération des usagers au développement de la production d’œuvres cinématographiques et audiovisuelles”
352 Decree n°2001-1333 “fixant les principes généraux concernant la diffusion des services par voie hertzienne terrestre en mode numérique”
353 Decree n°2002-140 of 4 February 2002 “fixant le régime applicable aux différentes catégories de service de radio et de télévision distribués par câble ou par satellite.”
417. One the main features of the modification of the 1986 Act was to insert a new definition of "distributor of services"\(^\text{354}\), which is distinguished from the "editor" of the channel, i.e. the broadcaster.\(^\text{355}\) Article 2.1 of the 1986 Act, as amended, defines the distributor as the person "entering into contractual relationships with content editors [the “broadcaster”] in order to set up an offer for audiovisual communication services, put at the disposal of the public by over the air transmission, by cable or by satellite". Therefore, the legislation includes all broadcasters in one and the same definition regardless of the medium used by such distributor to carry the channels, whereas a distributor may be subject to different regulations and authorisation procedures: cable network operators must be authorised by the CSA (Article 34 of the 1986 Act\(^\text{356}\)), whereas digital\(^\text{357}\) or satellite\(^\text{358}\) television distributors are merely required to declare their operations to the CSA for carrying out their activities (the CSA may only prevent them from pursuing their business if they are in breach of the 1986 Act provisions). Such distinction between distributors has been declared constitutional\(^\text{359}\).

The review of the discussions held in Parliament on the differences of treatment between distributors shows that the differences of status and additional constraints on cable operators are justified by the fact that they are in a monopoly situation in their geographical market, whereas the offer (and therefore competition) is available in satellite distribution. However, the rationale behind such additional constraints is to defend pluralism among the broadcasters rather than competition \textit{per se}.

418. With particular respect to terrestrial digital television (called in French “Télévision Numérique Terrestre” or “TNT”), at the request of the Ministry of Economy, the French Competition Council launched a public consultation on the economic conditions that the distribution of digital terrestrial TV should respect in order to ensure transparency and fair competition.

419. For the moment, different options remain open to ensure the distribution of digital terrestrial TV: a unique distributor, a common distributor or several distributors. The Competition Council nevertheless highlights that in any case, fair competition conditions should be ensured to the benefit of the consumers. The solution adopted should also enable the different actors to benefit from a fair portion of the profit in order to ensure their economic viability. In this context, whatever solution is adopted, the Competition Council suggests in particular to make a clear distinction between

\(^{354}\) In French, the “distributeur de services”.

\(^{355}\) In French “éditeurs”

\(^{356}\) And implementing decree of n°92-881 of 1st September 1992 "concernant l’autorisation d’exploitation des réseaux distribuant des services de télévision ou de radio par câble”;

\(^{357}\) Article 32.2 II of the 1986 Act

\(^{358}\) Article 34-2 of the 1986 Act

distributors and editors. If, for instance, a distributor and an editor belong to the same group, legal, commercial and financial separation should be compulsory.

420. In any event, the Competition Council considers that an in-depth competition law based analysis is required before the distribution of digital terrestrial TV is established. In this respect, the relevant market to analyse such distribution seems to correspond with the market for the cable or satellite distribution of pay-TV. The substitutability between these two markets results from the fact that they have similar characteristics: obligation for the consumer to pay for the service, supply of numerous TV programmes, need for decoders, importance of developing the public’s loyalty.

The limited selection of the programmes offered by digital terrestrial TV can be regarded as an incentive for cable or satellite subscribers, since opinions tend to show that the profusion of programmes is perceived rather negatively by consumers. For those consumers still hesitating about subscribing to pay-TV, digital terrestrial TV is attractive as it offers a restricted number of programmes at a less expensive price. Finally, access to the free programmes broadcast through digital terrestrial TV can further drive people, who are not cable or satellite subscribers to pay-TV, to subscribe to be provided with the remaining paying programmes. The Competition Council currently sees no evidence for distinguishing the market for digital terrestrial and for pay-TV by cable or satellite.

421. Regarding distribution of TV on the Internet, it is worth noting that broadcasting over the Internet is excluded. In any event, from our point of view and as results from the definitions of the Competition Council’s analysis (see below, section 2.3.1), this definition does not provide for a description of any supply-side substitutability, since, as a matter of fact, all Distributors are not included as belonging to one and the same market.

Categories of broadcasters

422. With respect to the categories of broadcasters, it should be noted that the legal regime for authorisations provides for different treatments depending on the whether the mode of broadcasting (satellite, cable, over the air) is free or paying, or public or private, with combinations of these criteria to create special authorisations. Even though these categories of broadcasters are not apprehended from a market definition point of view, the differences between their respective regimes may be an element to conclude the existence of a different market. In effect, the Competition Council seems to rely heavily on these different regimes for authorisations as defined by the 1986 Act, i.e. on the regulatory definition of parties involved in the media industry when defining the relevant markets in the media sector. Without entering into too much detail, the different categories of broadcasters are detailed hereafter.

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360 Report of Jérôme Gallot, Director Général of the Direction for Competition, Consumption and Frauds’ Repression, February 2002
• Public vs Private broadcasters (analogue and digital)

423. Public broadcasters are subject to specific rules 361. In this respect Article 1 of the 1986 Act provides that the CSA ensures the independence and impartiality of “the public sector of radio and broadcasting”. The access priority to terrestrial over-the-air resources of public companies over private ones is derived from their public service function. For the same reasons, public broadcasters should provide the public with a set of programmes and services that are characterised by their pluralism, quality and innovation, as well as their respect of individual rights and democratic principles 362. These obligations apply to both analogue and digital TV. This may be one element used for determining whether, at least as far as the public broadcasting sector is concerned, analogue and digital TV pertain to the same product market.

• Over the air vs Cable and satellite

424. With respect to over the air broadcasting (whether analogue or digital, national or local), the CSA grants broadcasting authorisation at the end of a bidding procedure based upon criteria set forth in the 1986 Act 363, which all candidates must satisfy before being granted broadcasting authorisation for 10 years, which may be renewed (as the case may be) with or without a bidding procedure for a period of 5 years.

In comparison with terrestrial over-the-air channels, cable and satellite channels are only required to sign conventions with the CSA which establish the rules that are applicable to their particular service. These rules apply in particular to advertising, sponsorship, and the production and broadcasting of film and television productions. In consideration of the fact that no frequencies are granted, there is no limited number of cable or satellites, as opposed to the air channels whose numbers are limited by available frequencies.

• Pay TV vs Free TV

425. The 1986 Act provides for specific obligations for Pay TVs that are subject to different productions and broadcasting obligations 364, as well obligations regarding the exploitation of their conditional access systems 365. Digital Pay TVs are also excluded from the must carry obligation imposed on cable operators 366 and which apply to all free-to-air analogue and digital channels received within the area where the cable operator operates.

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361 E.g no shareholding ownership restriction, more limited airtime for advertising.
363 Such criteria and procedure only apply for private broadcasters.
364 Decree n°2001-1332 of 28 December 2001 "fixant la contribution des éditeurs de services de télévision diffusés en mode analogique dont le financement fait appel à la rémunération des usagers au développement de la production d’œuvres cinématographiques et audiovisuelles”
365 Article 30-3 of the 1986 Act
366 Article 34.11.1 of the 1986 Act and implementing decree n°92-881 of 1st September 1992 "concernant l’autorisation d’exploitation des réseaux distribuant des services de télévision ou de radio par câble".
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• National TV vs Local TV

426. The 1986 Act authorises the CSA to organise different bidding procedures for the granting of national or local authorisation to broadcast, thus acknowledging the existence of the two categories of broadcaster. Such distinction is also made very clear with respect to media ownership restrictions (see below).

• Thematic vs Generalist TV

427. As far as the content of the channels is concerned, the 1986 Act and its implementing decrees make a distinction between teleshopping channels, autopromotion channels367 and movie channels368. Movie channels are subject to specific rules regarding advertising and broadcasting quotas for cinematographic works.

Conditional Access System (CAS)

428. The 1986 Act implements the EU Directive on TV Standards369, as far as conditional access systems (CAS) are concerned370. Article 95 of the 1986 Act requires, inter alia, that operators of conditional access systems who produce and market access service television services should grant licences to all broadcasters, distributors, or operators on a fair, reasonable and non-discriminatory basis.

429. The new provisions371 aim at respecting the different technologies set up by manufacturers, while also ensuring that they do not foreclose access to the market. However, these provisions do not provide for a market definition, either from a technological point of view (sector focus) or from supply/demand competition rules.

This type of consideration may be considered as typically competition-law oriented, as it aims at reducing barriers to entry as well as creating secondary markets, whose access would be limited because of technological reasons. In this respect, the new legislation provides that the owners of CAS should allow

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367 Decree n°92-280 of 27 March 1992 "fixant les principes généraux définissant les obligations des éditeurs en matière de publicité, de parrainage et de téléachat".
368 Decree n°90-66 of 17 January 1990 "fixant les principes généraux concernant la diffusion des œuvres cinématographiques et audiovisuelles par les éditeurs de services de télévision". This decree further distinguished the various types of movie channel such as pay per view channels, classic movies, or movies in first exclusivity.
370 CAS are defined in the new article 95-1 as “any technical device that enables, whatever the communication means employed, to restrict access to whole or part of one or several television or radio services that are transmitted by means of digital signals to the only public that is authorised to receive them.” Therefore decoders, application programmes interfaces and other electronic programmes guides are included.
371 New article 95 of the 1986 Act.
access thereto, under fair, reasonable and non-discriminatory conditions. Such conditions seem largely inspired by the French regime for restrictive practices, if not from competition law itself.

(ii) Cinema

430. Article 14 of the cinematographic industry Code mentions the existence of undertakings exercising their activity “in one of the branches of the cinematographic industry” (production, distribution). Specific rules also apply to the exploitation of cinema theatres, in particular regarding the possibility to create large theatres within a specific geographic perimeter and then its impact on the other theatres in the area at stake.

(iii) Radio and Music

431. Radio broadcasters are included in the French legal system within the general definition of broadcasters. The key feature distinguishing radio transmission from other forms of transmission is therefore the existence of an offer to the public. Radio activities are listed in the national statistics institute (the “INSEE”), which in this respect includes the diffusion and production of radio programmes.

432. Distinctions may be made between radios, from a strictly regulatory point of view, because of the variety of authorisations and regimes that apply to different radios. As for televisions, the CSA differentiates private and public companies, which must comply with different sets of rules for the allocation of frequencies. Briefly, the allocation of frequencies for the broadcasting of programmes on public radio (Radio France, RFI, RFO) is exclusively decided by the CSA, whereas private radios have to participate in bidding procedures in order to be allocated frequencies. Public companies’ access priority to terrestrial over-the-air resources over private companies derives from their public service function. Private radio stations must also enter into a convention with the CSA, which establishes certain obligations that are related to the quality of their programmes. Temporary radios are also granted licences, but independently of the bidding procedure.

433. In order to maintain the diversity and balance between private radio broadcasting in each region, in compliance with article 29 of the 1986 Act the CSA has identified categories of private FM radio stations when allocating frequencies.

372 This article refers to the authorisation regime necessary for such undertakings to exercise their activity.
373 The law n°73-1193 of 27 December 1973 (as amended by the Act of 5 July 1986) and the Decree n°83-13 of 10 January 1983.
Five categories are thus defined based on the geographic impact and the type of programmes broadcast:

1. non-commercial stations (category A);
2. commercial, local or regional stations that do not broadcast any nationally identified programmes (category B);
3. commercial, local or regional programmes that broadcast programmes from a specialist network nationally (category C);
4. specialist commercial stations that broadcast nationally (category D);
5. general commercial stations (category E).

As far as music regulation is concerned, most of sector focus regulation is to be found in the Intellectual Property Code who defined and set forth the rules applicable to producer and authors of music. Such rules are however not media oriented. But it is worth noting that pursuant to article 28-2 of the 1986 Act, all radios are subject to quotas for broadcasting French music (40% of air time dedicated to music) and new French artists (50% of the 40% quota). Such quotas may be modified (upward or downward) to be adapted to the specific format of the radio in question. The broadcasting regulation tends to identify two categories of music which in turn could potentially create a classification used for market definition purpose.

There are not any similar categories for private national, regional or local television stations broadcast through terrestrial over-the-air resources. Practice shows that some commercial operators rely on these categories to apply different regimes (e.g. pricing conditions, advertising conditions, rights) to radio stations. As will be seen below\(^{374}\), competition authorities also rely on administrative regulatory definitions for the purpose of competition law based market identification.

\[(iv)\] \textit{Press and publishing}

434. As far as the press is concerned, the 1881 Act recalls that any form of impression is free\(^{375}\), and that the Act at stake applies to “\textit{any newspaper or periodic writing}”\(^{376}\). It seems therefore that the same path as the one observed in EU legislation is applied here, namely the definition of a field of activity that would be regulated in its entirety by a set of rules.

435. Cross media ownership rules (described below), however, makes a distinction between national and local day newspapers, in order to protect

\(^{374}\) Paragraphs under section 2.3.2, case law on radio.
\(^{375}\) Article 1 “\textit{l'imprimerie et la librairie sont libres}”.
\(^{376}\) Article 5.
pluralism at the national and local levels. Such protection only applies to daily newspapers of general information.

436. With respect to publishing, the Act of 10 August 1981\textsuperscript{377} sets up a mandatory fixed price regulation which is applicable to the sale of books in France. This act was enacted as a means to protect independent and medium bookshops or small unit retail shops from the fierce price competition imposed by the major cultural products distributors of other supermarkets. In consideration of the peculiarity of the book market (\textit{e.g} large number of book references and low substitutability of each of the products), it was considered that all the different means of distribution had to be protected so as to ensure that all types of books and literature would be available, nationwide, to the general public.

Hence, pursuant to Article 1 of the Act of 10 August 1981, any publisher must fix a price for the sale of all books published under its control to the public. Such price may be determined at its sole discretion but it must be a single one. This price must be applied by all distributors, subject only to a possible 5\% discount.

437. From a market definition point of view, the act of 10 August 1981 does not provide a definition of the term "book", and therefore does not make any distinction between the different types of books\textsuperscript{378}. The only definition available is provided by a tax provision\textsuperscript{379}, which states that a book is a printed document, illustrated or not, whose purpose is to reproduce an author's work, in view of widening culture and education.

438. With respect to distribution, the regulation makes a distinction between traditional commercial distribution (to which the fixed price obligation applies) and the undertaking that carries distant sales or sales through subscriptions (such as book club sales)\textsuperscript{380} which may set their own prices for the books sold, provided that such sale only occurs 9 months after the first date of publication of the book. Such distinction was also recognised by the French competition council (see below, section 2.3.3) when appraising the book distribution market.

\textsuperscript{377} Act n°81-766 of 10 August 1981
\textsuperscript{378} Books of highly specialised interest or of general interest, softcover or paperback etc...
\textsuperscript{379} Documentation administrative 3C 215 of 31\textsuperscript{st} August 1994 to interpret article 278,6 and article 279 g of the General Tax code for the application of a reduced VAT rate on certain products
\textsuperscript{380} Article 4 of the Act of 10 August 1981
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(v) Media ownership rules

439. Media ownership rules are contained in articles 38 to 42-15 of the 1986 Act, which provides for anti-merger rules to be monitored by the CSA; the primary objective of these rules is protecting the freedoms of speech and pluralism.

Media ownership aggregation limits

440. TV: Article 39 of the 1986 Act prohibits the holding of more than 49% of the capital or voting rights of an over-the-air terrestrial channel that holds more than 2.5% of the national market share (analogue, digital, over-the-air, cable and satellite). A shareholder controlling one terrestrial (analogue) national channel may not hold more than 15% share capital of a second national channel and 5% of a third channel. As far as the digital channels are concerned, Article 41 §3 allows the detaining of up to 5 licences for national channels.

441. Concerning the ownership of channels, articles 41 to 41-2 § 2 of the 1986 provide for the following bans:

- National Level: (i) Ban on controlling more than one terrestrial analogue channel and (ii) ban on controlling more than 5 terrestrial digital channels.
- Local Level: (i) Ban on controlling more than two terrestrial analogue/digital regional channels in the same region and (ii) ban on controlling more than one terrestrial analogue/digital regional channel [in a particular region] if the population in that region exceeds 6 million.

- Concerning the ownership of radios, pursuant to Article 41 § 1 of the 1986 Act, a single undertaking may not control one or more radio stations or a network of radio stations, if population coverage of such station(s) exceeds 150 million.

- Lastly, concerning the ownership of press, the French provisions 381 prohibit the direct or indirect detention of daily general and political papers, the total of which amounts to 30% of publications of the same kind on the French territory.

Cross media ownership restrictions

442. Concerning analogue broadcasting, Article 41-1 of the 1986 Act aims at ensuring that in differing media sectors, an individual or body must satisfy not more than two of the following criteria:

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381 Act n°86-897 of 1 August 1986 and Act n° 86-1210 of 27 November 1986.
- National Level: (i) Owning one or more terrestrial TV channels in an area which has more than 4 million inhabitants, (ii) owning one or more radio stations with area coverage in excess of 30 million inhabitants, (iii) holding an authorisation to operate a cable network for an area which has more than 6 million inhabitants, and (iv) editing or controlling daily newspapers representing more than 20% of national circulation.

- Local Level: (i) owning a national terrestrial TV licence or local channel licence for the relevant area, (ii) owning one or more (local or regional) radio stations with an audience in excess of 10% of the cumulative audience in that area, (iii) holding an authorisation to operate a cable network in the area in question, and (iv) having editorial or other control of daily newspapers in the relevant area.

It appears from the above that the French anti-concentration rules in the media sector do tend to identify precise categories of media operators (depending on the medium, the geographic coverage and the importance of the operator), which in turn tends to create classifications that may be used for market definition purposes.

2.2.2. Market definitions in telecommunications focused legislation

2.2.2.1. Texts and Regulatory Authority

For the purpose of the present analysis, the texts regulating the media sector we examined were the following:

Internet: Act n°2000-719 of 1 August 2000

Telecommunications: French CPT

To implement European directives, the French Act of 26 July 1996 opened up the telecommunications sector to full competition starting 1 January 1998. This Act thus provides for telecommunications activities to be carried out freely. Regulation involves the application, by the competent authority, of all legal, economic and technical arrangements that will allow for telecommunications activities to be exercised effectively. In France, the law has entrusted this mission to the minister responsible for telecommunications and an independent institution: the French Telecommunications Regulatory Authority (ART), created on 5 January 1997.382

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382 A more detailed presentation of the ART is set in Annex II.7.
2.2.2.2. Market definitions upheld

Our analysis revealed that few market definitions, if any, are to be found in the Acts and the other pieces of legislation we examined. In a similar situation to the one that has already been noted at the EU level, the French regulatory sector-focused system aims at regulating a particular industry or field of activity, and is not based on product/geographic and supply/demand dichotomies. Therefore, instead of looking for those competition law based criteria, we based our analysis on the most striking features and definitions contained in these pieces of legislation.

i. Communications / Telecommunications

Article 1 of the 1986 Act establishes the principle of freedom of “audiovisual communication”. Article 2 of the 1986 Act then defines audiovisual communication as “any putting at disposal to the public or to categories of public, by means of a telecommunication medium, of signs, signals, writings, images, sounds or messages of any kind that do not bear the character of a private correspondence”. This definition may be read in light of the telecommunications Act of 1996, defining “Telecommunications” as “any form of transmission or reception of signs, signals, text, image, sound or other information, by wire, optical fibre, radio or other electromagnetic means”. This definition is common to the 1986 Act and 1996 Telecommunications Act.

Therefore, the specificity of the audiovisual communication as opposed to the telecommunications communication, is derived from the persons to which the transmission is directed and not from the content of the transmission. Bank services as well as services that are internal to an organisation are excluded from audiovisual communication voicemail services.

(ii) Networks / services

The 1996 Telecommunications Act provides for a different set of rules for networks, on the one hand, and services on the other hand. Telecommunications network infrastructure is defined as “any form of installation or group of installations which ensure either the transmission or the transmission and routing of telecommunications signals and the associated exchange of the control and operational information, between network termination points”. Broadcasting and cable TV network infrastructure used for the provision of public telecommunications services shall be subject to the provisions of the CPT code that governs the operation of public networks, only insofar as it is used for the provision of telecommunications services.

Telecommunications services are defined as services “including the transmission or routing of signals or a combination of these functions using telecommunications processes. Entertainment tele-communications services
are not subject to this provision insomuch as they are governed by the Freedom of Communications Act n° 86-1067 of 30 September 1986”.

450. Therefore, the legal system makes a clear distinction between what are, on the one hand, telecommunication services and the corresponding infrastructure and broadcasting services, on the other hand. The possible identity between the two networks may not lead to the identity between the services carried over such networks. For the purpose of market definition, it may therefore be inferred from the above that broadcasting and telecommunication services are legally considered to belong to separate services markets, even though the networks may pertain to one and the same infrastructure market.

(iii) Market identification for the purpose of identifying operators with SMP

451. Articles L. 36-7 and 8 of the Telecommunications Act provide for the conditions under which an operator may be found to hold significant market power. By definition, such market power is held on a specific telecommunications market. However, our reading of the Act did not provide any guidance as to the means through which such market could be defined. Nevertheless, it results from the decisions published by the ART providing the list of markets and the list of operators with significant market power\(^383\), that the markets defined are purely “telecommunications markets”\(^384\) and not media related.

(iv) Internet

452. The new legislation of August 2000 provides for a special set of rules concerning the persons or undertakings whose activity is to provide access to on-line communication services other than private correspondence\(^385\).

453. No particular rules are to be found as regards the definition of markets within the Internet sector. In this respect, we did not find any information as to whether Internet may represent a way of lessening the impact of barriers to entry\(^386\), or whether, on the other hand, it is also highly competitive/difficult to enter a market (importance of trademarks, of IP rights etc) that is analogous to a certain extent to the ones existing in the “old economy”. It results, however, from case law that a distinction is made between infrastructure and services. This distinction will be examined further in detail in the subsequent part, relating to case law.

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\(^{383}\) See in particular decisions n°01-1206, 01-750 and 01-458 of the ART.

\(^{384}\) For instance, fixed telephony, mobile telephony, leased lines.

\(^{385}\) See particularly in this respect the new article 43-7 s of the 1986 Act, as amended.

\(^{386}\) Low cost for setting up an Internet site and rapidity through which services may be organised.
2.2.2.3. Respective impacts of sector specific regulation and competition law on one another

454. The very different nature and approaches of the market definitions in sector focused legislation and competition law makes an evaluation of their respective impact on one another rather difficult to establish.

455. It nevertheless appears that the Competition Council relies on sector focused legislation when such legislation provides for a specific regime on a group of operators, thereby distinguishing them from the others (e.g. public national broadcasters that do not have the same legal obligations as private ones\(^{387}\)). On the other hand, it does not seem that other features of sector legislation are taken into account by the Council in the market definition process.

456. As far as sector-focused legislation is concerned, the influence of competition law appears clearly in two aspects. First, competition law seems to have an effect on sector regulation in the types of obligations that can be imposed on operators. Indeed, the regulation seldom provides for non-discrimination and objectivity obligations, or transparency or cost-oriented tariffs. These types of obligations are the regulatory phrasing of competition law axioms, which are usually imposed on dominant undertakings. Sector focused legislation therefore seems to be in line with the evolutions of competition law.

457. It results from the above that in our point of view, sector-focused legislation and competition law do not have much impact on one another but rather are placed in complementary situations, with a strong awareness from the Regulatory and Competition Authorities of their respective tasks.

458. The co-existence of these three authorities does not actually seem to correspond either to a complex administrative burden or to contradictory positions. This harmony seems to result from the fact that these authorities belong to the same legal category\(^{388}\), which means that (i) their legal status is analogous, which facilitates cooperation and (ii) a part of their decisions – and particularly decisions relating to access rights – are subject to the same appeal judge (the Paris Court of Appeal), which certainly guarantees a form of consistency of the adopted solutions. This harmony also seems to result the legal consultations systems. Thus, NRA’s must submit the abuses of a dominant position or behaviours affecting competition that they may be aware of to the Competition Council. In the same way, the Competition Council transmits the complaints it receives that fall within their field of activity to the NRA’s.

459. Furthermore, the Council tends to refer explicitly to the findings of the other NRAs, particularly when cases are linked to the telecoms sector. In this respect, in landmark decisions, the French competition council endorsed the  

\(^{387}\) Opinion n°99-D-14 of 23 February 1999, TDF.  
\(^{388}\) The so-called Independent Administrative Authorities.
ART to define the relevant markets, in particular where technological definitions are critical such as DSL technology. For instance, when the DSL market was still emerging, the Competition Council followed step by step ART’s description of the technology in order to conclude that France Telecom domination in access to the local loop would allow to favour the choice of the DSL internet service offered by its subsidiary, Wanadoo\(^{389}\), as the competition authority had relied on ART’s opinion to conclude that France Telecom was dominant on the local loop, without liberalization of the market\(^{390}\).

Also, in 2000, the Competition Council defined a market of high-speed Internet services via the DSL technology, relying on the ART’s expertise\(^{391}\). This was still true in 2002 when the Competition Council ordered France Telecom to suspend the marketing of ADSL services offered by its subsidiary, Wanadoothrough its agencies: quoting the ART’s opinion, the competition council took into account the real danger of the emergence of the DSL market if France Telecom was not stopped in favouring its subsidiary\(^{392}\).

460. It results from the above that French NRA’s and the NCA do work in close cooperation, though the existence of actual mutual influence of competition law and sector legislation on one another is unclear. One may also wonder whether such an influence would not actually tend to blur the frontiers and jurisdictions of these authorities and, therefore, whether it is necessary. Mutual awareness and assistance may indeed prove more efficient.

2.3. Analysis of the market definitions resulting from French case law

2.3.1. Market definition in the broadcasting and TV sector

461. Our research led to the identification various cases as regards the TV broadcasting sector; most of these cases are listed and analysed in our grid of analysis\(^{393}\).

2.3.1.1. The general market for TV broadcasting

462. There is a general market for TV broadcasting\(^{394}\), which corresponds to a global viewer’s market, and which must then be segmented according to the distribution means as well as the financial sources. This finding is therefore very similar to the solution found at the EU level. It is, however, interesting to note that the Council based its approach on the fact that access to the market was regulated, thereby indirectly inferring its market definition from sector-focused legislation.

\(^{390}\) Decision n° 98-MC-03 of May 19, 1998.
\(^{391}\) Decision n°00-MC-01 of February, 18 2000.
\(^{392}\) Decision n°02-MC-03 of February, 27 2002
\(^{393}\) Annex II 1.
\(^{394}\) See opinion n°98-A-14 of the Competition Council of 31 August 1998, _Havas and Cie Générale des Eaux_.

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463. It should also be noted that the global viewer’s market might have more importance in light of the convergence of technologies. In this respect, the Council noted the strategic importance for a broadcaster to control the entire value chain\(^\text{395}\) in order to offer the subscriber a portfolio of services; the Council thereby forecasted the appearance of a new phase of agreements between telecom operators and content providers, for the provision of new services between audiovisual and telecom. However, one may wonder whether this type of consideration concerns the global viewer’s market or whether it should actually be confined to the Pay-TV sector.

2.3.1.2. The infrastructure market

464. In 1992\(^\text{396}\), the Council identified a market for the operation of TV-cable networks supplied to local communities. That finding, however, was not thoroughly developed. Later on, the Council elaborated on that notion, upholding the existence of a market for the installation and management of cable infrastructures, where the leasers (the public local entities or “collectivités publiques”) are in a dominant position and cable operators are demanders. That market was to be distinguished from the market for the rental of network capacity by cable operators, and included the provision of analogue or digital transmission means to companies and added value service providers.

The Council further stated that this distinction could be carried out regarding satellite, within which several such sub-markets could be identified. However, this possibility still seems unclear, particularly as regards the dominant position that would be held by the local entities.

465. It also appears that even the cable network could be considered as an essential facility\(^\text{397}\) for carrying video signals to each one of the network sites where the cable is installed. That finding surely relies on the regulatory provisions regarding the installation of cable on the French territory (the so-called “plan cable”), whereby each cable operator used to have a local monopoly for TV cable distribution, in the area where it provided its services. There is therefore a market for the access to the cable infrastructure. This solution is largely identical to the ones rendered at the same time in the telecommunications sector, where there was a clear distinction made between networks and services.

466. As far as infrastructures are concerned, it also seems worth noting that the Council identified, from the consumer’s side, a market of the technical services linked to Pay TV\(^\text{398}\), which encompasses the technical infrastructure

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\(^{395}\) Chain of values: content provider → assembler of services and contents → service provider → infrastructure provider → terminal distributors → users.

\(^{396}\) Judgement of the Paris Court of Appeal of 17 June 1992 against the decision n°91-D-51 of the Council.

\(^{397}\) See decision n°99-MC-01 of 12 January 1999, Numericable.

enabling the subscriber to access the encrypted TV signals. The Council relied on the Commission decision **MSG Media Service**.

### 2.3.1.3. The broadcasting of free TV as opposed to pay TV

#### (i) The initial distinction: pay TV vs free TV

467. The Competition Council has adopted a line of analysis analogous to the one upheld by the Commission, by distinguishing the pay TV market from the free TV market. For that purpose the Council relied on EU precedents. On a factual basis, for the elaboration of that market definition, the Council also considered the differences of financing sources, noting that free to air TV was financed by the sale of advertising space to announcers whereas pay TV was characterised by viewers’ payment for the programmes to which they wished to have access.

This finding was confirmed by the Court of Appeal, which highlighted the difference in economic relations between free TV and Pay TV: free to air TV is financed by the sale of advertising space to announcers whereas pay TV is characterised by the payment by viewers for the programmes to which they wish to have access. Within free TV, the only existing relation is established between the broadcaster and the announcers whereas for pay TV, the commercial relation exists between the broadcaster and the viewer, in its capacity as subscriber. That finding is similar to the European Commission approach, and in that respect the Court of Appeal expressly quoted the **MSG Media Service** decision.

#### (ii) Within free TV, the distinction between private and public broadcasters

468. As far as free TV is concerned, the Council identified a difference between public and private broadcasters, noting that even though both private and public broadcasters were free for the viewer and competed with the target of having a maximum audience (see above, on the general viewers market), the public broadcasters did not have a choice in regards to their means of transmission; indeed, cable and satellite transmissions could not be acceptable alternatives to terrestrial transmission for national public-interest broadcasters, since they do not allow them to be transmitted throughout the entire national territory and, thus, to be viewed by the largest number of people.

469. The pertaining of private and public broadcasters to different markets seems to be confirmed by the provisions of the 1 August 2000 Act concerning

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399. See opinion n°98-A-14 of the Competition Council of 31 August 1998, **Havas and Cie Générale des Eaux**.
400. Decision n°98-D-70, of 24 November 1998, **TPS and MultiVision**.
401. Opinion n°99-D-14 of 23 February 1999, **TDF**.
the introduction of digital TV in France. Indeed, the public broadcasters shall be ensured to have digital channels, whether or not the private broadcasters must submit applications for that purpose. In these circumstances, one wonders to what extent this more favourable treatment of public broadcasters may raise state aid issues.402

(iii) The further delineation according to modes of transmission

470. In the Havas decision, the Competition Council made a further distinction according to the broadcasting means, and thereby identified sub-markets for cable, satellite and over the air TV. The distinction according to the means of broadcasting was rejected in a subsequent decision, by reference to the Havas case403, where the Council expressly underlined that the existence of three modalities for carrying the signal was not a relevant criterion for segmentation of the market, as the offered products had the same finality and an important similarity in their content.

471. The issue of substitutability between cable and satellite was again addressed recently, in 2002404, when the Council described the different respective characteristics of these two means of communication (it should, however, be noted that this case concerned interim measures and cannot therefore be interpreted for a clear position of the Council on the market definition issue).

The Council did not exclude, at that stage of the procedure (i.e., at the stage of a preliminary investigation for interim measures) that prima facie, the allegedly anti-competitive behaviours were occurring on the “French market for channels broadcasting via satellite”. That market is characterised by the meeting of a broadcasting demand from programmes editors and a broadcasting supply from the editor of services (in French the “éditeurs de service”405). The Council listed the criteria pleading in favour of the identification of a separate market for satellite broadcasting.

In this respect, the Council noted that satellite transmission had a broad geographic scope since it had a broad footprint, whereas cable, by nature, was limited to a local area. The Council also noted that, as far as satellite was concerned, the channel did not need an agreement with a distributor (TPS or CanalSatellite) in order to be broadcasted, whereas channels needed to have contracts with an operator of a cable network (NC Numericâble, Noos or FT Câble) to become part of its commercial offer; such a constraint generally gives rise to difficult negotiations, since each operator focuses on a certain offer and generally accepts to broadcast notorious channels. From the demand-side, the Council also noted the difference in the regulatory regimes (a mere

402 However, the analysis of state aid issues will not be developed in this study, as it goes far beyond the question of the market definition analysis.
403 See judgement of the Court of Appeal of 15 June 1999 on the appeal lodged against the TPS decision.
404 Decision n°02-MC-01, Canal Europe Audiovisuel.
405 See supra, section 2.2.1.2. (i).
declaration to operate satellite services as opposed to a legal authorisation to operate a cable network).

Last but not least, the Council expressly underlined the specific nature of the services offered to demanders (the programme editors) by satellite broadcasters and which consist in the obligation imposed on these broadcasters in particular to “allow for the reception by their subscribers of free and unencrypted channels, whereas no obligation of this type is imposed upon cable operators”.

(iv) The relevance of the delineation in light of coming convergence

472. In the Havas case, the Council also noted that the distinction between transmission means should not be overestimated, since the emergence of convergence may modify the delimitation of the relevant markets and favour the emergence of new ones.406

Furthermore, in 1998, the Council considered that even though the two modes of Pay TV broadcasting were bound to be under more and more frontal competition as users adapted to them, this substitutability did not imply that these two markets were already unified407. The Council thus took “time considerations” into account in the above-mentioned EU meaning. It should be noted that this decision was rendered in an infringement case, i.e. in a situation concerning a past situation. One may therefore wonder whether the finding of the Council would have been different in case of a merger appraisal.

473. As a conclusion, the position of the Council as regards market delineation in the light of convergence can potentially be summarised as follows.

- In the 1998 Havas opinion408, the Council identified within the Pay TV market, three sub-markets according to the type of broadcasting and, in particular, a market for digital satellite TV.

The Council also addressed the issue of the existence of a distinction according to transmission means in the 1999 Planète cable decision409. That decision was again rendered in the course of a request for interim measures procedure which

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406 The Council referred in particular to the Green Paper on convergence as well as to the Bertelsmann decision.
407 See also the judgement of the Court of Appeal of 15 June 1999 on the appeal lodged against the TPS decision, where the Court rejected the arguments of Canal + stating that subscription TV and pay per view participate in the same market but do not compete with one another as there are no companies offering pay per view independently of subscription. The Court noted on the contrary that on the market for pay TV, digital compression made a new form of programmes distribution possible.
means, therefore, that the reach of the decision in terms of market definition should not be overestimated. In that decision, the Council did not exclude that analogue and digital TV could be not substitutable and not pertain to the same product market. It should however be recalled that in such interim measures proceedings, the Council makes a plausible hypothesis on the definition of the relevant market, which will be later on checked, in the course of the subsequent investigation. Therefore, in interim measures decisions, because of procedural time limits, the Council had neither the time nor the elements to fully assess the definition of the market.

- The Council also identified a “French market for satellite broadcasting of channels” identified prima facie in the 2002 interim measures decision, the demand for broadcasting from programme editors meet the supply for broadcasting from satellite operators.

- Finally, the Council considered (like the EU Commission) that, within the Pay-TV sector, it was not necessary to operate a distinction according to the means of broadcasting.

Far from being contradictory, these decisions actually tend to show the importance given by the Council to the value chain in the broadcasting sector. Indeed, the decisions upholding the existence of a global pay TV sector relate to the downstream market where the demand from final users meet the supply from broadcasters; and actually, from the consumers’ point of view, satellite and cable may be considered as substitutable to one another. On the other hand, that conclusion would not be true for the upstream market, where programme editors and channel editors meet. The market thus endorses a different definition depending on its level in the value chain.

(v) The upstream market for the production and acquisition of TV rights or programmes

In 1983 the Council identified a market upstream from the TV broadcasting sector, which includes the production of TV programmes. At that stage, the market definition was not particularly detailed, as the Council considered that such market included any type of programmes (films, documentaries or shows) to be sold to any broadcaster, whether public or private. This finding was in contradiction with the definition of the programmes contained in the 1986 Act, which clearly distinguishes

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broadcasting and financing obligations between audiovisual, cinematographic and other works (shows for instance) in terms of production. As far as the geographic scope of the market is concerned, the Council considered it to be national.

476. However, later on (in 1999)\textsuperscript{413}, the Council distinguished the market for the edition of TV documentaries, though it did not give any particular information in that respect. Then, in 2000\textsuperscript{414}, it made the distinction between the so-called “flow programmes”, whose lifetimes are rather short (entertainment and variety shows) and “stock programmes” (fictions, animations, documentaries). This distinction corresponds to the broadcasting obligations imposed on broadcasters by the 1986 Act, since such obligations exclusively include stock programmes.

477. The edition of programmes was further elaborated in the Vivendi / Canal + case\textsuperscript{415}, where the Council identified an upstream market (from the broadcasting one) for edition of thematic channels. In this respect the Council noted the growth of thematic channels, though it did not elaborate on it.

\[ \text{Supply of programmes from editors to broadcasters/distributors and acquisition of rights} \]

478. Major sporting events are distinguished under French competition law from other types of broadcasting\textsuperscript{416}. The Council considered in a later decision\textsuperscript{417} that among sporting events, there was no evidence of the existence of a sub-market of broadcasting rights specific to each type of sporting event, and that sporting events were not substitutable with each other for the viewers. This finding is in line with the conclusions reached by the Commission. However, one may wonder whether it is not in contradiction with the broadcasting obligations, and particularly with the existence of “major events”, as defined in article 3bis of the Television without frontier directive, implemented in France by article 20-2 of the 1986 Act. Indeed, the identification of such events tends to show that, from the viewer’s perspective, there are some sporting events of greater significance, for which broadcasting conditions fall within a particular set of obligations.

479. The Council and the CSA relied on that finding to identify a corresponding market in the radio sector. Indeed, in the very recent RMC decision\textsuperscript{418} regarding interim measures ordered against the exclusive radio broadcasting rights of the World Cup, the Council held that there could be a

\textsuperscript{413} decision n°99-MC-05 of 23 June 1999, Planète cable.
\textsuperscript{414} Opinion n° 2000-A-04, Vivendi.
\textsuperscript{415} Opinion n° 2000-A-04, Vivendi.
\textsuperscript{416} See in this respect the decision n°91-D-11, case 3.3. of the grid, though in that particular decision the Council did not elaborate on the market definition but merely mentioned the existence of a national market for the broadcasting of major sporting events, including in particular football. See also the opinion of 31 August 1998, Havas and Cie Générale des Eaux, where the Council referred to the Commission Bertelsmann decision, without further expanding.
\textsuperscript{417} Decision n°01-D-81 of 19 December 2001, CFDT Radio Télé.
\textsuperscript{418} Decision n°02-MC-06 of 30 April 2002, RMC Info.
specific market for the acquisition of transmission rights for sporting events. That issue is not thoroughly addressed by the Council, since the case at stake relates to interim measures; the Council therefore did not elaborate on the existence of a market of transmission rights only for major events. Neither did the CSA, which was consulted by the Competition Council in this procedure, and thus gave an opinion on the facts of the case. The CSA made a comparison with the TV sector and referred to the EU directive and corresponding internal legislation, but did not provide for further developments about this market. It is nevertheless interesting to note the convergence of positions and the consultation that exists between these two authorities.

480. French-speaking thematic programmes were also distinguished from other types of programmes, though in 1991 the Council did not elaborate on the criteria that led to that conclusion.

481. However, further precisions were made over time. The Council thus redrafted the distinction between American movies and other movies, on language and cultural grounds. In this respect, on a language and audience basis, in the TPS decision the Council made a distinction between French and foreign movies, as well as between recent and older ones. It is interesting to note that the Council based its findings both on the demand side (audience and needs of the French market) and on the supply-side, relying on the regulatory obligations put upon broadcasters to finance and broadcast certain French or EU films. This finding was confirmed by the Court of Appeal, which expressly rejected the position sustained by Canal+ that there was a strong substitutability between movies and TV films and between American and French movies.

482. This solution was further expanded in 2001, when the Council identified a market for broadcasting rights of recent French movies for Pay TV. Therefore, as far as the acquisition of rights is concerned, the market encompasses all forms of Pay TV, irrespective of their modes of transmission.

419 See above paragraph -- on the procedures set to ensure co-operation and consultation between NRAs and NCA.
420 Observations of the CSA of 26 March 2002 on “the complaint lodged before the Competition Council by RMC Info against the EIG “Sport Libre and its members”.
421 Decision n°91-D-51, case 3.4 of the grid.
422 See opinion n°98-A-14 of the Competition Council of 31 August 1998, Havas and Cie Générale des Eaux, where this distinction is, however, only mentioned, without any further elaboration.
423 Decision n°98-D-70, of 24 November 1998, TPS and Multivision.
424 The Council noted in this respect that these types of content may not be substitutable, from a consumer’s point of view, to series which only exceptionally have audience shares that are comparable to movies.
425 Judgement of the Court of Appeal of 15 June 1999 on the appeal lodged against the TPS decision.
483. Moreover, the Council also went on to identify a supply from editors of French-speaking thematic programmes to the TV cable network operators. The reasoning behind this finding was further elaborated on appeal, which identified a global upstream market of supply from editors to broadcasters/distributors, with a market of the supply of cable programmes by the broadcasters to the viewers. The Court, however, considered that there was a market for French-speaking thematic programmes, since such programmes were indispensable for the development of TV-cable broadcasting from the point of view of companies exploiting TV-cable networks. On the basis of that finding, the Court considered that there was no need to go into further segmentation between the thematic programmes.

484. Within the market for the acquisition of audiovisual rights, the Council went on to distinguish between the “primary rights”, i.e., the rights purchased by the broadcaster during the co-production, and the “secondary rights” purchased in that case by American companies specialised in the sale of second hand programmes. This distinction was also relied upon in the Vivendi / Canal+ case. It may also be worth noting that the video edition was considered to be “closely linked” to the cinematographic production, without, however, any further explanation thereon.

485. One particularity of the acquisition of rights is its geographic scope. Indeed, the Council noted in the Vivendi / Canal+ concentration that the language barriers and national regulations that divide the common market in terms of broadcasting did not apply to broadcasting rights. Indeed, the broad geographic scope of the market for the acquisition of rights may conflict with the narrow product market definition, which tends to distinguish between French and American movies. The solution to that conflict may rely on differences in the place of the operators within the chain of value. This issue may require further clarification from the Council.

486. The Competition Council gave two leading opinions (in 1993) and rendered one decision (in 2000) in the cinema sector, which respectively related to (i) the reciprocal transfer of cinema houses between Gaumont and Pathe, (ii) UGC’s acquisition of cinema theatres and (iii) the unlimited access card issued by UGC (interim measures).

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427 Decision n°91-D-51, case 3.4 of the grid.
432 The Council based its findings on the Commission decision TPS in which the Commission considered that the supply of rights may be world-wide and that certain operators acquire rights for more than one territory, even though it mostly occurs on a national /linguistic basis.
435 Decision n°00-D-13 of 25 July 2000.
It appears clearly in these documents that the Competition Council makes a distinction between the markets of (i) films edition, (ii) films distribution and (iii) running of cinema theatres.

The latter market is subdivided into three distinct markets, including respectively (i) the running of pornographic movies, (ii) the re-running of films and the running of so-called “research films” and (iii) the first running of non-pornographic movies, to which should be added – under the very terms of the Council – the cinema theatres using the IMAX technology.\(^{436}\)

487. The Competition Council also makes a clear distinction between the market of running films in cinema theatres, the market for video sales and the market of TV film broadcasting. Indeed, running of cinema theatres goes beyond the mere commercialisation of the movie and includes a broader supply of services, which distinguishes it from the sale of videos and TV broadcasting. It thus appears that the Competition Council took into account qualitative criteria related to the services supplied, in order to distinguish different relevant markets in the film sector. The Council also relied on the regulatory measures relating to the so-called media chronology, according to which movie diffusion in cinema theatres impedes their simultaneous video sale TV broadcast (one to three year period, depending on the TV channels concerned).\(^{437}\)

488. In 2000, the Competition Council identified the new phenomenon of the development of theatre complexes offering more than 800 seats and generally located outside city centres.\(^{438}\) It is interesting to note that this distinction corresponds to a specific regulatory status.\(^{439}\) This market could be singled out on the basis of the criteria linked to the specificity of these theatres: good rate of frequency, higher profitability, high barriers to entry since an administrative authorisation is requested for the construction and the investments needed are impressive (between 7 and 40 million EUR).

489. As far as the geographic market in the cinema sector is concerned, the Competition Council takes particular qualitative and quantitative criteria into account. Cinema theatres showing films in first exclusivity and which are situated in “main areas” (“quartiers directeurs”) of Paris (i.e., Champs-Elysées, Montparnasse, Quartier Latin, Grands Boulevards), were identified as playing a determinant role in the commercial success of a film; they were thus identified as a distinct market from other cinema theatres located elsewhere in Paris. On the basis of a comparison of the frequency indicators of the cinema theatres in Paris and its suburbs, the Competition Council also considered that

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\(^{436}\) These theatres are used for film catalogues for which regular means and technique of projection are not substitutable.

\(^{437}\) Article 70-1 of the 1986 such provisions have been replaced by professional people of conduct which apply by law to each distributor of broadcasting XXX pursuant to new article 70-1 of the 1986 Act.

\(^{438}\) These complexes are called in French “multiplexes”.

\(^{439}\) See Act n°96-603 of 5 July 1996 obliging one to have an authorisation granted by a specific local commission in order to avoid overcapacity and to protect the interests of the cinema houses situated in the city centre.
the attraction area of the Parisian cinema theatres was not restricted to the
capital city but was broader, so as to include its suburbs.

2.3.2. Market definition in the music sector

490. Very few decisions concern the issue of market definition in the music
sector\(^{440}\). On the supply-side, the Council identified three categories of
players involved in the music sector, namely editors, wholesalers and
distributors\(^{441}\).

491. At the upstream level, there is a market for the supply of disks, without
differentiation between the different types of music nor between the different
types of artists. This market is composed of the producers who have
negotiated agreements with the artists\(^{442}\). This market was considered to be
national, on the basis of the existence of exclusive agreements between
producers and the artists, and of supply method of distributors who directly
addressed producers.

492. One step below, the Council identified the existence of a market for the
resale of disks, even though it admitted that the musical products differed
according to the type of support (tapes, disks, cds)\(^{443}\). Within the resale of
disks, the market can be divided between the two forms of distribution
corresponding to (i) specialists (independent shops and department stores) and
(ii) other stores where music distribution is only a secondary activity. However,
it does not seem that these forms of distribution actually correspond
to different market definitions.

493. Finally, at the stage of the end-consumer, the Council did not identify a
particular market that corresponds to the tastes or purchasing behaviour of the
consumer. This finding was confirmed by the Supreme Court (”Cour de
Cassation”) in January 2002\(^{444}\), where the Court expressly rejected the
allegation that the works of the Beatles could be considered as a market of its
own. The Court considered that the famous reputation of the Beatles was not
sufficient to assess the lack of substitutability of their works with other
musical compositions. On the other hand, it held that demand was determined
by a series of various factors, including one’s personal taste, the reputation of
the artist, and advertising (particularly on radio). The Council also noted the
existence of captive customers for a particular artist. Furthermore, no product

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\(^{440}\) The SACEM (Société des Auteurs Compositeurs et Editeurs de Musique) and the SDRM
(Société pour l’administration du Droit de Reproduction Mécanique des auteurs, compositeurs
et éditeurs) are the rights management companies in music copyright. Even though they
intervene on a private basis on behalf of the artists, we could not find their decisions and
therefore did not take them into account.

\(^{441}\) Decision n°97-A-18 of the French Competition Council, of 8 July 1997.

\(^{442}\) Decision n°98-D-76 of the French Competition Council of 9 December 1998 Audito VS
FNAC, Sony, BMF and Varner S.A.

\(^{443}\) Decision n°97-A-18 of the French Competition Council, of 8 July 1997.

market distinction was upheld according to whether or not the music was a new release or pertained to the editor’s catalogue.

494. Within the music sector, the decisions about radio do not provide much guidance as to whether radio broadcasting of music could be considered as a separate product market whereas radio broadcasting regulation tends to create such classification. Indeed, the 1995 decision concerning NRJ and Cherie FM identified a market for the provision of national radio programmes, without, however, providing much information as to the exact scope of the market.

The Council did not expand on whether the market should be divided according to the type of programmes and, particularly, whether there could be a specific market for national musical radio programmes.

The same lack or precision is to be found in a later decision, where the Council stated that the existence of a market for the provision of radio programmes could not be excluded. Geographically, the Council mentioned that the identification of a regional market could be conceived, though again, no further information is found in this respect.

2.3.3. Market definition in the books and publishing sector

495. Over the past 15 years the French Competition Council examined few cases related to the books and publishing sector.

Not many of the cases deal in details with the books and publishing sector. Therefore, we selected four cases, which are be precise enough to be able to extract criteria that might be used by the French Competition Council to define the market in the books and publishing sectors.

(i) Publishing

496. The decision n°91-D-21 of 7 May 1991 concerned the press sector. It related to two newspapers, which the Council considered to belong to the same category, i.e. daily newspaper focused on general as well as local information. However, one newspaper (“La Dépêche du Midi”) cost 3,80FF and was distributed by the network of newspaper agents or by subscription, whereas the other one (“Le Journal de Toulouse”) was free and was distributed by shopkeepers and supermarkets. “La Dépêche du Midi” filed a complaint to the French Competition Council on 25 January 1989 putting the free distribution of “Le Journal de Toulouse” in question.

445 Pursuant to article 28-2 of the 1986 Act, all radios are subject to quotas for broadcasting French music (40% of air time dedicated to music) and new French artists (50% of the 40% quota). Such quotas may be modified (upward or downward) and adapted to the specific format of the radio in question.

In its decision, the Council identified the general press sector and then subdivided it into daily and weekly newspapers. It thereby distinguished the type of information: local or national/international and general or specialised (sports, financial, etc.)

The French Competition Council rejected the complaint but decided on its own motion to carry out a further examination, of the practice set up by “Le Journal de Toulouse” by which it prohibited its network of shopkeepers from selling other free newspapers that specialised in small ads and advertisements.447

From our point of view, that case does not particularly reveal the way the publishing or even the newspaper sector may be analysed. Indeed, the newspapers at stake were comparable to some extent. Besides, the Council did not carry out an in-depth analysis in regards to whether free newspapers may be distinguished from the paying papers, nor did it proceed to any distinction based on the distribution channels used by the publishers.

497. In its 1993 opinion448, the Council examined the press sector by referring to the administrative categories of publications as set by the services of the Prime Minister449 (national daily press, regional daily press, magazines, specialised press and free press). The Council further stated that the press was present on several markets: the readers market (supply of publications), the space advertising market and classifieds (supply of space). That distinction was made in an opinion in 1986 by the Competition Commission (prior to the establishment of the Competition Council by the 1986 Ordinance), which recognised that press editors were actually active on two markets that corresponded to two types of customers: the advertisers at the upstream level and the readers at the downstream level.

498. In that 1986 opinion, the Competition Commission distinguished the geographical reach of the press, to identify two product markets. The Commission took into account the fact that regional papers were focusing on the events likely to interest their readers but that do not have national significance. The Commission corroborated this finding by economic evidence (the recession of national press and the stability of the regional one). The Commission also distinguished the press from other media.

499. It thus appears that the Council never identified any global readers market but always analysed the written press sector as composed of distinct markets made of those supports which have neighbouring characteristics and having comparable structures in terms of readers450.

447 An appeal lodged against the decision n°91-D-21 was rejected (Case of 11 March 1992 of the Paris Court of Appeal).
448 Opinion n°93-A-13 of 6 July 1993, relating to the participation of the Société générale occidentale in the capital of the Société d’exploitation de l’hebdomadaire Le Point”
449 Direction des Médias.
450 See decision n°2000-D-54 of 28 November where the Council identified a market for consumer press.
In this respect, the Council considered\textsuperscript{451} that the supports providing for national general information could be differentiated according to the type of information chosen to be highlighted, their style, presentation, periodicity, commercial policy (subscription or sale by numbers) and price. Thus, the Council indicated that the market for weekly press for national general information was a fragmented market, on which no paper could be considered as strictly substitutable to another. However, notwithstanding that analysis, the Council concluded that papers with neighbouring characteristics and comparable readers’ structures could be considered as competing on the same market. On that basis, the Council limited the market at stake to six weekly magazines, namely l’Express, Le Point, Le Nouvel Observateur, l’Evénement du Jeudi et le Figaro Magazine.

Even though the conclusion seems to correspond well with the actual characteristics of the weekly press sector in France, one could wonder about the methodology followed in that opinion. It should, however, be noted that this opinion was rendered at the occasion of a concentration, regrouping the activities of “l’Express” and “le Point”. The market definition thus served three purposes: (i) the application of the merger control provisions threshold, (ii) the appraisal of the legal criteria relating to the ownership of several papers and (iii) the competition appraisal of the operation. In condition (ii), the French provisions\textsuperscript{452} prohibit the direct or indirect detention of daily general and political papers, the total of which amounts to 30% of publications of the same kind in French territory.

\textit{(ii) Press Printing}

501. In its decision n°99 D-41 of June 22, 1999\textsuperscript{453}, the Competition Council also identified a distinct product market for the printing of periodicals.

\textit{(iii) Books}

502. Different markets have been identified by the Competition Council, which used different criteria for each market at stake, in particular to define the product market according to the type of book or according to the form of distribution.

\textsuperscript{451} Opinion n°93-A-13 of 6 July 1993, relating to the participation of the Société générale occidentale in the capital of the “Société d’exploitation de l’hebdomadaire Le Point”

\textsuperscript{452} Act n°86-897 of 1 August 1986 and Act n° 86-1210 of 27 November 1986.

\textsuperscript{453} Decision n°99-D-41 of 22 June 1999 relating to practices set up by a trade union committee (“décision relative à des pratiques mises en œuvre par le Comité intersyndical du livre parisien”).
The main case in relation to definition of product according to the type of book is the opinion n°94-A-22 of the French Competition Council of 13 September 1994 which was given at the request of the Minister for Economy at the occasion of the acquisition of the “Codes Rousseau” (editor specialised in books and materials to teach and learn how to drive) by Média Communication (subsidiary of the Bertelsmann group).

The French Competition Council defined the relevant market as the market for provisioning driving schools with products and related services for teaching and learning how to drive. The Council first considered that “Codes Rousseau” was specialised in the edition of specific books and documents for teaching and learning how to drive. Furthermore, taking this sector focus into account, the Council restricted the relevant market to this particular sector but expanded it to include the full range of products and services supplied to driving schools and necessary for teaching how to drive. The Council then considered, more particularly, that educational materials for teachers and students, official documents for obtaining driver’s licences and other useful materials for the regular functioning of driving schools, were complementary products and services for driving schools.

All in all, the French Competition Council gave a negative opinion concerning the acquisition at stake, since the operation threatened the competition in the concerned market, i.e. market for provisioning driving schools with products and related services for teaching how to drive, since the remaining competitor in the market, namely “Ecolauto”, appeared very small in comparison with the new entity formed, on the one hand, and, on the other hand, since the access to the concerned market was evaluated as very difficult for new competitors.

However, the acquisition was accepted by the Minister but only under the condition that Média Communication sells its subsidiary Ediser, a new company recently active in the market in question.

The decision of the Council could be interpreted in the sense that, for the books and publishing sector, different markets could be distinguished based on the topic developed, e.g. travel books, novels, political-economic books, children’s books, cookbooks, driving books (c.f. Opinion n°94-A-22 of the French Competition Council of 13 September 1994) etc… If certain books are so specific that they interest only a certain category of consumers, it could thus appear that there is a special market for that type of books.

The French Competition Council also relied on the criteria of price differences to examine the existence of relevant markets. Once again, that criterion seems rather usual in terms of market definition, and is not specific to the media sector in general, nor to books and publishing in particular.
In that respect, in the case n°93-D-37, the French Competition Council noted the small price difference between the two newspapers in question (3.80FF in comparison with 0FF) and, therefore, considered that from the consumer’s point of view, they were substitutable to each other.

507. A distinction on the basis of the distribution channels does not seem determinant as long as newspapers provide the same kind of information. For the reader, it does not matter whether he/she receives the newspaper at home by a subscription or if he/she buys the newspaper at a shop that is either specialised or not (newspaper agents or supermarkets). However, this criteria was considered essential when assessing whether there was a separate market for book clubs (i.e. definition of product according to the type of distribution).

508. In that respect, the main case in relation to definition of product according to the type of distribution is the decision n°89-D-41 of 28 November 1989\(^{454}\) of the French Competition Council which was which given at the occasion of the review of a complaint from a book club company who challenged the validity of an exclusivity clause contained in the agreement between a competing and dominant competitor and a major publisher.

509. A distinction on the basis of the distribution channels appeared to be determinant. On the supply-side, the Council identified three categories of distributors involved in the book sector, namely, sale through wholesalers or retailers, direct selling by correspondence, and direct selling through book clubs. The Council considered that the different distribution forms actually correspond to different market definitions.

510. Such case is a good illustration of how sector focused regulation may assist the Competition authority in defining the market at stake. In effect, one of the key features and main competitive advantages of book clubs is that they can offer new books at price that are significantly cheaper than the prices of similar books on sale in retail shops since they are not subject to the fixed and single price obligation\(^{455}\) that is imposed on all other retail book stores. Despite the fact that the Council relied on the criterion of price\(^{456}\), a criterion that is rather usual in terms of market definition, it is interesting to note that the differentiation of price that leads to the differentiation of markets is the consequence of specific media sector focused regulation.

\(^{454}\) France-Loisirs vs Le Grand Livre du Mois. The court of appeal of Paris confirmed the Council’s position and rejected an appeal lodged against this decision. The French Supreme Court further rejected the appeal decision. But in a final hearing, the Court of Appeal of Paris in a second decision confirmed its initial position.

\(^{455}\) Act of 10 August 1981 described in section 2.2.1.2 (iv) above.

\(^{456}\) Once again, that criterion seems rather usual in terms of market definition, and is not specific to the media sector in general, nor to books.
511. However, the French Competition Council also relied on other criteria such as the different quality of the books and different types of clientele to identify two different markets.

512. At the upstream level, the Council found that there is a market for the supply of books, without differentiating between the different types of books nor between the different types of authors.

Geographic market

513. Regarding the geographic scope of the market for books and publishing, it seems that for the moment, in the cases examined, France is the appropriate level of market definition.

For the press sector, however, the French Competition Council determined in its decision n°93-D-37, that the relevant geographic market was local, namely Toulouse and its suburbs, since the newspapers at stake were characterised by the fact that they provided local information and that one of them was only distributed to this particular zone. Such market definition is in line with cross media ownership restrictions regulation described above which provide for different thresholds at local or national level.

2.3.4. Market definition in the Internet related sector

514. As far as infrastructures are concerned, the Competition Council identified three distinct markets, namely:

- the conveying of communication from the subscriber until the point of entry of a network for data transportation (segment 1);
- the data transportation between the local network and the Internet service provider (segment 2);
- the Internet network access, from the Internet service provider (segment 3).

The Council considered that each segment could be considered as corresponding to one or several product markets. In this respect, on the merits, the Council found that segments 2 and 3 were largely competitive, whereas segment 1 corresponded to the local loop, whose access was liberalised. On the latter segment, the Council considered that several sub-markets could potentially be identified depending on the technology used.

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457 Book sold through club are presented in different format and are not considered to be substitutable.
458 The clientele of book clubs are distinctive and do not have the same behaviour. All clients are member subject to certain buying commitment (captive customers). All the same, through their membership client expectations are different.
459 Save school books.
It appears, however, that these three markets are more linked to telecommunications issues than to Internet markets issues in the media sense of the word. Therefore, that distinction will not be developed any further.

515. More interestingly from our perspective, the Competition Council found in the *Havas / CGE* concentration case\(^{462}\) that, as far as Internet related markets were concerned, three markets could be identified:

- Access provision: this market corresponds to the above-mentioned one; the Council noted that it sustained strong competition.
- Hosting of sites: management of servers and bandwidth access to Internet.
- Provision of content: according to the parties of the concentration, this market could be further divided into (i) on-line edition on the Internet (which should itself be split between content for professionals or for the general public) and (ii) the sale of advertising space over the Internet.

The Council, however, did not take a position on the existence / relevance of such markets or sub-markets.

### 2.3.4.1. Distinction from the “traditional” service

516. Concerning the possible assimilation of the Internet to other forms of distribution (and particularly the Internet and broadcasting), the Council reckoned that as the Internet becomes the main transmission means for sounds and images, telecom operators are incited to increase their infrastructure capacity in order to allow for adapted transmission of audiovisual content. Nevertheless, the devices are currently so different that these two services could not be considered as substitutable; indeed, such differences include the reception equipment (TV set or PC) as well as the interface (modem, decoder, antenna).

517. Similar findings were held as regards the possible substitutability between the Internet and the French so-called Teletel services\(^{463}\). The Council rejected France Telecom’s argument that these two services pertained to the same services market and considered, on the contrary, that from a consumer’s perspective, the Internet is not substitutable to Teletel, even though it provides services similar to or more elaborated than Teletel.

Indeed, there are still a limited number of Internet users, and these two services presented different characteristics in terms of access and costs. Access to the Internet requires the use of a computer, the installation of a modem and a subscription with an ISP, which is different from the Minitel,

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\(^{462}\) Opinion n°98-A-14 of 31 August 1998; see also Opinion n°2000-1-04 of 29 February 2000, *Vivendi/Canal*+, where this reasoning was retaken exactly.

\(^{463}\) Decision n°99-D-55 of 7 October 1999, *SARL Photolem*. This distinction was upheld in exactly similar terms in decision n°2000-D-07 of 18 February 2000, *SA Forum & carte vs France Télécom*. 

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which only requires a phone line and an adequate terminal (provided on a free basis by FT). Furthermore, the Council noted the development of highly priced Teletel services, parallel to the development of the Internet, which tends to show that the services are not substitutable. This finding was corroborated by brochures edited by FT sustaining that Minitel services covered needs that were otherwise not satisfied.

From the supply-side, the Council further noted that, as far as service providers are concerned, Internet and Minitel did not allow the same clientele to be reached and did not offer similar payment conditions.

518. On the other hand, the French Courts found that a distribution agreement could in certain conditions contain a prohibition of distant sales, therefore including the Internet, particularly when the nature of the products so justified.\(^{464}\)

2.3.4.2. Distinction according to the client

519. A market sub-division according to the type of clients was first held in 1999, where the Council found that the market for Internet access for private individuals was to be distinguished from the market of Internet access for companies, due to differences in services proposed and in capacities needed.

520. In this respect, the Paris Court of Appeal left open the issue of determining whether the market for commuted access could be split according to the type of consumers (residential and small and medium sized companies), as the commuted access to companies is often provided through more sophisticated mechanisms.\(^ {466}\)

2.3.4.3. Distinction according to the technology used

521. The three markets identified in 1998 (namely (i) the conveying of the communication from the subscriber until the point of entry of a network for data transportation; (ii) the data transportation between the local network and the Internet service provider; and (iii) the Internet network access, from the Internet service provider) were relied upon in the Grolier case, in 1999.\(^{467}\)

\(^{464}\) In that case, the products at stake were luxury perfumes. See Versailles Court of appeal, 13è ch. 23 February 1995, \textit{SA Chanel c/ Sté LV SA} and Pontoise Commercial Court, ord. Ref. 15 April 1999, n° 99 R 00132, \textit{Société Pierre Fabre Dermo Cosmétiques c/ Brockler}.


\(^{466}\) Paris Court of Appeal, 9 May 2000, n° 199/28852.

\(^{467}\) Decision n°99-MC-06 of 23 June 1999, \textit{Grolier Interactive}. See also the decision n°99-MC-11 of 21 December 1999, \textit{AOL Compuserve France and Cegetel vs. France Télécom}, where the same market definitions were upheld.
From the demand-side, the market may be understood as encompassing the ADSL technique, which, through digitalisation of telephone lines, enables broadband access while leaving the phone line free and, thereby, enables a user to have permanent and unlimited access to the Internet.

From the supply-side, the Council also noted a specific supply from ISP’s, which needed to modify their equipment and the connection procedures to their servers by creating content that valuated broadband access, and negotiate their conventions with national and international data carriers in order to adapt their commercial offers and prevent technical difficulties.

However, as the Grolier decision is an interim measures decision (ie no thorough examination of the market), it remains uncertain whether the ADSL technique could be considered as a market on its own. Indeed, it does correspond to a specific demand and to a specific supply. Nevertheless, no comparison is made as to whether these supply/demand would also correspond to other similar technology.

The answer to that question was brought in 2002, when the Council identified a market for broadband Internet access, which encompasses both cable and ADSL access. It is interesting to note that the Council relied on the opinion of the ART of 9 January 2002, where the ART found, quoting the European Commission, that Wanadoo has 60% of the French market for broadband Internet access (including access by cable) and more than 90% for access by ADSL for the residential clients.

2.3.4.4. Additional factors

Time considerations have also been taken into account by the Council, who stigmatised the so-called first mover advantage. However, whether time considerations are taken for the purpose of market definition or for the purpose of infringements assessment is still unclear.

The issue concerning whether domain names may be considered as a market has been left open by the Council, though it considered that these could not be considered as barriers to entry (in a finding that seems to treat such barriers in analogue fashion as essential facilities).

The Council indeed considered that domain names were not a barrier to entry in so far as it was not obvious that “the domain [in that case, “.fr”] was the main point of access to Internet markets aimed at by the undertaking (...); should the domain “.fr” even be considered as a relevant market on which the [National French association for the Internet names] would hold a dominant position, it should be noted that the (...) alternative proposals to the name

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468 Decision n°02-MC-03 of 27 February 2002, T-Online.
469 See the decision n°99-MC-06 of 23 June 1999, Grolier.
470 The Council considered the necessity to delay the launch of the ADSL system in order to allow new entrants to be on equal footing with the incumbent operator.
“concurrence.fr” represented as much alternative solutions which could allow, under satisfactory conditions, access of clients to its site”. The “.fr” domain name is therefore substitutable to the “.com” one. Since that decision, it should be noted that the legislation has been amended and that domain names are considered to be a scarce resource, the attribution of which should be carried out on a non-discriminatory basis\textsuperscript{472}.

\textsuperscript{472} Article L.34-11 of the CPT.
3. THE UNITED KINGDOM

525. The aim of this chapter is an examination of the current legal framework and corresponding case law concerning market definition in the UK media sector. Our research and analysis has been based on the materials listed in *The UK Bibliography*[^473] and *Grids of Analysis*[^474] annexed to this Report, which reflects the original scheme of analysis outlined in the Introduction to this Report.

526. As we shall go on to illustrate, the UK methodology adopted and criteria relied upon to define the relevant market, differs depending on the authority concerned. A significant number of regulatory and competition authorities, frequently with overlapping powers, are involved in defining the media market, including The Director General of Fair Trading (DGFT)[^475], The Office of Fair Trading (OFT), The Competition Commission (CC), The Director General of Telecommunications (DGOFT), The Office for Telecommunications (OFTEL) and The Dept of Trade and Industry (DTI). In addition, the relevant legislation tends to combine competition with regulatory concerns[^476].

3.1. **Origin and criteria for market definition in U.K. competition law**

527. The most important UK statutory measures are: (i) The Competition Act, 1998 (“the 1998 Act”); and (ii) the monopolies and mergers provisions of The Fair Trading Act, 1973 (the “FTA”).

528. The 1998 Act is modelled on Articles 81 and 82 of the E.C. Treaty and generally prohibits: (i) agreements or concerted practices which prevent, restrict or distort competition in the market, or are intended to do so, and which may affect trade within the UK (“the Chapter I prohibition”); or (ii) the abuse by one or more undertakings of a dominant position in a market, which may affect trade within the UK (“the Chapter II prohibition”). Like Article 82

[^473]: Annex III.1.
[^475]: There is also a body, called DGFT’s staff, which can not be distinguished from the DGFT in terms of authorities defining markets. The DGFT is the legal authority and currently only
takes advice from his staff.
[^476]: See in particular the draft Communications Bill, May 2002 (“The Draft Bill”), which combines both competition law and sector-focused principles in order to provide regulation for a catch-all “electronic communications services” sector. However, media content is not addressed in the draft Bill, thereby making the joint analysis of competition and media legislation more complex.
of the E.C. Treaty, the Chapter II prohibition of the 1998 Act does not provide how the relevant market is to be defined.

529. The FTA (as amended by the 1998 Act) provides for the separate treatment of ‘monopoly situations’ and ‘mergers’, in Part IV and Part V respectively. Generally speaking, the 1998 Act is concerned with controlling anti-competitive behaviour, whilst the FTA provides for changes in the structure of the relevant market which may affect the public interest (in the case of mergers), and (in the case of monopoly situations) allows assessment of market practices and market structure which is broader than that which is possible under the Chapter II prohibition. Again, the FTA does not provide how the relevant market, is to be defined.

530. The authorities\(^\text{477}\) charged with the task of applying and enforcing UK competition law are:

- The DGFT - appointed by the Secretary of State for Trade and Industry (the “SOS”) but independent from Government, is supported and advised by the OFT. It is the DGFT who has the key enforcement responsibilities under the 1998 Act, the FTA and The Control of Misleading Advertisements Regulations, 1988 (the “CMARs”)\(^\text{478}\). The DGFT has extensive powers to investigate businesses suspected of breaching the anti-competitive provisions of the 1998 Act and to impose penalties. Under the FTA, the DGFT has a duty to keep himself informed about actual or prospective arrangements or transactions which may result in a qualifying merger, and to make recommendations to the SOS as to whether such mergers should be referred to the CC.

Furthermore, under the Broadcasting Act 1990, the DGFT has a statutory duty to ensure that competition is maintained within the broadcasting industry regarding networking arrangements on Channel 3 and the broadcasting of independent productions imposed on the BBC. While the DGFT as an individual is legally the regulator in these areas, in practice is the OFT, a body with no legal status except that derived through the DGFT’s power to appoint staff, which is often referred to as the regulator. The OFT is frequently described as an independent governmental agency. A bill currently before the UK Parliament, proposes to modify this situation by formally establishing the Office of Fair Trading to which the existing DGFT’s powers will be transferred.

- The SOS - a government minister and head of the DTI, has responsibility for reviewing UK competition policy and the exclusive power to make a merger reference to the CC. Pursuant to

\(^{477}\) Also referred to as National Competition Authorities (“NCAs”).

\(^{478}\) Under the CMARs, the OFT’s role is primarily to support and reinforce the controls exercised by other bodies where they have been unable to take effective action, and in instances where an advertisement should be stopped in the public interest.
the provisions of the FTA, after consideration of the advice of the DGFT, the SOS may decide to allow a merger to proceed, to refer it to the CC for consideration, or to accept undertakings in lieu of a reference;

- The CC - investigates mergers referred to it by the SOS. In accordance with the FTA, upon reference of a merger the CC investigates two questions: (i) whether the transaction is a merger that qualifies for investigation; and if so, (ii) whether the merger is likely to operate against the public interest;

- OFTEL is charged with competition issues involving telecommunications (and now also includes the “electronic communications networks and services” field). OFTEL was set up under The Telecommunications Act 1984 as the regulatory body for the UK telecoms market. Its regulatory powers are primarily contained in the 1984 Act, which provides for the enforcement and modification by OFTEL of licence conditions on telecoms operators. Some additional powers are contained in the 1998 Act, which grants OFTEL the authority to prevent anti-competitive practices and impose fines. It also has concurrent jurisdiction with the OFT to enforce the Competition Act 1998 in the telecoms sector. OFTEL has applied competition law principles (including those derived from EC law) in assessing the UK telecoms regulatory regime in general and in making individual decisions before it acquired any powers under the Competition Act.

3.1.1. The standard approach of demand and supply

531. To deal with anti-competitive behaviour or changes in market structure, competition authorities must develop a framework for defining the relevant market(s), and then proceed to analyse the functioning of competition within that market. The UK analysis has developed along the same lines as that developed at the EU level, with the relevant criteria being split into: (i) product; and (ii) geographic market definitions. The analysis is then further subdivided into demand-side and supply-side substitutability.

532. As a preliminary comment, the UK competition law criteria adopted to define the market by and large reflects the criteria applied at the EU level. However, the UK legislator and its authorities tend to consider ‘additional factors’, which often result in a narrower market definition than that upheld at the EU level. Furthermore, aside from referring to EU principles, in particular, the 1997 Commission Notice on the Definition of the Relevant

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479 See for example The Effective Competition Review - A Statement on Market Definition and Competition Analysis (February 1998) where the OFTEL explicitly endorses a competition law based analysis.

480 See OFT, Competition Act, 1998 Guidelines on Market Definition, paras. 1.3., 4.8., 4.10 and 5.9.
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Market (“the 1997 EU Notice”), the UK authorities also rely on US measures and case law, resulting in a ‘comparative’ technique, which whilst stemming from the EU model, highlights the UK’s dynamic approach to market definition.

3.1.1.1. Product market

i. Demand-side substitutability

Concerning the product market, three main criteria characterise demand-side substitutability:

- “The Hypothetical Monopolist Test”[^482]: This involves assessing whether, as a result of a small, non-transitory change in price (in the range of 5%-10%) above the competitive level, the number of customers likely to switch products would be significant enough to deter a hypothetical monopolist from exercising market power.[^483] This test is not strictly identical to that contained in the 1997 EU Notice. The OFT guidelines do not explicitly refer to a SSNIP test as the EU Notice does.

- ‘Captive Customers’.[^484]: This criterion used to refine the issue of substitutability by assessing whether a significant number of customers that could potentially switch to another product are in reality held ‘captive’ and therefore prevented from doing so, allowing price discrimination between those who are held captive and those who are not.[^485]

To our knowledge, the Captive Customer criterion has not explicitly referred to at the EU level nor do the UK Competition Act Guidelines on market definition refer to any legal source for this analysis.

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[^482]: Criterion No.1 of Grid of Analysis, U.K.- General Competition Law and Regulatory Principles, para. 1.1.1.


[^485]: For example, the OFT Competition Act Guidelines mention the case of commuters (who need to take the train before 9:00 a.m. and on the shortest routes) and leisure travellers (who, instead, do not have such time and route constraints). There, “commuters might be captive while leisure travellers were not, and a train operating company could price discriminate against the commuters by charging higher fares.” OFT, Competition Act, 1998 Guidelines on Market Definition, para. 3.8.
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- ‘Chain of Substitution’\[^{486}\]: This criterion is also used to expand the market definition reached using the “hypothetical monopolist test”. A finding of a chain of substitution is upheld where customers can switch to another product located at a different level in the value chain provided that there are no breaks in the chain. Similarly to that position adopted at the EU level, this criterion is only resorted to in “obvious” cases. The criterion does not actually define the boundaries of any market. The chain of substitution principle was also considered by OFTEL in its Effective Competition Review of 1998\[^{487}\], when assessing whether the links between different products/geographical areas is sufficiently strong to constrain behaviour.

(ii) Supply-side substitutability

534. The Hypothetical Monopolist Test is also used when assessing supply-side substitutability\[^{488}\] in the UK, however in contrast to the EU approach, the test is of limited use and only relied upon where its application could take place quickly and easily\[^{489}\]. Indeed, the OFT guidelines highlight 12 months as an appropriate time frame. If potential entry to a define market is considered, a longer time frame may be considered. This test is generally used at the second stage of an analysis to determine whether an undertaking has market power.

3.1.1.2. Geographic market

535. The same criteria used when defining a product market are also applied when defining the geographical market\[^{490}\]. However, in contrast to the approach adopted in the EU analysis\[^{491}\], some importance is placed on factors, such as the value of a product or the mobility of customers. Additional factors mentioned in defining the geographic market, such as the existence of imports from foreign countries (to determine the international nature of the market) and transport costs\[^{492}\] are largely similar to that at the EU level.

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488 Criterion No.4 of Grid of Analysis I.1., U.K.- General Competition Law and Regulatory Principles, para. 1.1.1.

489 OFT, Competition Act 1998 Guideline, cit., supra; and OFT/OFTEL, Guidelines, cit., supra.

490 Grid of Analysis I.1., U.K.- General Competition Law and Regulatory Principles, para. 1.1.2.

491 In the 1997 EU Notice the essence of the geographic market definition analysis includes “an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations.”

492 The existence of imports or transport costs are also used for product market definition, to identify whether the market is merely retail or wholesale based.
3.1.2. The introduction of more sophisticated criteria

536. Further *sui generis* factors\textsuperscript{493} if adopted might adjust the “more natural” market definition reached upon an assessment of demand-side and supply-side substitutability. These *sui generis* criteria are not fully described or applied at the EU level.

3.1.2.1. Temporal factors

537. Temporal factors are considered where customers cannot switch from one time period during which a service is provided to another time period, and where suppliers’ capacity varies between time periods. Whilst the 1997 EU Notice does not expressly mention such time-horizon factors, nevertheless temporal factors might possibly be applied in the assessment of research and development agreements\textsuperscript{494}.

Three factors must be considered:

\begin{itemize}
\item [\textbullet] \textbf{Peak and off-peak services}\textsuperscript{495}: This factor is accounted for in the utilities sector in particular, although it has also been used in media cases, principally in radio and publishing.\textsuperscript{496} To the best of our knowledge, no such factor is expressly referred to at the EU level.

\item [\textbullet] \textbf{Seasonal variations}\textsuperscript{497}: These refer in particular to summer and winter months, and the corresponding changes in the use of certain products and services. Again such variations are not expressly referred to as such at the EU level.

\item [\textbullet] \textbf{Inter-generational products}\textsuperscript{498}: These products relate to the broader scenario of “developing and future markets”. Similar to the market analysis relating to research and development agreements described at the EU level,\textsuperscript{499} markets defined under this criteria may prove to be wider or narrower depending on whether a new
\end{itemize}

\textsuperscript{493} Grid of Analysis I.1., U.K.- General Competition Law and Regulatory Principles, para. 1.1.3.
\textsuperscript{494} See, for example, the Commission Notice on Horizontal Agreements, 2001 – R&D Agreements
\textsuperscript{495} No. 1 of Grid of Analysis I.1., U.K.- General Competition Law and Regulatory Principles, para. 1.1.3. OFT, Competition Act 1998 Guidelines, cit., supra.
\textsuperscript{497} No. 2 of Grid of Analysis I.1, UK- General Competition Law and Regulatory Principles, para. 1.1.3…OFT, Competition Act, 1998 Guideline, cit., supra.
\textsuperscript{498} No. 3 of Grid of Analysis I.1., U.K.- General Competition Law and Regulatory Principles, para. 1.1.3L. OFT, Competition Act 1998 Guideline, cit., supra.
\textsuperscript{499} EU Commission Notice on Horizontal Agreements of 2001. See Grid of Analysis of the media markets as defined by the Community institutions both from a competition law standpoint and from a sector focused approach
technology product or service merely improves or in fact is an innovation over existing technology products or services. This factor is also taken into account by OFTEL when defining certain markets\(^{500}\), in giving due consideration to the pace of technological development in a sector. Through changing the economics of producing existing goods, technological developments are considered to reduce barriers to entry and broaden existing markets definitions.

538. A determination as to whether a new improved product is part of the same product market as an existing product considers factors analogous to those developed at the EU level. This results in three possible relevant markets:

- an improved market, but one not wider than the existing market as defined;
- a new separate market for the innovative product; and
- a new, broader market comprising both the new technology and the existing product.

539. Where IP rights are concerned, for example, the criterion used to determine whether products belong to the same or different product markets, is to establish whether customers tend to defer expenditure on existing products in favour of future purchases (i.e., occasions on which they can readily switch to innovated products).

3.1.2.2. Complementary services / products

540. Corresponding conclusions to those drawn for inter-generational products may also be reached where complementary products or services (i.e., products/services that are either consumed and/or produced together)\(^{501}\) are concerned. Three market definitions are possible:

(i) a “single market” consisting of the entire group of complementary products;
(ii) a “dual market” consisting of a separate primary market and secondary market (an “after-market”); or
(iii) “multiple markets”, one for each primary and secondary product.

541. The key question is to determine whether competition for a particular product constrains the prices charged for those products which are complementary to it. In other words, if prior to purchasing a sufficient number of customers takes into account the whole life cost of a product, which is part of a complementary group, then the market comprises the ‘whole

\(^{500}\) OFTEL, Effective Competition Review - Statement on Market Definition and Competition Analysis (February 1998).

\(^{501}\) OFT, Competition Act 1998 Guideline, cit., supra.
package’ of primary and secondary products. Therefore, with a ‘group of complements’, the Oftel examines the whole-life cost of the product.

542. Our understanding is that the UK model adds a further ‘economic’ element (the whole-life cost) to the standard EU analysis, however this is still a matter of debate at the EU level. It is interesting to note that whilst the OFT in reaching its conclusions, refers to the 1995 Commission decision of *Pelikan vs. Kyocera*, this issue has not yet been settled, and therefore may not be fully representative of all ‘secondary-markets’ decisions.

543. To corroborate a finding of a primary and a secondary market in any of the above combinations, the OFT regards as highly conclusive the following evidence:

- price of the secondary product: consumers are deemed to consider the whole-life cost of the group of complements if the price of the secondary product is relatively higher than that paid for the primary product;
- buying power;
- uncertainty concerning the usefulness of the secondary product;
- previous replacements of the primary product and the related switching costs;
- the ability of the supplier to price discriminate between customers.

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502 No. 4 of Grid of Analysis, U.K.- General Competition Law and Regulatory Principles, para. 1.1.3.

503 See for example the *Swan Solutions Limited vs. Avaya ECS limited* case where the Oftel, citing its Market Definition Guideline, considers the primary-secondary product relationships for the purpose of appraising market power in the secondary market (in this case, interfaces for use with the INDeX switch). The test is however based on market definition analysis and considers ‘whether customers take account of the whole-life cost of a product before purchasing. If customers were aware of these costs then the manufacturer of the primary product is less likely to possess market power in the secondary market’. Decision under Competition Act 1998, *Swan Solutions Limited vs. Avaya ECS limited*, March 2001, para. 29.

504 See for example, the 1997 EU Notice.


506 In Report on Competition Policy 1995, vol. XXV, at point 87 and page 140. There, the Commission held that dominance on a secondary markets (toner cartridges) could not be found where the primary market (printers) was effectively competitive. This implies that complementary products, though not substitutable with one another, would have to be seen as a part of a whole, broader market. This was because Kyocera was subject to intense competition on the 'primary' market - that for printers- and circumstances on the market were such that this competition also restrained its behaviour on the "secondary" market for printer consumables. Purchasers of printers were well informed about the price charged for consumables and appeared to take this into account in their decision to purchase a printer. The useful life of a printer and the balance between the capital cost of a printer and the total cost of consumables for that printer over its useful life were such that consumers would have a strong incentive to switch printer brand if the price of consumables for that brand were raised. The complexity and cost of printers was such that the costs of switching from one brand to another are not excessive.] See also the *Digital Undertaking*, in Report on Competition Policy 1997, vol. XXVII, para. 69.
3.1.2.3 Marginal customers

OFTEL, in its Effective Competition Review of 1998, took into account marginal customers as a criterion for market definition, when defining markets from a competition law aspect rather than from a purely regulatory focus. Therefore, in addition to the hypothetical monopolist test, OFTEL regards a key factor to be the existence of marginal customers, whose ability to switch products protects infra-marginal customers (those customers with no effective choice) from price increases. This examines whether in the event of a price increase a sufficient number of customers would switch to another supplier, that the price increase would be unprofitable. This test would imply that in any communications sector, the relevant geographical market for a particular product or service is not necessarily limited to a specific localised area in which an individual operator is licensed to provide services.

3.1.3 Different approaches apply according to the type of procedure concerned

Whilst the UK competition law system stems from that of other Member States to the extent that the procedure adopted differs depending on the authority undertaking the review, generally speaking there still exists a distinction in the approach used to define the market in a (i) merger review; and (ii) infringement cases (Chapter I or Chapter II).

3.1.3.1 Market definition under UK merger review

Mergers involving UK entities not falling within the scope of the EC Merger Regulations (ECMR), and which meet the jurisdictional tests of the FTA, are appraised by the OFT, the CC and the SOS. Generally (except for the newspaper sector), mergers can only be examined by these authorities if the assets taken over exceed £70 million or if the merger creates or increases a 25% share in the relevant market for goods or services in the UK or a substantial part of it.

The OFT investigate all mergers in the first instance, and then will either clear the transaction at this stage, make a recommendation to the SOS to refer it to the CC for further investigation, or reach undertakings in lieu of a reference. Market power may also give rise to competition concerns where a qualifying merger operates against the public interest. Although the current Merger regime is currently based on a public interest test, in practice the predominant

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507 OFTEL, Effective Competition Review - Statement on Market Definition and Competition Analysis (February 1998)
508 The OFTEL Review, however, is limited only to the telecommunications activities.
509 Section 84 (1) of the FTA, 1973.
test adopted is ‘a substantial lessening of competition’ (SLC) test, which has a broader reach than the dominance test used in EC merger appraisals.

547. Two conclusions concerning the specificity of market definition in merger cases (as opposed to infringement cases) may be made. Firstly, the law itself provides a market share threshold, with jurisdictional consequences. Since defining the market is a necessary first step in identifying the market on which the 25% share is held, legal certainty in terms of market definition is required.

548. Secondly, and of more general importance, merger analysis applies a forward-looking approach because appraising the effects of a proposed transaction requires consideration of a greater time frame in which to analyse the post-merger market, for example, as we go on to explain later in this Report, ‘developing markets’ such as on-line versions of national newspapers, play an important role in assessing a merger as the existence of future or developing markets continually ‘dilute’ current market power.\(^{510}\)

549. The choice of SLC test may make a difference in terms of market definition. Indeed, as the dominance test is first and foremost based on market shares to assess market power, market definition is likely to have a very central and critical role in the dominance test. Although in the UK, the first step in assessing a merger is to define the proper frame of reference identified by defining the product and geographic market in order to establish the competitive constraints, market definition may be less important for the SLC test. The reason is that the SLC test is geared towards assessing and analysing rivalry from first principle economic analysis. Whilst market shares and entry barriers determine rivalry between firms to some extent, the SLC test also places great emphasis on other factors such as nature of the product, the behaviour of firms, the cost characteristic of firms and the general incentives to compete.

Therefore, it may be that an examination of the wide-ranging criteria contained in the notion of “affecting the public interest” may blur the distinction between the criteria relevant to assessing market definition and market power. In particular, this might occur when identifying the narrowest market definition when it is likely that in a post-merger scenario, no competition or public interest concerns would arise.\(^{511}\)

\(^{510}\) Infra the OFT Review of Undertakings Given by Newspaper Wholesalers, January 2002 in Annex III.5.

\(^{511}\) For instance, in BskyB Group plc and Manchester United plc, the CC took into account when appraising the concentration’s anticompetitive effects also the structure of the relevant market according to the viewers’ and advertisers’ perspective. There, the U.K. authority not only evaluated both the demand-side and supply-side substitutability but also qualitative evidence. More particularly, the CC examined customers’ surveys, indexes of the popularity of certain content and sport events (e.g., the notoriousness of the Premier League) and the level of competitive success of such programmers, on the basis of which it considered that the narrowest possible market definition consisted of a market for sports premium pay-TV channels.
3.1.3.2 Market definition analysis under infringement cases

550. In contrast with the ex-ante approach of merger review, infringement procedures adopt an ex-post position, which implies screening past factual-based evidence. This approach was pre-eminently adopted by The DGOFT in his Review of BskyB’s Position in the Wholesale Pay TV Market.

3.2. Comparison with Criteria Upheld in Sector-focused Legislation

551. Jurisdictional competence in the UK includes the intervention of NRAs and NCAs, which interact in the exercise of their regulatory powers. The following authorities are charged with media regulation:

(a) SOS/DTI - is responsible for licensing telecommunications systems and services under the Telecommunications Act of 1984 (the “TA of 1984”);
(b) The Department of Culture, Media and Sport (the “DCMS”) - is responsible for formulating policy in broadcasting, including ensuring plurality in broadcasting and television program policy within the UK;

(c) Director General of Telecommunications/OFTEL - is responsible for regulating network industries under the TA of 1984. As we have seen earlier, the DGT/OFTEL are also vested with competition enforcement powers (concurrent with the DGFT) under both the TA of 1984 and the Competition Act, 1998;

(d) The Independent Television Commission (the “ITC”) - is responsible for the licensing and regulation of commercial television services under the Broadcasting Act of 1990 (“BA”). Notwithstanding the ITC not having explicit competition law powers, it may issue decisions to prevent anti-competitive behaviour by entities providing services licensed by it;

(e) The Broadcasting Standards Commission (the “BSC”) - is entrusted with monitoring UK broadcasting standards, and reporting on the attitude of the public concerning issues of fairness and existing standards; and

(f) The proposed new communications regulator, the Office of Communications (“OFCOM”), to be established by the proposed Communications Bill published 7 May 2002, which introduces a single regulator to deal with all electronic communications activities.

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512 Chapter I and Chapter II of the 1998 Act.
552. Existing legislation governing co-operation between NRAs and NCAs is extensive. Moreover, the Communications Bill will establish a new regulatory body for the converging telecommunications and broadcasting industries, subsuming the roles of OfTEL, the ITC, the Broadcasting Standards Council, the Radiocommunications Agency and the Radio Authority.

3.2.1. Market Definitions According to UK Media-specific Regulation

553. For the purposes of our analysis, we have split the most important regulatory provisions into the following headings:\(^{513}\) (i) broadcasting; (ii) publishing and media ownership rules; and (iii) convergence (in particular, the legal provisions relating thereto).

3.2.1.1. Broadcasting

554. Legislative provisions relating primarily to broadcasting obligations\(^ {514}\) tend to focus on policy goals\(^ {515}\) rather than competition law issues. Traditionally the broadcasting sector has been distinguished from other sectors as a matter of public policy, rather than economic considerations. Public policy considerations, for example, concern programme content, in particular maintaining plurality and diversity of ownership in the commercial provision of content; securing commercial (and politically) neutral reporting; and a desire to ensure that certain classes of information are made available to all citizens at affordable prices. However, these policy goals are not concerned with defining markets, nor with assessing particular areas within the broadcasting industry, which could lead to the identification of a separate product or service market. The ‘market-areas’ or legal standards referred to in this sector-focused legislation are outlined in the Grid of Analysis\(^ {516}\).

\(^{513}\) For a detailed list of the regulatory measures taken into consideration, see Bibliography – U.K. (Annex III.1).


\(^{515}\) These policy goals include in particular the need: (a) to regulate the broadcasting in digital form of television and sound programme services and the broadcasting in that form on television or radio frequencies of other services; (b) to amend the Broadcasting Act 1990; (c) to make provisions about rights to televise sporting or other events of national interest; (d) to amend in other respects the law relating to the provision of television and sound programme services; to provide for the establishment and functions of a Broadcasting Standards Commission and for the dissolution of the Broadcasting Complaints Commission and the Broadcasting Standards Council; and (e) to make provisions for the transfer to other persons of property, rights and liabilities of the British Broadcasting Corporation relating to their transmission network.

\(^{516}\) U.K.- General Competition Law and Regulatory Principles, para. 3 annexed to the present Study.
The ‘must-carry obligations’ reflect the approach of the EU Directive on Television without Frontiers. In the UK, these obligations cover the provision of both analogue and digital services, however a distinction is not made between these two services for the purposes of defining the relevant market.

The distinctions between different types of broadcasting services, in particular concerning the appearance of new types of services are mainly dealt with in the following documents: the TA of 1984; the Advanced Television Services Regulations, 1996; OFTEL Guidelines on Conditional Access for Digital TV Services Regulation, March 1997; Statement of OFTEL Director General on Digital TV; April 1999; OFTEL Draft Guidelines on Regulated Supplier Determinations, July 1999; OFTEL’s Submission to the OFT Review of the position of BSkyB’s in the Pay-TV Markets, May 2000; and The Joint ITC, OFTEL and OFT Advice to Government on Digital TV, May 2000.

(i) Pay-TV

The Overall Characteristics of Pay-TV

UK regulation identifies two basic criteria for defining the relevant market in pay-tv services: (1) type of content and (ii) time frame for exploitation.

Substitutes are identified by looking at the availability of substitutable content and the number of adjacent windows. The most obvious substitutes, (those products being part of the same market) will be either (i) shown in the same window and have substitutable content, for example, all action films shown on pay-per-view; or (ii) have the same content but shown in adjacent windows, for example, all European league football matches on a basic pay-TV channel.

With this framework of analysis, a number of separate segments can be identified, an approach which has been supported at a pure competition law level in UK.

As illustrated below, pay-TV is not at the present time part of the same product market as digital interactive TV services.

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517 This is a floor-provision: i.e., Member States are free to impose stricter requirements than those contemplated by the Directive – depending on the realistic structure and characteristics of the national market.


519 See, for all, the Director General of the OFT’s Review of BSkyB’s Position in the Wholesale Pay TV Market December 1996.

Part 3 – The U.K.

Market definition in the media sector: a comparative analysis

 Pay-TV delivered via different platforms

561. In the Open Access to Communications Network Provisions, OFTEL identified a retail market (as opposed to wholesale), which was characterised by the delivery of services directly to end-users by a ‘cable services package’ or otherwise, for example, by telephony, pay-TV or Internet access.

562. In applying the demand-side substitutability test, OFTEL concluded that different elements making up a bundle were substitutable for similar elements that were not offered in the bundle, thereby rejecting the idea that individual packages (or bundles) of services offered by cable companies should each be regarded as a separate market. Pay-TV services available via satellite, digital terrestrial or cable platforms are therefore all within the same product market, irrespective of whether pay-TV is supplied as part of a bundle or not. The price charged for a package is constrained by the prices charged by other suppliers for either the same individual elements of the package or for those elements considered substitutes. Therefore, based on the standard approach to market definition, OFTEL considers bundled services of cable operators to be part of the same retail product market as non-bundled offerings. The resulting market definition as rather broad, and does not distinguish between different transmission paths. Investigations carried on by various other national competition authorities have lead to similar conclusions.

563. When defining the geographic market, the UK regulator (in this case OFTEL) relying on the ‘chain of substitutability test’ between the distinct areas of cable operators, found that each cable operator was constrained in its pricing policy by the availability of pay-TV from BSkyB and ON-Digital, both of which had nation-wide uniform pricing. As a result, the geographical scope

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521 To our knowledge, the issue of bundled services via different delivery platforms has not yet reached a final decision at the EU level. The issue was raised in UGC/Liberty Media (whether the provision of broadband services or a “triple play” of digital services - broadcast TV (analogue and digital), high-speed data in both directions and interactive TV services - provided over cable networks constituted a separate relevant product market; the issue was left open) and in Microsoft/Liberty Media/Telewest (investigation of a JV agreement under Regulation 17/62, where the Commission examined whether the offering of “triple-play” services constituted a distinctive market; this case was settled - See Press release, Commission Opens Full Investigation into the Microsoft/Liberty Media/Telewest, IP/00/287, March 22, 2000).

522 See Consultation on Open Access to Communications Networks: Ensuring Competition in the Provision of Services, April 2000

523 Ibidem.

523 See Conclusions of Consultation on Open Access to Communications Networks, April 2001

524 Ibidem; see also Statement of OFTEL Director General - Digital Television and Interactive Services / ensuring access on fair and reasonable and non-discriminatory terms Pricing of conditional access and access control services, of April 1999.

525 These include the CC report, NTL Incorporated and Cable and Wireless Communications plc (March 2000) and the OFT Report, The Director General's review of BSkyB's position in the Wholesale Pay-TV Market, (December 1996).
of a cable operator’s activities has been broadly defined as the national market for pay-TV.

(ii) Access Control Services

564. Generally speaking the majority of the access control services provisions from a regulatory viewpoint reflect the EU Directive on TV Standards 1995 and The EU Directive on Conditional Access 1998, which require *inter alia* that operators of conditional access systems who produce and market access services for digital television services to all broadcasters, should also provide technical services enabling digitally-transmitted services of the broadcasters to be received by viewers. These are to be authorised by means of decoders, and administered by service operators on a fair, reasonable and non-discriminatory basis.

Furthermore, in compliance with the EU Directive on Copyright 1993, certain provisions of which apply to satellite broadcasting and cable retransmission, holders of copyright and related rights over conditional access products and systems must ensure that they grant licences to manufacturers of consumer equipment on fair, reasonable and non-discriminatory terms.

565. In its draft Guidelines on Regulated Supplier Determinations 1999, OFTEL does not provide for any legal standard to pre-define the market. The term ‘relevant market’ therefore has a specific economic meaning, combining both a description of the product(s) (such as Access Control Services and, potentially, other methods of providing the services in question) and a geographical dimension.

566. In the guidelines OFTEL provides a basis for imposing *ex ante* obligations on those Access Control Services Providers who qualify as a “regulated supplier”. As set out in the new EU Regulatory Framework Directive, the NRA analogous to a competition authority, determines whether there is effective competition in the market under inquiry.

However, in order to establish whether an operator is in a dominant position or has market influence over the supply of access control services, it is necessary to first define the relevant market (or markets) within which the access control services are provided. This in turn enables one to determine the existence or otherwise of market power against the background of the operation of competition in the relevant market. OFTEL hence provides for a legal standard or “market area” by: (i) defining “Provision of Access Control Services” as those technical services which enable only authorised digital interactive TV services to be accessed by end users; and (ii) describing the activities that fall within this definition.
567. This market definition of access control services was applied by OFTEL when it examined whether Sky Subscribers Services Limited (‘SSSL’) should be considered as a regulated supplier, which initially required assessing the existence of a so-called “effectively competitive market”.

568. With regard to the provision of access control services (referred to in the “legal standard” definition), UK sector rules tend to create a technology-neutral model of obligations concerning access.

\[ \text{Product market} \]

569. At the upstream level, these access control services are provided by digital broadcasting platform operators to digital interactive TV service providers, who in turn use these services either, to charge for the use of digital interactive TV services or for goods or services delivered via the TV shopping network, or to protect the security and integrity of their network. A number of factors essentially based on the technical characteristics of the final services, are generally considered as valuable evidence of the existence of a market for the provision of access control services. On the other hand, conditional access duties are considered to be provided irrespective of the means of transmitting (cable, satellite or terrestrial) the television services in question.

These services therefore are a means of controlling access to end-users by service providers, together with end users’ access to content. OFTEL has included Electronic Program Guides (EPGs) and Application of Protocol Interfaces (APIs) within this category as well, which has had the effect of expanding the market to include the publishing and software industries.

570. Identification of a separate product market for access control services: The first criterion mentioned in the OFTEL draft guidelines of 1999 concerns the relevance of related markets to access control services. No reference is made to the concept of “a group of complements”, as provided in the OFT Guidelines. Rather the question to be determined is whether a firm with a dominant position or “market influence” in one primary market, being integrated into markets related to that primary market (“secondary markets”), has the ability to adversely affect competition in those related markets. To this effect, the OFTEL guidelines expressly refer to the [EU 1997 Notice] and to the ECJ decision of Tetrapak II.

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527 OFTEL actually concluded that the Licensee (‘SSSL’) was in a position of market influence/dominant in the market for Access Control Services.
528 This is only the case provided the EPG controls access by viewers to television services. We have included EPGs within the Publishing Heading. See Grid of Analysis, U.K.- General Competition Law and Regulatory Principles, para. 3 (Annex III.2).
529 Such as the verification and validation services enabling third-party broadcasters to incorporate software functions.
571. The hypothetical monopolist test can be applied to access control services to see whether alternative (but not necessarily identical) services are available to which third parties could switch without significant effort or expense, if a hypothetical monopolist supplying the access control services in question tried to put effect a small but significant, non-transitory price increase\(^ {530} \).

572. Access control services are not supplied directly to end-users but rather are supplied to third parties who wish to supply digital services to end-users, therefore the relevant market is defined as the intermediate market (upstream of the provision of digital services)\(^ {531} \). OFTEL accepts alternative digital (e.g., PCs) and non-digital (e.g., high street florists) forms of delivery as corroborating factors to a finding of the existence of an intermediate access control services market. Both digital and non-electronic means of conveyance represent an equivalent and economic ‘network’ for the delivery of services, which are acceptable substitutes for those services, the access to which is or could be controlled. These delivery structures are numerous and incorporate a number of gateways, with access control services representing just one of them.

573. However, in the SSSL notice, OFTEL went further, and by way of a strict application of the demand-side and supply-side substitutability tests, identified the provision of access control services as a separate market.

On the demand-side OFTEL concluded that there were no close substitutes to access control services for service providers who wanted to provide digital interactive TV services, for which there was an associated charge or from which they otherwise intended to derive revenue. OFTEL considered that because of the switching costs borne by service providers, access control services supplied on all types of broadcasting platforms could be regarded as belonging to the same market. Indeed, each platform operator uses a different, proprietary technology for providing digital interactive TV services. Switching platforms involves "re-authoring" content, therefore the associated costs of switching indicate that access control services delivered over each platform constitutes a separate economic market. In doing so, OFTEL stepped back from the Commission’s broader market definition, which considered other types of technical services as demand-side substitutes.

On the supply side, OFTEL found that any alternative services would have been an unlikely constraint to the market definition under review.

574. At the downstream level, conditional access services are considered a subset of access control services. Based on the hypothetical monopolist test, OFTEL identifies an end-user market, consisting of those digital services for which access control services are a necessary conduit, because whilst access

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\(^{531}\) To the best of our knowledge, no such expression as “intermediate” market is set at EU level for the purposes of market definition.
control services are supplied to third parties who wish to supply digital services to end-users, digital service providers supply end-users directly.

For a finding of an end-user market, OFTEL\(^{532}\) takes the example of the delivery of flowers. If the digital service requiring access control services was the ordering of floral deliveries via set-top boxes or digital interactive television sets, then the relevant downstream market potentially could be very broadly defined, covering high street florists and PC floral delivery services. The test therefore is always focused on the perspective of the end-user, namely are high street florists, TV or PC florists acceptable substitutes for each other?

\[ \text{\textit{Geographic market}} \]

575. As with the analysis of supply and demand, the geographical market is defined based on an assessment of substitutability in response to changes in relative prices, a test commonly used under competition law. In the present scenario, this test identifies the extent to which the geographical proximity of rival suppliers can impose competitive constraints on a supplier\(^{533}\).

576. Prevailing price levels provide a reasonable basis from which to start the analysis, unless there is evidence to the contrary. OFTEL also recognises the precedential value of any judgement of the ECJ, or any decision or statement of the Commission setting out market definitions. Regarding the methodology adopted in defining the geographical scope of the market for conditional access, specific reference is given to the 1999 EU Commission decision of BiB/Open.

\[ \text{(iii) Digital interactive TV services} \]

577. To define new digital services, the UK media regulators rely on the use of a return connection from the consumer back to the service provider, typically provided either via a standard telephone line connection or a cable television network. The use of an on-line connection from the digital receiver back to the service provider opens up the possibility for Internet access to be made available via the digital receiver. Evidently, no particular weight is given to the device or technology employed for the transmission paths. Another indicator is the greater control and choice to the viewer.

Case law has also developed a rather broad relevant product market in the field of digital interactive TV. Such case-law analysis proved to have a substantial impact on sector-specific regulation. In the BiB/Open decision, for example, the Commission identified a separate market for "technical and administrative services for digital interactive TV services and retail pay-TV", which incorporated a wide range of technical services offered by digital


\(^{533}\) This test refers to the EU Commission notice concerning Access Agreements in Telecoms, 1998.
platform operators (or other companies) including access control services, conditional access, customer management services, and transactions management systems. In coming to its decision, the Commission did not use the traditional substitutability test, but instead relied on the suppliers’ functional approach (i.e., the final purpose of the devices).

The Commission also identified a narrow and separate geographical market for “technical services for pay-TV and digital interactive TV services”. From a geographical viewpoint, the Commission based its analysis of the relevant market on the existence of a specific national regulatory measure, and considered that the market should not be extended beyond national boundaries.

(iv) Distinction between digital interactive TV Services and digital pay-TV

578. Definitions of the market reached identify a number of digital interactive services which under EU competition law are not considered to be part of an overall digital Pay-TV market.

579. In BiB/Open, the Commission did not consider interactive pay-TV services to be part of the general pay-TV market. However, it is unclear the extent to which the Commission took into account a time-horizon factor in its substitutability testing. New interactive services may fall within the same relevant product market in the future or in light of current technological developments. In its decision, the Commission decided to limit the scope of the pay-TV market by taking into account the content characteristics of these services, which led to the conclusion that pay-TV services were entertainment-related, while digital interactive pay-TV were “largely transactional or informational” in nature.

580. In its 1999 Notice on SSSL OFTEL refers, in addition to UK competition law, to the EU Commission’s methodology as elaborated in its case-law. Reflecting the decision in BiB/Open, two separate markets are identified: (1) the market for digital interactive TV services in the UK, consisting of the provision of a package of interactive services to consumers which includes, retailing, financial services information, education, Internet access, e-mail and games; and (2) the market for digital pay TV. The test focused on the notion of a developing market; digital interactive TV services

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534 See supra, para. 2.4.1.3.
536 One may wonder about the importance given to a time horizon factor in this finding.
537 Cf. our analysis of the BiB/Open EU decision as described in Grid of Analysis, U.K.- TV & Broadcasting Cases (Annex III.3).
in the UK being developing markets within the meaning of the EU Notice Horizontal Agreements 2001.\textsuperscript{539}

However, OFTEL acknowledges that this market definition may change over time. Time-horizon factors here play a substantial role, with the possibility that Internet access via television sets may broaden the market definition so to include all digital pay-TV services.

UK sector-specific provisions therefore consider the pace at which technological innovations may transform the current product market, including time horizon factors and potential competition, when defining the market. The consistency of national versus EU law, and competition versus sector-focused legislation may be an issue in that particular case\textsuperscript{540}, although to our knowledge, no UK case law has yet examined the matter.

\subsection*{3.2.1.2. Publishing: Directory Information Services and Products Regulation}


EPGs appear to fall in the category of conditional access markets. According to the Code, EPG Services are information services, and may include visual images relating to the promotion, listing or selection of television programmes or services; or other services where more than one service is available.

OFTEL’s view in the field of directory information services is competition-oriented. Its definition of the relevant market derives from a strict application of standard competition criteria, in particular an identification of barriers to entry to each market.

As a result, it appears from OFTEL materials that each public telecommunications operator’s (a “PTO”) raw directory information may constitute a separate market, each PTO being a monopolist over its own customers’ directory information. Demand-side substitutability is limited; one PTO’s directory information may not be a close substitute for another’s

\textsuperscript{539} See supra section 1111 of this Study and Annex I.1. More specifically, under the EU Commission Notice Horizontal Agreements 2001, if the new technology, completely innovates the existing product such as to create a new demand, the market will be limited only to the new technology (that is the emerging market). The concept of ‘developing market’, however, may embrace both the notion of ‘emerging market’ or the one of ‘future market’. Where the former belongs to purely market definition criteria, the latter belongs to the fabric of potential competition assessment. For a more detailed description of the differences see the Grid of Analysis, EU Competition and Sector-specific Principles, para. 1.1.3.

\textsuperscript{540} Broader market definition at regulatory level -v- narrower market definition at competition level.
directory information (except where a customer uses two suppliers). This view is strengthened by the fact that PTOs have licensing requirements to supply their customers with comprehensive directory enquiry services, and in providing such services PTOs’ raw directory information sets are not substitutes, but complements. There also appears to be few supply-side substitution possibilities.

### 3.2.1.3. Media ownership rules

586. Media ownership rules are primarily set out in the 1990 Broadcasting Act, as amended by the 1996 Broadcasting Act. Regulation of ownership is approached differently than other media regulatory measures because it is based on a market share threshold beyond which cross-media ownership is restricted.

587. For the purpose of assessing media concentration levels, public television broadcasting is distinguished from private television broadcasting, with media concentration rules not applying to public broadcasting. These rules regulate private TV broadcasting by distinguishing individual segments by their transmission (technology) paths, which can be either: (i) analogue; (ii) cable; (iii) satellite; or (iv) digital transmission of terrestrial TV. There is no distinction made between digital satellite and cable TV.

### 3.2.1.4. Convergence

588. The most significant documents existing when this Report was started were the DTI Green Paper of 1998 and OFTEL’s Response to the UK Green Papers, 1999, both of which aim to guarantee the safe development of access, universal service, choice, competitiveness, and investment with regulation no more strict than that required to achieve the necessary protection. However, since then, the Draft communications Bill provide for valuable and interesting information on Convergence. The Bill gives effect to the White Paper and aims, inter alia, at transferring the functions to the Office of Communications (OFCOM) from the bodies and office holders which currently regulated the communications sector (which broadly speaking encompasses telecommunications, broadcasting and spectrum management). This Bill therefore takes full account of the fact that frontiers between industries are currently blurring. The OFCOM will thus develop and maintain rules for the entire “communications sector”, thereby highlighting the fact that all various industries of the media or communications sector pertain to the same logics and tend to overlap one on another.

541 Regulating Communication Approaching Convergence in the Information Age, 1998
542 Regulation Communications: Approaching Convergence in the Information Age, January 1999.
543 As introduced in the House of Commons on 19 November 2002 [Bill 6]
544 Communications White Paper – A New Future for Communications (Cm 5010) published on 12 December 2000.
589. Convergence is recognised in the on-going technological process. Digital technologies are changing the way that services are delivered, blurring the boundaries between types of service operation and the means of delivery, and eroding the technical distinctions between text, audio and video.

3.2.2 Market Definitions in the New Electronic Communications Framework: the Communications Bill, 7 May 2002

590. An aim of the new Communications Bill is to set up a common regulatory framework in the UK, by the introduction of new rules, governing all electronic communications activities, including both network and services. The draft bill reflects the complexity of applying competition law principles to sector-specific situations.545

591. Similar to the current regulatory package of the EU, the “market-areas” pivotal to the new regime shall consist of electronic communications networks, electronic communications services and access markets. However, the proposed UK measures differ from the EU package, insofar as the level of importance placed on the type of technology involved. The EU Framework Directive limits the notion of ‘electronic communications networks’ to “satellite networks; fixed and mobile terrestrial networks; electricity cable systems; and networks used for radio, TV broadcasting and cable TV, irrespective of the type of information conveyed.” The UK draft bill on the other hand tends to be more technology-neutral, embracing all possible future electronic delivery mechanisms, and therefore is based on an extended time horizon.

592. Based on the neutrality of the technology and/or device concerned, the Bill defines an electronic communications network as: (a) a transmission system for the conveyance by the use of electrical, magnetic or electromagnetic energy, of signals of any description; and (b) the apparatus or software used by the person providing the system and in association with it, for the conveyance of the signals.546

593. No particularly distinctive factors characterise the definition of electronic communications services.

594. Access markets are defined as the provision of network access to a relevant network. Access markets are upstream in the value chain and in accordance with the wording of the draft Bill, they cover any form of access service supplied by a network-owner to a service provider wishing to use that

545 The following analysis is derived from our findings in the Paragraph 2 of the Grid of Analysis, U.K.: General Competition Law and Regulatory Principles.

546 This apparatus and software includes: (i) apparatus comprised in the system, (ii) apparatus used for the switching or routing of the signals; and (iii) the software and stored data.
particular network facility.\textsuperscript{547} This definition differs from the EU approach, in that the \textit{EU Access Directive 2002} defines access markets according to the type of relationship that exists between the access-supplier and the access-purchaser, thereby defining ‘access’ exclusively as a function of the vertical relationship between access and service/content providers. This definition should also be read in the light of the \textit{EU Notice on Access Agreements in Telecommunications 1998}.\textsuperscript{548}

595. Finally, the UK measure explicitly delimits the meaning of ‘content’, which is defined in the Bill as (i) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network; and (ii) the exercise of editorial control over the contents of signals conveyed by means of this network. On the contrary, the \textit{EU Framework Directive} does not provide for a clear definition of ‘content’ or ‘content-specific’ services. The Bill therefore may be considered a useful tool in interpreting the EU regulatory package.\textsuperscript{549}

596. In addition to those corner-stone definitions outlined above, we found of particular interest a number of market-areas or legal standards, which whilst falling within a pre-defined area for \textit{ex ante} regulatory purposes, at the same time reflect a pure competition rationale. They are as follows:

\begin{itemize}
  \item Service/intermediary markets: These markets fall within the notion of wholesale services, and may be provided by the same access-supplier (if vertically integrated) or by a third party (using the network) to which it has access in return for reasonable consideration.
  \item In this scenario, the provision of services to end-users over the network is viewed as a secondary market, and may be considered as retail services.
  \item Closely related markets: These markets are complementary or secondary markets which, when examined in accordance with EU case law, in particular \textit{Tetra Pak II} and sector-specific regulation such as the \textit{EU Framework Directive} are considered to be part of the same market as the primary product. For this purpose, the Bill grants legislative support to the so-called ‘group of complements’ criterion.
\end{itemize}

\textsuperscript{547} Cf., for example, our distinction of ‘network’ and ‘content / service’ on the basis of the ‘container-content’ parameter in Grid of Analysis, \textit{EU Competition and Sector-specific Principles}, para. 2 (Annex I.1 ).

\textsuperscript{548} ‘Access market’ is the provision of facilities and/or services to another undertaking, on an exclusive or non-exclusive basis, for the purpose of providing electronic communication services. See Grid of Analysis, \textit{EU Competition and Sector-specific Principles}, para. 2 (Annex I.1 ).

\textsuperscript{549} Cf. Grid of Analysis, \textit{EU Competition and Sector-specific Principles}, para. 2 (Annex I.1 ).
597. Within the domain of the Internet, the UK regulator has endorsed a non-interventionist approach, focused on promoting investment and the number of transmission paths available for the provision of ‘broadband’ content.\(^{550}\) Here OFTEL strictly follows competition law analysis when both defining the relevant market and assessing an operator’s market behaviour therein.

598. On the assumption that the Internet and developing markets should not be over-regulated,\(^{551}\) the sector-specific measures analysed hereunder fall within the broader framework of “electronic communications networks and services” to which the UK Government based its draft Bill. If the threshold for imposing \textit{ex ante} obligations (such as interconnection, local loop unbundling or open access obligations) is met, then the new regulatory package will also apply to markets related to the Internet and broadband access, provided they are not content-based.

599. The NRA sets a minimum level of regulation, for example, by fixing access prices or determining whether a given market is effectively competitive, so that the bulk of its intervention is \textit{ex post} oriented. This type of intervention essentially consists of promoting and monitoring, rather than restriction and control.\(^{552}\)

600. When defining the relevant market, the OFTEL applies the competition law model, consistent with such general principles as the use of the hypothetical monopolist test and case law relevant, for example, when applying the ‘group of complements’ criteria\(^{553}\). Probably as a result of the inclusion of such competition law principles, the relevant markets as defined for Internet access at the national level tend to be more various and narrower.

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\(^{550}\) For the purposes of this work, ‘broadband’ refers to a capacity to transmit information \textit{electronically}. It allows for fast transmission of large amounts of information, which enables bandwidth hungry technologies, such as full-motion video or CD-quality audio. Such applications are available on narrowband networks, but only with slow download times or low quality. Therefore, when referring to ‘broadband content’, we mean full two-way interactive digital content whether in the form of audio, video or music.

\(^{551}\) It is widely agreed that convergence should not lead to additional regulation. Cf. EC Green Paper on Convergence of Telecommunications, Media and Information Sectors (egp/greenp) www.europa.eu.int/ISPO/convergcegp/greenp>

\(^{552}\) “Higher bandwidth access is of fundamental importance to development of new information society services. Technologies such as DSL, cable modems, third generation mobile, broadband fixed radio and digital TV will enable services such as always-on unmetered high speed Internet access, interactive audio-visual services and video-on-demand to be accessible to a wide audience. Enabling these services to develop to their full potential is central to Oftel’s primary goal of promoting choice, quality and value for money for consumers. The best way to achieve the variety of services that consumers want at reasonable prices is to promote effective competition in the provision of access to and delivery of these services. In examining the case for action, Oftel has considered the level of demand in various segments of the market, the supply routes available and whether there are barriers to the competitive delivery of higher bandwidth access and services.” See OFTEL, 1999d, “Access to Bandwidth: Delivering Competition for the Information Age”, November 1999, chapter 2.

\(^{553}\) As we will see further on in this study, national case law in this area thoroughly implements OFTEL’s approach.
than those recognised by the EU Commission\textsuperscript{554} at a sector-specific level. Furthermore, they tend also to include a broader range of dial-up and broadband market areas than those upheld in EU precedents\textsuperscript{555}.

601. The U.K. principle of technological neutrality does not apply here because of the advancements in transmission media and access technologies, and the specificity of their purposes. OFTEL tends to conduct its market analysis by making a distinction for ‘commodities’, the driving force being the customer (for example, the ISP in a market for Internet call termination) or the ultimate consumer (for example, the subscriber in the market for dial-up Internet access).

602. Sector-specific measures in the UK extend to Internet access only, and not to Internet content.

603. As shown in the Grid of Analysis,\textsuperscript{556} Internet-related markets in the UK are generally divided into three major categories: (a) dial-up (narrowband) Internet access services at the retail level;\textsuperscript{557} (b) broadband retail and wholesale services; and (c) Internet access wholesale services, irrespective of whether they are narrowband or broadband.

\textbf{3.2.3. Respective impacts of sector specific regulation and competition law on one another}

604. OFTEL’s \textit{Effective Competition Review 1998}\textsuperscript{558} appears to have opened the gate to a ‘hybrid’ form of regulatory intervention on its part, when dealing with telecommunications and conditional access activities.\textsuperscript{559} Indeed, in the \textit{Effective Competition Review}, OFTEL expressly endorses and expands on EU law by suggesting a unitary and coherent approach to market definition, where product and geographic market criteria are subdivided according to demand and supply side substitutability, taking into account certain additional factors.


\textsuperscript{555} As noted above, the Commission in a number of Decisions has drawn a specific distinction between the markets for dial-up/narrowband and dedicated access (such as, \textit{inter alia}, Telia/Telenor/Schibsted, para. 17; Telia/Telenor, para. 60; Case No. COMP/JV.50 – Blackstone/CDPQ/ Kabel Baden Württemberg (1 August 2000), para. 26; Case No. COMP/JV.46 – Blackstone/CDPQ/ Kabel Nordrhein – Westfalen (19 June 2000), para. 36.) and has identified the developing demand for residential (and small business) broadband Internet access (i.e., via xDSL and cable modem) (such \textit{AOL/Time Warner}, para. 38; UGC/Liberty Media, para. 13.).

\textsuperscript{556} See in particular, \textit{UK - General Competition Law and Sector-specific Principles}, paragraph 2, annexed to the Study, pp. 15-25.

\textsuperscript{557} According to the OECD, ‘retail’ services corresponds to the provision of Internet services and ‘access’ wholesale services is the provision of local loop services for the origination of the connection to the Internet. See OECD, \textit{Competition Issues in Telecommunications}, DAFFE/CLP/WP2 (2001), 3, 30 April 2001, para. 97.

\textsuperscript{558} Statement on market definition and competition analysis (February 1998).

\textsuperscript{559} See supra note 16.
605. The current trend of setting sector-specific regulation and combining sector-specific concerns with competition law analysis is particularly evident in OFTEL’s practice, which, when applying competition law criteria, still sometimes a priori defines the ‘sector’ or ‘legal standard’ to which competition law is to be applied (with respect to market definition criteria and the dominance test). Therefore, some regulatory instruments end up imposing ex ante obligations, on the basis of ex post competition law thresholds. This trend is evident in the open access obligations, which are set to allow consumers to obtain communications services from a number of different service-providers over the same communications network, thereby increasing the level of competition in the communications sector. The methodology of this purpose is to decide whether or not to impose open access obligations on the basis of a competition law based analysis.

606. The difficulties associated with determining the extent to which competition law principles should and could be applied to specific sectors is reflected in the draft Bill, which contributes to the implementation in the UK of the new EU Common Regulatory Package, approved in February 2002. From our investigations it appears that the trend to include competition law concerns into sector-specific regulation mainly concerns ‘new’ fields of technology, that are currently opening up to competition, with this trend being less noticeable in other more traditional forms of media. This difference of approach depending on the types of media involved is particularly obvious where open access obligations (which differ from “must-carry obligations” which involve content-specific regulations) and interconnection obligations of incumbent telecommunications operators are concerned.

3.3. Practical Implementation of the Criteria in the Media Sector

607. The aim of the following section is not to go through an exhaustive review of all UK case law of relevance to the media sector, but instead to highlight potential and existing conflicts and convergences between market definitions upheld at the UK level, and at the EU level. This analysis takes a ‘bottom-up’ approach, starting with market definitions upheld in U.K. case law, which are compared to corresponding criteria in the EU formulation.

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560 According to OFTEL the regulatory meaning of the term ‘market’ refers to either the area where it sells its products or more generally the sector to which it belongs. However, in the context of competition analysis, the term market, or more specifically the relevant market, is used with a specific economic meaning and combines both a description of the product(s) that make up the market and an assessment of the geographical dimension of the market. See OFTEL, Effective Competition Review - Statement on Market Definition and Competition Analysis (February 1998).

561 See para 2 of the Grid of Analysis, U.K.- General Competition Law and Regulatory Principles, which shows the difficulty to apply the two approaches.

562 Which, in turn, is classified per media sector.

563 As in the previous sections of this Report, we conducted the investigation on the basis of our finding thereof summarised and classified in the Grids of Analysis on Case law created for each media sector.
608. Market definitions upheld in UK case law and at a regulatory level indicate internal consistency. Moreover, national courts\textsuperscript{564} and NCAs charged with the implementation of national and EU competition law or applicable sector-specific laws, have for market definition purposes, duly taken into account foreign and EU competition law principles and precedents. In some occasions, UK authorities have even based their reasoning almost entirely on ECJ precedents\textsuperscript{565}.

609. Nevertheless, as we shall illustrate, some inconsistencies remain between national and EU relevant market definitions. These inconsistencies appear not so much on the criteria to be taken into account for that purpose, (competition-oriented versus regulatory-oriented) but rather between the different interpretations of such criteria. This tends to happen particularly when national courts and NCAs, whilst using commonly adopted criteria, uphold market definitions that in turn are different to those upheld by the EU authorities. This outcome may result from a number of factors, amongst which exists a rather dense superseding national regulatory framework\textsuperscript{566}.

### 3.3.1. Market Definition in the Broadcasting and TV Sector\textsuperscript{567}

610. This analysis here is based on the case law annexed to the Study\textsuperscript{568}, which because of the strong emphasis accorded it by national authorities, and in particular by OFTEL which included it as part of the UK media sector legal ‘precedents’\textsuperscript{569}, includes the 1999 Commission decision in BIB/Open. Despite national authorities relying heavily on this decision for market definition purposes, the views expressed therein by the Commission do not always appear consistent with those upheld at the national level.

611. Despite highlighting a number of potential clashes between the UK and EU competition law approaches, the significance of these differences should not be overestimated because there are a significant number of similarities and convergences of approach as well. Indeed, the frequent cross-references

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\textsuperscript{564} For the purposes of this study, “court” means any jurisdictional authority competent with deciding a specific matter brought before it by means of a direct complaint or by reference from another authority

\textsuperscript{565} Most significant example of this trend is the case of Aberdeen Journals v The Director General of Fair Trading, where the U.K. CC Appeals Tribunal founded its reasoning on national competition law and ECJ decisions.

\textsuperscript{566} See e.g., the case of a court/authority defining a market in accordance to regulatory provisions. See for example Portsmouth & Sunderland Newspapers plc and Johnston Press plc / et altr, CC Report on Proposed Merger, June 1999, where the regulatory definition for ‘newspaper’ was upheld for the purpose of relevant economic market definition, which led to the notion of “market for the provision of national newspapers”. The Director General of the OFT’s Review of BskyB’s Position in the Wholesale Pay TV Market, December 1996.

\textsuperscript{567} See the Grid of Analysis, U.K.- Broadcasting & TV Cases (Annex III.3.).

\textsuperscript{568} See our U.K. Bibliography and the Grid of Analysis, (annex III.1).

\textsuperscript{569} This statement was limited to the relevant market definition methodology to be adopted. See Decision of OFTEL’S Director General in the Status of Sky Subscribers Services Limited (SSSL) as a Regulated Supplier in the Market for Access Control Services for Digital Interactive TV Services, 20 June 2000 at 1.9.
between decisions at the two levels\textsuperscript{570} prove an ever-increasing awareness of each other’s rules.

612. Nevertheless, the broadcasting and TV sector is probably the main arena in which the UK court has tended to use the most discretion when applying EU and UK competition law principles. Interestingly, it is however also the sector where national and EU sector-specific measures are mostly referred to, although they are not always consistently applied. More particularly, national decisions show a trend for reaching narrower market definitions, due probably to differences in appraising the conclusive weight of factual and comparative evidence (for example, according to the OFT, the distinction between premium sports and film channels is proven by the factual characteristics of the two types of content, whereas no analysis of this type is conducted at the EU level).

613. Some internal friction was, however, found between national sector-specific regulation and case law, particularly in the light of the Commission’s decision in \textit{BiB/Open} which refers to a U.K. situation. This is the case, for example, where a NRA recognises a sector-specific legal standard as a relevant economic market for competition law purposes in a way in which it clashes with a relevant market definition upheld by a NCA.\textsuperscript{571}

614. It should also be mentioned that, except for \textit{BskyB Group plc/Manchester United plc. April 1999}, we did not encounter particularly interesting decisions concerning the geographical scope of the market. In this decision the CC identified both a national and international market for pay-TV. In the former market, the UK competition authority referred to the EU 1997 Notice and to the ITC Opinion, and the international market was found on the basis of the \textit{EU Report on Broadcasting of Sports Events and Competition Law June 1998}. The increase in cross-border broadcasting of sporting events was viewed as corroborating evidence.

\textbf{3.3.1.1. The ‘viewers’ market}

615. This approach of the NCA concluded that retail pay-TV services and a broad viewers’ market overlapped with one another. In June 2000, in the \textit{Carlton case}, the CC upheld the existence of a broad viewers’ market, encompassing the supply of TV services to viewers, made up of both free-to-air TV and pay-TV. According to the CC, viewers with pay-TV subscriptions are now readily able to switch between pay-TV and free-to-air TV channels without associated costs, and as a result the degree of competition between the

\textsuperscript{570} U.K. courts have widely referred to EU case law and competition law principles, while the EU Commission has based its conclusions for upholding a given market under the guidance of U.K. sector-specific regulation.

\textsuperscript{571} See, for instance, the \textit{U.K. Joint OFTEL and DTI Notice Consultation} of July 1997 which distinguishes between a market for technical services for digital interactive television from the one for technical services for pay television as opposed to EU Commission approach in \textit{BiB/Open}.
Different channels available on either type of transmission path has increased.\textsuperscript{572}

3.3.1.2. The distinction between pay-TV and free-to-air TV

616. The first thorough review and definition of an autonomous pay-TV retail market (i.e., subscription services to end consumers) was conducted by the DGFT in his \textit{Review of BskyB’s Position in the Wholesale Pay TV Market}. Here the DGFT rather than applying the demand-side SSNIP test\textsuperscript{573}, chose a more factual-based approach that highlighted the inherent characteristics of the products and took into consideration the perspective of the ultimate consumer.\textsuperscript{574} It appears that such an analysis was conducted because at the time of his \textit{Review}, BskyB was the only supplier (monopolist) of the products in question, and the choices available to the consumer in the event of a price increase would therefore have been limited, if not non-existent.

617. In addition to these factual-based criteria, the DG investigated the possibility of employing the SSNIP test at an up-stream level in the value chain. In other words, the DGFT enquired about the likely reaction of content providers to a small permanent increase in the price charged by BskyB. It was further added however, that any such scrutiny (“wholesale-demand substitutability”) would be inherently related and dependent on the likely reaction of BskyB subscribers, (“retail-demand substitutability”) which in turn was dependent on the ultimate factual traits of the product. The SSNIP test was therefore applied, but only in view of its ‘relationship’ with the downstream market (the viewers’ market at the retail level). The pay-TV market is viewed as a ‘derived market’, from the ultimate viewers’ market where cross-price elasticity does not hold greater significance than the respective products’ characteristics.

618. On the other hand, in the \textit{NTL} case, the CC held that the “normal concept of substitutability” (i.e., the retail-demand SSNIP test) could not be employed to assess the substitutability of free-to-air TV and pay-TV. Free-to-air TV required as a prerequisite a certain investment or “price constraint” on the behalf of the consumer (TV sets and licences). The purchase of pay-TV services therefore was analysed as the purchase of a new service, for which customers would be willing to pay an extra charge. The relationship between these two services could therefore not be analysed through a substitutability test. The CC also found it improbable that a monopoly supplier of all pay-TV channels would be prevented from sustaining prices of 5-10\% above competitive levels because of the existence of free-to-air TV. These two services were therefore regarded as separate markets. Nevertheless, the CC admitted that free-to-air TV could be a limitation on prices that pay-TV

\textsuperscript{572} Carlton Communications plc and Granada Group plc and United News and Media plc, CC Report the three Proposed Mergers, June 2000.

\textsuperscript{573} In this case, the likely response of customers to a hypothetical small, non-transitory change in relative prices of BskyB’s offering.

\textsuperscript{574} The question is: how do consumers view terrestrial TV or other forms of audio-visual entertainment as close substitutes for subscription to cable and satellite TV (pay-TV).
broadcasters could charge. The NCA on this occasion referred to and applied EU competition law principles\textsuperscript{575} and EU sector-specific provisions.\textsuperscript{576}

619. Supply-side substitutability focuses instead, on the value of a viewer from the broadcaster’s viewpoint. For a pay-TV broadcaster, the value of the viewer is reflected by reference to the subscription fee; on the other hand, for an advertising-funded terrestrial TV broadcaster, the value of such viewer simply corresponds to the value of the viewer to advertisers.

### 3.3.1.3. Upstream markets for the supply of content

620. The first distinction to be drawn between the supply of content is that drawn between premium and non-premium channels. Initially, the DGFT did not make any clear-cut market distinction between these channels, considering in its \textit{Review} that the relevant market was that for the supply of ‘basic’ channel packages where general interest programmes were mixed with films and sports. To support his finding, the DG went through the “classical” competition law based test of examining both demand-side\textsuperscript{577} and supply-side\textsuperscript{578} substitutability, none of which led to the conclusion that general interest programmes were a separate market from premium channels offerings.

621. However when this market definition was applied in the \textit{BskyB/Manchester United} decision of April 1999, the CC clearly distinguished between a ‘basic’ channels offering and a premium one, essentially basing its findings on quantitative evidence (different price levels).\textsuperscript{579}

622. Within premium channels, the DGFT’s \textit{Review} identified two separate markets for premium films and sports channels. The NCA relied in particular on the different traits of the two offerings, including their durability and method of payment. This approach was further developed in the merger decision of \textit{BskyB Group plc/Manchester United plc}.


\textsuperscript{577} Looks at the viewers’ behaviour: with the basic package they buy an option to access a greater volume and variety of programming - here individual basic channels might be a partial substitute to premium channel.

\textsuperscript{578} Individual basic channels is a partial substitute to premium channel because the programming rights for basic channels are more easily available than the rights for premium channels, which tend to be in short supply.

\textsuperscript{579} It calculates the extra cost of a single premium channel if added to the basic package.
However it appears from the BIB/Open decision that the Commission may be rather dubious of the OFT’s market definition. In particular, the Commission noted that both offerings (as opposed to the basic package one) were financed on an individual basis, for each sport event or film. On that basis, the Commission upheld the existence of a broad market, irrespective of the distinction inferred between sports and film-oriented offerings of the premium channels. Contrary to the DG of the OFT, who rigorously applied the SSNIP test, the Commission here disregarded the ‘content’ factor (distinction between films and sports) in coming to its conclusions.

### 3.3.1.4. Digital interactive television services

623. This market was recognised as a developing market (so not yet at the stage of a “relevant” market) for the first time in the DGFT’s Review of BskyB’s Position in the Wholesale Pay TV Market, December 1996. The Review concluded that digital interactive TV services were to be regarded as a potential constraint to the pay-TV market, which was conclusive for the assessment of barriers to entry in the pay-TV market.

624. In a subsequent decision, NTL Incorporated and Cable & Wireless Communications Plc., the CC clearly denied the possibility that digital interactive TV services could amount to a separate relevant market. With NTL, the NCA deliberately departed from the BiB/Open decision. The additional factor introduced in this case was that it was neither upheld as a ‘relevant’ market, nor as a ‘barrier to entry’. The CC also took greater account of the time horizon criterion. The CC considers digital TV (in all its versions, also comprising its ‘interactive’ format) to be part of a wider market for pay-TV services, which includes Internet access via TV screens or via PCs. The pay-TV market definition reached at this time was the broadest yet in the UK. In our point of view, this approach reflects the over-all tendency of national judges to give conclusive importance to technological innovation as a determining factor of market definition.

### 3.3.1.5. Conditional access technology

625. The conditional access technology market was upheld in Vivendi SA/BskyB Gorup plc as a particular and very specialised application of digital technology. This market definition is narrower than that reached in BIB/Open, and can sometimes seem at odds with the EU approach, which conceived a much broader market definition that embodied all “technical services for digital interactive television services and pay-TV”.

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580 In NTL, the CC refers to the BIB/Open case arbitrarily endorsing thereof a different view. As we have seen supra, the EU Commission took the view that a separate market for digital interactive services existed because of the inherent characteristics of the products.


582 Cf. supra section 2.4.2.2. (para. “Conditional access to digital platforms”).
3.3.1.6. Customer access infrastructure market for telecommunications and related services

626. In the BIB/Open decision, the Commission regard customer access infrastructure for telecommunications and related services as a product market, the definition of which heavily relied on the concept of ‘triple play’.\(^{583}\) In the longer run, the convergence of transmission paths and technology may lead to an expansion of this market definition, so as to enlarge the market for current video-related services\(^{584}\). Time horizon was again of great significance, however, the SSNIP test prevented the Commission from upholding a separate relevant market in this sense.

627. In NTL, the CC foresaw a possibility of direct competition between ADSL technology and cable broadband infrastructures. This case also proves a distinctive willingness, on the part of UK courts, to rely on international benchmarking, with the US case, AOL/Time Warner, certainly greatly influencing the national court.\(^{585}\)

3.3.2. Market definition in the books and publishing sector\(^{586}\)

628. The publishing sector focuses on five potentially different product markets, each of which in turn can be further segmented. These are (i) the national newspaper market; (ii) on-line editions of the national newspaper market; (iii) a newspaper market, divided into retail and wholesale, local and regional, and paid-for and free newspapers; (iv) series; and (v) slip editions. This latter distinction between series and slip editions is not reported herein, because they were merely mentioned by the NCA who did not provide specific market definition criteria, and so no specific analysis may be conducted thereupon.

3.3.2.1. The national newspaper market

(i) Product market

629. Defining the national newspaper market as a separate product market emanates from the MMC’s report in 1993, entitled “Newspaper publishing and the market for national newspapers”. Paragraph 3.2 of the report states

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\(^{583}\) On this point, cf. (chapter 3.1.4. (iv) on ‘border-line criteria of market definition’).

\(^{584}\) Pay-TV, telephony and other interactive entertainment / informational services.

\(^{585}\) Especially on the issue of whether Internet related services and pay-TV compete with one another.

\(^{586}\) See Grid of Analysis, U.K.- Books & Publishing Cases (Annex III.5). It should be noted that the present section will not examine the issue of the advertising market in newspapers, which falls out of the scope of the present study. However, one should bear in mind that the existence of advertising revenues may have an impact on market definitions.
that “in interpreting the terms of reference to this inquiry (see Appendix 1.1) we have taken as national newspapers those daily and Sunday newspapers of general interest which one might usually expect to find on sale at most retail outlets in England and Wales”.

Besides that, the FTA has defined what newspapers means within its own specific context\textsuperscript{587}, stating that a national newspaper is defined as a “daily Sunday, or local (other than daily or Sunday newspaper) circulation wholly or mainly in the UK or in part of the UK”\textsuperscript{588}.

630. The delineation of a product market on the basis of a legislative provision tends towards the \textit{a priori} exclusion of elements not expressly mentioned therein, therefore television and radio news are excluded from the national newspaper market. UK case law does not provide any further corroborating factor regarding the specificity of the printed media and thereby differentiates from the Commission in that a few Commission decisions, such as \textit{Newspaper Publishing} emphasised characteristics of the printed press, such as its physical portability, rapid coverage, and wider range of depth of analysis.\textsuperscript{589}

   \breve{\textit{Broad nature of the national newspaper market}}

631. UK case law includes within the broad scope of this market, a number of other varieties of newspaper such as “national weeklies”, popular tabloids, mid-market titles and quality broadsheets, but excludes national monthlies. The broad nature of this definition appears to be largely inferred from the use of a \textit{chain of substitution test}, where identifiable segments of the market, such as popular tabloids, mid-market titles, and quality broadsheet, were considered not to be autonomous markets because they were linked by a chain of substitution on the demand side.\textsuperscript{590} As regards to, supply-side substitutability, the MMC Report 1993 paragraph 3.7 states “\textit{product prices and content are also noticeably different between the popular tabloids and the quality broadsheet, ... most of the existing publishers have two or more titles of different types but do not operate in all market segments and there is a potential, therefore, for supply side substitution between segments}”

The MMC therefore does highlight a possibility of supply-side substitution. Additionally, the report does suggest a distinction between newspapers on the basis of content however not to the same level of differentiation as the EC level.

632. Our analysis of UK case law did not provide for any scenario suggesting a distinction within national newspapers on the basis of content type (such as press publications with different content or political orientation). Major relevant decisions here are \textit{Johnston Press plc/Home Counties}

\textsuperscript{587} For a concise explanation of the \textit{FTA 1973}, see \textit{supra} section 2.4.1.1. of this Report.
\textsuperscript{588} Section 57(1)(a) of FTA
\textsuperscript{589} \textit{Supra} section 1.4. of this Report.
\textsuperscript{590} See \textit{Trinity plc/Mirror Group plc and Regional Independent Media Holdings Limited/Mirror Group plc}.
Newspapers Holdings plc; Portsmouth & Sunderland Newspapers plc and Johnston Press plc/et alii; Trinity plc/Mirror Group plc; and Regional Independent Media Holdings Limited/Mirror Group plc.

However, such a distinction has been made at the EU level in the Recoletos/Unedisa decision, where the Commission differentiated for market definition purposes, between national daily ‘sports’, ‘financial’ and ‘general interest’ newspapers. The Commission took into account ultimate consumers’ needs, the type of readers expected for each type of publication, their respective prices and selling patterns. Similarly, in the Newspaper Publishing decision, the Commission made a qualitative and quantitative analysis, on the basis of which it upheld the existence of four different markets: (i) television and radio news; (ii) regional or national newspapers; (iii) popular tabloids; and (iv) quality segment newspapers.

The broad national newspaper market still includes the on-line edition of papers.

633. In the OFT Review of Undertakings Given by Newspaper Wholesalers of January 2002, on-line editions of national newspaper qualified as a developing market on the basis of the standard SSNIP test. The OFT considered that, notwithstanding the increasing reach of Internet connection and on-line trading, a price increase in printed national newspapers at the retail level by a small but significant amount above competitive levels, would probably not lead to sufficient losses in sales likely to make such a price increase unprofitable by consumers switching to on-line editions. It should be noted, though, that the OFT Review of Undertakings Given by Newspaper Wholesalers is only a consultation document and therefore that its legal value should not be overestimated.

634. The lack of substitutability between on-line and printed newspapers was inferred from two aspects of on-line publishing: (1) for a number of consumers, access to on-line newspapers is still not possible, for example commuters without remote-Internet access or consumers without Internet access at home; and (2) of those consumers able to switch from printed to on-line newspapers, the cost of reading time due to online connection charges may exceed even a small but significant increase in retail prices.

635. No corresponding EU case law was found.

594 COMP/M.1401, 1 February 1999.
595 Supra section 1.4. of this Report.
597 More detailed comments on the reasoning employed by the Commission cf. supra section 1.4. of this Report.
(ii) Geographic market

636. The geographic market was defined *ab initio* in the FTA as being national in scope. No indication was given as to the geographical scope of the emerging market in on-line newspapers, however should that be considered as a market on its own, it is very likely that its geographical boundaries would be analogous to that of printed newspapers, and therefore limited to the national territory.

3.3.2.2. The further segmentations of the newspaper market

Within the national newspaper market, the OFT relied on regulatory findings to recognise a further segmentation between retail and wholesale newspaper distribution\(^{598}\). The OFT thus followed the format of the general national newspaper market definition (where the OFT referred to national legislation\(^{599}\)), despite also taking it a step further and relying on a sector-specific measure in the strictest sense of the meaning.

As for the retail newspaper market, the OFT relied on section 3.2. of the *UK Code of Practice on the Supply of National Newspapers*, which defines the retail newspaper market as “those daily and Sunday newspapers of general interest, which one might usually expect to find on sale at most retail outlets in England and Wales.” At the retail level therefore, newspaper distribution is concerned with the relationship between the retailer and the customer.

At the retail level, the NCA distinguished between a local urban and a local rural market. The existence of a local urban market was essentially based on the SSNIP test, for example, London represented a “cachement area” and also in the chain of substitution test, which shows the existing link between all retail outlets within a given conurbation. The frontiers of a market end with man-made barriers (e.g. motorways) or natural barriers (e.g. rivers or unpopulated countryside). The local rural market on the other hand involves a narrower determination, because the chain of substitution is considered broken when dealing with unconnected rural areas.

In accordance with a demand-side substitutability test, the wholesale newspaper market was defined by the OFT, on the basis of demand from retailers for the wholesale supply of national newspapers. At the wholesale level, the OFT took into account contractual constraints, for example, exclusive publishing contracts between wholesalers and publishers, when defining the relevant geographic market as the minimum geographic area within which a single wholesaler could own the exclusive right to distribute all printed national newspaper. Potential competition from other media, such as

\(^{598}\) OFT Review of Undertakings Given by Newspaper Wholesalers, January 2002.
\(^{599}\) Ibid.
local commercial radio, cable television with local programming was also examined, although it was not considered as conclusive to a broader market definition.

640. No corresponding EU case law was found.

Identification of local and regional newspapers

641. Local press was distinguished from regional press in accordance with industry standards, therefore no substitutability test was applied. The geographic market was defined according to the area of circulation or distribution, which determines whether the newspaper is concerned with local (town, counties) or regional (‘shires’) news, events etc. The Commission has endorsed the same reasoning in *Newspaper Publishing*, for instance.  

Distinction between paid-for and free newspapers

642. Paid-for newspapers and free newspapers have been found to pertain to different markets when based on industry standards, but not when economic-based criteria were taken into account. In *Portsmouth & Sunderland Newspapers*, the CC mentioned the existence of distinctions “within the industry, for measurement purposes” between paid-for newspapers for which “circulation data is published”, and free home-delivered newspapers for which “distribution data is used”, hence it seems that the industry distinguishes between these two publications.

643. Concerning economic-based criterion, the key decisions are: (i) the CCAT’s decision in *Aberdeen Journals Limited* of 19 March 2002, which set aside the DGFT’s decision of 16 July 2001 on the grounds that the market definition adopted in that decision was insufficiently reasoned, and ordered that the matter of the definition of the relevant product market should be remitted to the DGFT for further consideration; and (ii) the decision of the DGFT of 16 September 2002, where after further analysis of the market, the DGFT confirmed its original decision, that there exists one broad market for the supply of advertising space in local daily or weekly newspapers, consisting of both paid-for and free publications.  

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600 *Supra* section 1.3.3 of this Report.
601 *Portsmouth & Sunderland Newspapers plc and Johnston Press LPC / Newquest (Investments) Limited/ News Communications and Media plc.*
602 Paragraph 4.4.
603 *Aberdeen Journals Limited v Director General of Fair Trading Case No: 1005/1/1/01*
604 Decision of the DGFT No. CA98/5/2001, Case CF/99/1200/E
605 Decision of the DGFT No. CA98/14/2002, Case CE/1217-02
606 The differences between the methodologies adopted by the DGFT, on the one hand and the Appeals Tribunal on the other are clearly visible in the Grid of Analysis in Annex III.5.
In its expanded treatment of market definition, the DGFT reiterated the opinion of the CCAT in its overall approach to market definition, that the identification of products substitutable for advertising space, and in turn, the definition of the relevant product market was essentially a matter of fact, taking into account the whole economic context within which the conduct of the undertakings took place, including, the degree of substitutability or interchangeability between them; an examination of the competitive conditions; the structure of supply and demand; and the attitudes of consumers and users, in addition to the objective characteristics of the products concerned. An analysis of economic and econometric evidence (such as customer switching in response to price changes) might also be of assistance in establishing the conditions of competition, in particular when determining the degree of demand side substitutability.

However, the DGFT went on to note that the CCAT had itself acknowledged that an economic assessment of substitutability was, as a matter of law, not required, provided that the matter could be sufficiently established from other evidence. Furthermore, in certain cases economic and econometric techniques might be of limited value due to atypical competitive conditions or a lack of sufficient reliable data or because survey data happened to be inconclusive.

In such circumstances, the CCAT had supported the use of factual-based evidence, comprised of both subjective and objective approaches. Statements by the parties involved, for example, reflecting their views of the market on which they operated might be of crucial importance, given their intimate knowledge of the market concerned or the conduct of the allegedly dominant undertaking and its competitors, for example, where an undertaking reacts to the introduction of a new product in a manner which indicates that it views it as a competitive threat to its business.

Concerning whether the market ought to be segmented into free versus paid-for newspapers, the DGFT noted that the fact that a reader must pay to read a certain newspaper did not necessarily place advertising space in that

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607 The DGFT noted that such a test must be applied with caution, in cases involving markets where competition is being distorted (e.g. where there is a dominant undertaking), because market prices might already be at uncompetitive levels. In such cases, a small but significant increase in prices that were already excessive might lead to large scale switching to products that normally would not be a viable substitute.

608 The Tribunal had relied on the specific, objective characteristics of the three newspapers involved in the alleged abuse: the nature of the advertising, comparative advertising rates, numbers of copies distributed, target audience, and catchment area to be covered, in determining the market. In its opinion, a description of the objective characteristics of the products in question was almost always necessary in cases of disputed market definition, because it was on that very foundation that the discussion of the relevant product market must rest. However, the DGFT in its original decision had provided no description of the characteristics of the three newspapers concerned. It further noted, that since the DGFT had also not provided any economic-based assessment of substitutability on the demand-side to support the market definition it had reached, it had had to rely on other evidence. Yet the DGFT had relied on only one single letter to establish a competitive relationship between two of the parties, and to come to the conclusion that there existed one broad market. In the eyes of the CCAT, this was not sufficient.
newspaper in a different market from space in a free newspaper; the important factor was whether that space was substitutable from the point of view of an advertiser. The key factor for these purposes was whether the readership of a newspaper gave broadly equivalent coverage for an advertisement, at a comparable or lower cost, which in turn largely depended on the appeal of a particular newspaper to its target readership.

The DGFT referred to several decisions of the CC and MMC, which had held paid-for and free newspapers as being in competition with one another, but acknowledged that previous CC comments were not sufficient in themselves to prove a market definition. Instead, the DGFT relied on further evidence, in particular the fact that the newspapers shared certain characteristics, namely, format, circulation and general style, and to some extent, similar advertising ratecard rates for display advertisements, the lack of viable alternative media for the majority of local advertisers, the conduct of the parties, and contemporary statements from them concerning their views of the market in forming the view that free and paid for publications formed one and the same market.

644. Supply-side substitutability also played an important role in the reasoning of the CCAT, as to whether the different newspapers could be considered as complements or substitutes. The CCAT relied on the “groups of complements.” criterion, in considering that “complements” were usually not substitutable products and thus did not pertain to the same product market, save in exceptional circumstances where they might form a single broader market. The CCAT added that such a situation exclusively depended on the facts of the case, usually on the overall business strategy of the undertakings concerned. Interestingly, however, the DGFT’s decision hardly contained any factual description of objective characteristics, such as the content or kinds of advertising, although this kind of reasoning is necessary in order to assess the relevant market.

The courts viewed as conclusive, evidence of a difference in advertising content, and formatting and editorial content.

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609 See infra section 2.4.1.2. of this Report.
610 In this case the question was whether advertising activities of the paid-for-daily Evening Express was subject to competitive constraints or competitive pressure from the advertising activities of the free-weekly Independent.
611 Here we found inconsistency amongst national judgements. In other words: why is the difference between advertising content on free and paid-for newspapers relevant to distinguish between free and paid-for newspapers, whereas such a difference is not considered important for distinguishing advertising on free and paid-for newspapers? This issue is further developed supra at section 2.4.3.4. where the CC Appeals Tribunal decision in Aberdeen Journals v the Director General of Fair Trading marks a major shift in opinion on the matter, distinguishing from previous case-law (those CC Reports commented in the current section).
3.3.3. Market definition in the Internet related sector

645. As outlined in the Grid of Analysis, Internet related markets in the UK are generally divided into three major categories: (a) dial-up (narrowband) Internet access services at the retail level; (b) broadband retail and wholesale services; and (c) Internet access wholesale services, irrespective of whether they are narrowband or broadband.

646. The following analysis is structured on the basis of this three-fold partitioning. Moreover, rather than examining each of these markets in a ‘static’ way, we endorsed the more dynamic approach favoured by the UK regulator. In a forward-looking fashion, OFTEL identifies Internet-related markets in opposition to other products/services with common characteristics. By adopting the ‘X vs. Y’ parameter, we thereby focus the UK authority’s reasoning, which aims at highlighting the differences between the relevant product/service upheld and a potentially analogous market (which is excluded from the relevant market definition).

3.3.3.1. Internet call origination, termination and Internet connectivity

647. With regard to this distinction, OFTEL adopts the same perspective as that developed by the Commission in its Draft Recommendation. However, contrary to the Commission, the UK regulator gives relevancy to both the market for Internet call origination and Internet call termination.

648. According to the legal standard, Internet call origination is essentially the service provided by an operator that has access to the customer; therefore, the operator gives the customer access to the initial part of the network (normally the local exchange). Whereas, Internet call termination, is the part of the Internet call between the originating network and the ISP (the ‘consumers’ of wholesale Internet call termination services). Demand for call origination is derived from the retail market, because end users’ demand for retail Internet access determines ISPs’ demand for Internet call termination from the termination operator. An analogous reasoning was adopted in a few EU decisions involving the distinction between pay-TV and free-to-air TV.

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612 UK - General Competition Law and Sector-specific Principles, at paragraph 2 (Annex III.2.) See in particular pp. 15-25.

613 According to the OECD, the “retail” service corresponds to the provision of Internet services and the “access” wholesale services is the provision of local loop services for the origination of the connection to the Internet. See OECD, Competition Issues in Telecommunications, DAFFE/CLP/WP2 (2001)3, 30 April 2001, para. 97.

614 e.g., ABC/Générale Des Eaux/Canal+/WH Smith TV, IV/M.110, 10 Sep 1991; Kirch/Richemond/Telepiù’, IV/M.410, 2 Aug 1994; Bertelsmann/News International/Vox, IV/M.489, 6 Sep 1994; MSG Media Service, IV/M.469, 9 Nov 1994; VOX II, IV/M.0525, 21 Dec 1994. There the pay-TV and free-TV markets are considered ‘related’ because they are dependent on each other as the value of the former depends directly on the alternative viewing possibilities (e.g., the growth of the pay-TV market decreases where the programs provided over free-access TV are more varied).
649. The NRA further explains that the hypothetical monopolist test cannot be applied because both Internet call origination and Internet call termination belong to the same “group of complements”. However given the long-life cost criterion, these are not seen as substitutable because both are required to provide end-to-end Internet access.

650. Internet call origination and termination are distinguished from wholesale Internet connectivity for the purposes of ex ante analysis. Internet connectivity market is defined as the ability to access the entire Internet from a point of interconnection to the Internet, such as a connection to one of the backbone networks that comprise the Internet. As in other jurisdictions such as Italy, this market consists of wholesale-integrated national and international connectivity services offered to ISPs to connect them to end-users. There is no correspondence link with the market definition given by the Commission in WorldCom/MCI and MCI WorldCom/Sprint, which refers to a specific and distinct market for the provision of “top-level” or “universal” Internet connectivity. For this particular market, the Commission has not yet provided a market-area or market-competition definition, it being a sector characterised by vigorous competition.

651. From a geographic viewpoint, OFTEL applied the hypothetical monopolist test, and concluded that from the perspective of small and medium-sized ISPs, there was no demand-substitutability between supply of Internet connectivity from UK backbone providers and supply of Internet connectivity from foreign backbone providers due to the high barriers (costs and quality constraints) for purchasing connectivity from suppliers in other Member States. It nevertheless admitted that there might be demand substitutability between national and international supply of Internet connectivity from the larger ISPs’ perspective, however this was irrelevant because it was the perspective of the majority that should be taken into account.

3.3.3.2. The initial broadband/narrowband distinction

652. The first criterion of distinction is the intrinsic characteristics of the products, i.e. their capacity and speed. OFTEL considers dial-up Internet
access as a separate market from broadband Internet access at the retail level. However, it did not apply the hypothetical monopolist test because of the lack of quantitative evidence. The distinction is therefore primarily based on ‘qualitative’ evidence, such as substantial price differences (despite cross-price elasticity not being fully available), different quality (speed of access and reliability), and the always-on availability that is peculiar to broadband connection.

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OFTEL examined the substitutability of broadband and narrowband by investigating demand-side substitution, and considered that a supplier of narrowband access to the Internet would probably find it unprofitable to raise its prices significantly, because consumers would be increasingly encouraged to switch to higher-quality, high-speed products. This leads to the conclusion that narrowband and high-speed access services may belong to the same market (the price of the broadband offering being a competitive constraint on the narrowband offering) from a demand-side perspective.

However, the application of the SSNIP test at the supply level shows that consumers would become so used to the quality/services, that suppliers of broadband services would need a much larger price differential to switch to narrowband supply: indeed, the more consumers are used to quality broadband services, the less they will be likely to switch to narrowband ones, particularly if the theoretical change in prices is “small”.

Thus, the extension of broadband services tend to show that narrowband and broadband pertain to two different markets. In this context, OFTEL attaches greater relevance to supply-side over demand-side substitutability, considering that the SSNIP test is misleading in dynamic and developing industries such as the Internet, where quality-based variables influence the service/network providers’ choice (whether to switch to narrowband or broadband transmission capacities).

OFTEL also takes into account time-horizon considerations, in particular it does not exclude the possibility that technological advancements may, in the longer run support a broader market definition encompassing both narrowband and broadband applications for retail Internet access services, because it believes that the price of broadband services will decrease and the

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620 OFTEL found very little empirical evidence on usage patterns and price elasticities. See OFTEL Director General, International Benchmarking Study of Internet Access (Dial-up and Broadband), 12 June 2002.

621 It is interesting to note that the Commission adopted the same analysis and reached the same conclusion in its Draft Recommendation on the Relevant Product and Services Market in accordance with Directive 2002/21/EC June 2002. See Draft Commission Recommendation on Relevant Product and Service Market, cit., p. 18 para. 4.2.2. of the Explanatory Memorandum.
3.3.3.3. Dial-up (narrowband) Internet access and services

Service (downstream) and network (upstream) markets

We can deduce from the regulatory definition that the narrowband Internet access market consists of a bundle of two elements: service provisioning (at the downstream level), and network (at the upstream level). Under EU competition law, particularly in the telecommunications sector, these two components are viewed as distinct markets. However, in the Commission’s latest regulatory proposal, the provision of network and services are “bundled together”, although few competition-based explanations for this are given.

The UK regulator has departed from the EU approach because of the ‘group of complements’ criterion, which may broaden or restrict the market definition depending on whether the complementary-relationship implies a long-life time consideration on the demand-side and supply-side level. Dial-up Internet services and network access are considered complements in the sense that they belong to the same market, because both are required to provide the ultimate dial-up access service.

No market distinction on the basis of customers

OFTEL also addressed whether separate sub-markets existed, based on type of user, and concluded that such distinctions were not appropriate because narrowband access was not generally a genuine option for actual commercial use of Internet applications.
Market distinctions on the basis of technology

659. Modem (dial-up via PSTN) and ISDN connections are considered as part of the retail Internet access market for narrowband applications on the basis of potential competition existing between them. Internet connection through the deployment of a modem and ISDN technology\(^{629}\) form a single market because of the high demand substitutability existing between the two technologies. Quality-based evidence predominates here.\(^{630}\)

660. On the other hand, within the narrowband Internet access, OFTEL made some market distinctions, according to technology type for the following:

- **GSM vs. Narrowband dial-up**: Internet access though GSM mobile technology falls outside the definition of narrowband dial-up markets. There is in fact an absolute lack of substitutability between these two transmission technologies, the different speed and content available makes the two services complementary to one another, so that long-life costs evaluation brings consumers and suppliers to the conclusion that are separate offerings.

- **Leased lines and Narrowband connectivity**: leased lines and dial-up Internet connections are not considered as a single broad market, mainly due to the lack of demand and supply-side substitutability, which is mostly determined by the substantial price differences between them.

- **Internet via TV vs. Internet via narrowband connection**: OFTEL addressed the issue of whether Internet access through digital TV set-top boxes might be considered substitutable for dial-up access. It concluded that any market, where Internet access operators may chose to use a broadcast access path instead of a modem, might be seen as an ‘emerging’ broader marketplace, however no substitutability was found because only a small fraction of users would switch as a result of a non-transitory price increase in the range of 5%-10%. Factors corroborating that finding were: (i) barriers to entry, such as the costs involved in obtaining the necessary equipment (digital TV set or a PC); and (ii) content, which is not equally accessible (certain content on TV is re-authored and might not be fully accessible, such as attachments). For these reasons Internet services via the TV set and via dial-up connection amount to two different markets.\(^{631}\)

\(^{629}\) Modem and ISDN connectivity both use the public switched telephony network (PSTN) of the incumbent operator.

\(^{630}\) NRA refers to the “similar characteristics” (OFTEL, Effective Competition Review of Dial-up Internet Access, cit., p. 58 para. A.27).

\(^{631}\) In this regard, it seems that this finding can be distinguished from the Commission decisions in BskyB/Open, UGC/Liberty Media (para. 12), and Vodafone/Vivendi/Canal+ (para. 34)
No market distinctions on the basis of pricing policies

661. Notwithstanding the lack of demand-side substitutability under the perspective of user type, for example, low and high-usage customers, OFTEL considered metered and un-metered Internet access services to belong to the same retail market. In particular, it noted that:

- Demand-side substitutability should not be used to measure how suppliers choose to structure tariffs;
- The product is the same;
- The test should apply with regard to the behaviour of medium-usage consumers that are the majority, rather than take into account the point of view of low and high-usage customers; and
- Supply-side substitutability is very high because an hypothetical monopolist providing un-metered access would not be able to raise prices above the competitive level, if companies were able to promptly switch to the provision of un-metered access at a lower price than the hypothetical monopolist.

3.3.3.4. Broadband Internet access and services

662. Broadband services are defined from a regulatory point of view as, “always-on services with a minimum downstream capacity in excess of 128 Kbit/s.” OFTEL here endorses a conclusion different from that adopted, for example by the OECD and the FCC (the U.S. NRA). However, this definition corresponds to the notion of “electronic communications services and networks” according to the EU Telecom Regulatory Package, with a methodology similar to that followed for dial-up Internet services.

where the test was based on the sole characteristics of the technology used. However in neither decision did the Commission reach a definitive conclusion on this issue.

632 See also Draft Commission Recommendation on Relevant Product and Service Market, cit., p. 19 para. 4.2.2. of the Explanatory Memorandum.
633 See the Grid of Analysis, U.K. - General Competition Law and Sector-specific Principles, at paragraph 2 (last portion of Internet Access section) (Annex III.2).
634 According to the FCC, capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, ‘bandwidth’) in excess of 200 kilobits per second (Kbps) in the last mile (FCC, First Inquiry Concerning the Deployment of Advanced Telecommunications). The OECD raises the threshold: for a service to be considered broadband, in respect to downstream access to 256 Kbps. (OECD, The development of broadband access in OECD countries, 10 May 2001).
635 See above the U.K. Draft Communications Bill. According to the Commission in its Draft Commission Recommendation on the Relevant Product and Service Market, “higher bandwidth or broadband Internet services may be characterised as allowing downstream
Part 3 – The U.K.

Market definition in the media sector: a comparative analysis

(i) The distinction between broadband retail and wholesale services markets

663. Within the broadband category of products and services, OFTEL further segments it into retail and wholesale broadband products/services. Demand-side substitution is the only test used and, indeed, the only available one. Even though there is a degree of supply-side substitution at the retail level, such a migratory tendency (i.e., switching from the supply of broadband retail services to broadband wholesale services) would not provide a competitive constraint on suppliers of upstream services. The basic assumption is that the retail and wholesale markets are ‘related’ markets, since the level of demand for the input/upstream depends on the demand for the output/retail service.

(ii) Broadband markets at retail level

Retail Internet access

 ostream of the traffic: Asymmetric vs. Symmetric

664. OFTEL made a few subdivisions within the broadband retail sector, the first relating to the direction of traffic (i.e., asymmetric and symmetric connectivity) provided to the end user. The downstream speed, to the end user might also vary from the upstream speed, away from the end user. For these reasons, OFTEL distinguishes between a retail broadband ‘asymmetric’ Internet access market and a retail broadband ‘symmetric’ Internet access market.

 Technology

665. On the other hand, no distinction is made between xDSL (Digital Subscriber Line) and cable, both of which fall within the same product capacity to end-users in excess of 128 kbit/s. The bandwidth of the service supplied may be asymmetric or symmetric.” (cit., note 30, p. 18 para. 4.2.2. of the Explanatory Memorandum).

See OFTEL’s Director General’s distinction between narrow and broadband markets in its Direction to Resolve a Dispute Between BT, Energis and Thus Concerning xDSL Interconnection at the ATM Switch, cit., paras. E.6 – E.9.

The Commission did not carry on that distinction.


See OFTEL Director General, International benchmarking study of Internet access (dial-up and broadband), 12 June 2002.

According to Oftel, the Digital Subscriber Line (DSL) is ‘a family of technologies, generically referred to as DSL or xDSL, that are capable of transforming a normal telephone line into a high-speed digital line. These include ADSL (Asymmetric DSL), SDSL (Symmetric DSL), HDSL (High data rate DSL) and VDSL (Very high data rate DSL). DSL enabled lines are capable of supporting services such as fast Internet access and video or TV on-demand.’ OFTEL’s Glossary, cit. Both DSL and cable services have similar capacity with respect to their ‘return paths’ (which is ‘the means by which messages are transmitted back
market, because they provide high-speed telecom services to consumers over the local loop/cable network. Both enable interactivity, such as video-on-demand services and are thus generally substitutable from the end-user’s perspective. The Commission considers retail broadband Internet access via upgraded cable TV networks and via xDSL substitutable with one another so as to fall within one single market.\textsuperscript{642}

OFTEL nevertheless found that retail broadband Internet access services, whether through xDSL or cable infrastructures, might be subject to some competitive pressure by other transmission paths. Potential competition however, is not used here for the purpose of market definition, but rather for an assessment of market power. Potentially competing infrastructures are leased lines (over 128 kbit/s), satellite, broadband fixed wireless access and UMTS mobile access.\textsuperscript{643}

\textit{Consumers}

666. Finally, the determination of possible separate markets based on consumers (residential and business) services was left open.

667. Concerning demand-side substitution, these are regarded as separate markets because a hypothetical monopolist of business broadband Internet access would find it profitable to raise prices above competitive levels. Indeed, business users would not switch to residential broadband Internet access because of the lower quality bandwidth, the higher contention ratios and the lower quality of service.

668. However, the SSNIP test for supply-side substitution leads to a broader single market definition, on the grounds that most ISPs provide both business and residential costumers. However, supply-side substitution does not provide a constraint on suppliers of upstream broadband inputs, which tends to reduce the importance of that element as a factor in the identification of market definition. Similarly in more recent decisions,\textsuperscript{644} the Commission has sought the existence of a developing demand among residential and small business customers for the provision of broadband (“always-on”) Internet access services, as opposed to business customer demand. The issue, however, was not decided because it was irrelevant for the purposes of the entity’s appraisal.

\textsuperscript{642} UGC/Liberty Media, para. 13. A step back was made in \textit{AOL/Time Warner}, where the Commission did not find it necessary to decide whether DSL, cable and other forms of high-speed Internet access belong to the same relevant product market (para. 41).

\textsuperscript{643} See for a general overview of the competing technologies OFTEL, \textit{Internet and Broadband Brief}, July 2002.

\textsuperscript{644} \textit{AOL/Time Warner}, paras. 38-41; \textit{UGC/Liberty Media}, paras. 12-13.
Low bandwidth leased lines

669. Regarding ‘data retail services’\footnote{With the expression ‘data retail services’, OfTel wants to highlight the technological trait of broadband services for Internet access as opposed to the leased lines platform with low bandwidth connection.}, OFTEL applies a factual-based analysis, which highlights the differences in characteristics, for broadband data retail services the driving technology is SDSL, HDSL, and fibre, whereas low bandwidth leased lines rely on a separate platform.

670. Low bandwidth leased lines and Internet access services amount to two different retail markets. This further segmentation within retail broadband Internet access services has not been upheld by the Commission in its latest regulatory framework package. OFTEL reaches such an outcome on the basis of the different \textit{purpose} for which the dedicated connection is used, and not on a demand-side or supply-side substitution analysis. According to this approach, low bandwidth leased lines are used to transmit data between two points in a private network, while Internet access is aimed at providing Internet access within a broader backbone network.

\textbf{(iii) Broadband markets at wholesale level}

671. OFTEL maintained a distinction within broadband on the basis of traffic direction, by differentiating between broadband asymmetric origination (which includes ADSL EUDP and ATM backhaul) and broadband symmetric origination\footnote{Ibid, E.70 – E.74.}. This distinction relies essentially on the characteristics involved with employment of the two services (e.g., lack of symmetric functionality), and corresponds to the same rationale adopted for distinguishing between retail asymmetric broadband and retail symmetric broadband Internet access.\footnote{See supra}

672. Within symmetric broadband origination, OFTEL further isolated the low bandwidth PPC terminating segment, which is \textit{per se} a form of wholesale broadband conveyance. As OFTEL states, “this input market largely overlaps with that for symmetric broadband origination with the important exception that low bandwidth PPC terminating segments cannot be used to provide a contended symmetric Internet access service” at the retail level.\footnote{See OFTEL’s Director General’s Report on the distinction between narrow and broadband markets in its \textit{Direction to resolve a dispute between BT, Energis and Thus concerning xDSL interconnection at the ATM switch}, cit., at E.75.} OFTEL therefore considers that the potential overlap at the wholesale level cannot lead to a finding of a single broad market definition because of the different ‘derived’ retail markets, in other words, because low bandwidth PPC termination derives from low bandwidth leased lines and not from broadband...
symmetric Internet access\textsuperscript{649}, it cannot fall within the broadband symmetric origination as defined above.

\textit{Broadband conveyance}

673. On the demand-side, broadband conveyance is complementary to broadband (asymmetric and symmetric) origination as described above. There is no demand-substitutability between these two services as they involve the delivery of xSDL traffic over two different (but complementary) elements of the PSTN.

674. On the supply-side, substitution does not occur because of the significant sunk costs involved to build a distinct network. As a result, broadband conveyance and broadband (asymmetric and symmetric) origination do not fall within the same market.

\textit{Position of the node of interconnection}

675. Finally, OFTEL maintained a further distinction, which was dependant on the position of the mode of interconnection. Even though ‘non-trunk’ and merely ‘trunk’ broadband conveyance services are both interconnection services, they are distinguished for market definition purposes. The characterising factor is that where the former market is provided over the transmission element of the PSTN for DSL within the incumbent’s ATM nodes, the latter (trunk conveyance) includes the transmission element of the PSTN for DSL traffic between primary ATM nodes and other ATM switches (for example, those of competitors to the incumbent).\textsuperscript{650}

676. A retail market for dial-up or narrowband Internet access services has been consolidated into NRA practice since July 2001.\textsuperscript{651} The regulatory definition identifies a retail package comprising two elements: (i) the service provision (i.e. linking the customer to the Internet and e-mail, content and billing); and (ii) the network service (that is access to the network and conveyance of calls by the communications company). After having identified a ‘legal standard’ of analysis, OFTEL develops a competition-based methodology for defining the actual market, on the basis of the \textit{1998 Act, Guidelines on the Definition of the Relevant Market}; the characteristics of that market will or will not justify the imposition of sector-specific regulation.

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\textsuperscript{649} For a definition of the market for the provision of broadband symmetric Internet access, see supra.

\textsuperscript{650} See OFTEL’s Director General to the distinction between narrow and broadband markets in its \textit{Direction to Resolve a Dispute Between BT, Energis and Thus Concerning xDSL Interconnection at the ATM Switch}, cit., at paras E.77 – E.81.

\textsuperscript{651} See Oftel, \textit{Effective competition review of dial-up Internet access}, 30 July 2001.
4. GERMANY

677. This part of the report aims at briefly presenting the methodology and market definition content in the media sector, as upheld by the German competition and regulatory authorities. This section is articulated under the same outline as the one adopted at the EU level, and which was also used for the examination of the other countries subject to the present study. Therefore, this part shall successively examine the origin and criteria for market definition in German competition law (4.1), in order to then compare such criteria with the definitions upheld in sector-focused legislation (4.2). Finally, it will examine and describe the practical implementation of these criteria under German competition law, as applied to the media sector (4.3). Initially we have to stress that due to the time limit of the study and the limited resources, the scope of the study had to be restricted. This especially applies to decisions of the Federal Cartel Office and the courts. They are numerous and therefore could not have been elaborated to the full extent.

4.1. Origin and criteria for market definition in German competition law

678. The competition law related provisions analysed for the purpose of the present report and in light of the identification of market definition criteria are the following:

- Act against Restraints of Competition, as amended by the Act about the Regulation of Price Maintenance of Published Products of 2 September 2002 ("Gesetz gegen Wettbewerbsbeschränkungen" or "GWB").

Besides these there are the following secondary sources that were researched:

- Reports of the Federal Cartel Office ("Tätigkeitsbericht des Bundeskartellamts");
- Regular Opinion of the Monopolies Commission ("Hauptgutachten Monopolkommission")
 Authorities involved

679. Before examining the criteria upheld for market definition in competition law, a presentation of the institutions involved in competition matters is necessary, especially since the federal administration of Germany has led to the establishment of a rather complex network of authorities.

680. The antitrust authorities in Germany are the Federal Cartel Office (“Bundeskartellamt”), in specific cases the Federal Ministry of Economics and, to the effect of which is restricted to the border of a Land, the cartel authorities of the Länder, which are usually part of the Ministry of Economics of the respective Land.

681. On the administrative side, the Federal Cartel Office has jurisdiction to examine all competition restraints in so far as they affect more than one Land and so far as they only have an effect in Germany. These are especially matters of control of concentration and the application of EU Competition Law. The Office is also competent for specific matters e.g., the resale maintenance price regarding published products. The Federal Ministry of Economics may issue general directives towards the Federal Cartel Office, but may not intervene in any pending case. There is, however, a so-called Ministerial Authorization. In these cases, the Federal Ministry of Economics can oppose the decision of the Federal Cartel Office and release the interdiction of a cartel or merger. The Ministry of Economics of a particular Land has jurisdiction whenever a given behaviour only affects its own Land. Therefore, even though the cases dealt with by Ministries of Economics of the Länder may include legally challenging issues, their economic impact is generally limited.

For the purpose of the present study, decisions at the Länder level have been identified and analysed, but they are only mentioned in footnotes and not subject to a thorough analysis.

682. There is an information exchange between the federal authorities and the ones of the Länder. The cartel referents of the Länder, who are usually the directors of the cartel authorities, and the director of the Federal Cartel Office meet informally - at least once a year - to discuss market developments. These meetings may result in the adoption of resolutions, which are not legally but de facto binding upon competition authorities in future cases.

683. The Monopolies Commission complements the Federal Cartel Office and the Federal Ministry of Economics in their work. Its task is especially to issue opinions that concern the level and foreseeable development of business concentration, and the provisions regarding the control of concentrations. They are an important source of cognition of the German law of competition

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652 Sect. 48 Act against Restraints of Competition.
653 Sect. 48 para 2, 15 para. 3 Act against Restraints of Competition.
and are therefore included in this analysis, which acknowledges that they are not binding to the cartel authorities.

684. The Civil District Courts have an exclusive jurisprudence in all civil actions that arise from the Act against Restraints of Competition, cartel agreements and cartel decisions. The jurisdiction for legal remedies against decisions of the Federal Cartel Office lies with the Court of Appeals in Dusseldorf ("Oberlandesgericht Dusseldorf"). Appeals against judgements of the Oberlandesgericht Dusseldorf are handled and decided by the Federal Supreme Court ("Bundesgerichtshof").

### 4.1.1. The standard approach of demand and supply

685. As the GWB determines market dominance among such other things as "the ability of the opposite market side to resort to other undertakings", the market definition must depend on whether a dominance in supply or demand is in question.

#### 4.1.1.1. Product market

\(\checkmark\) Demand side substitutability

686. The starting-point in German competition law for market definition purposes relies on the Act against Restraints of Competition. This Act addresses the issues of cartels, vertical agreements, market dominance and restrictive practices, as well as the control of concentrations. In this Act, market definition is located in the provisions that concern market dominance and restrictive practices. Other chapters of the GWB and other Acts refer to this definition. However, in the Act against Restraints of Competition, the criteria to be relied upon for market definition are mentioned in Sect. 19 GWB, which deals with definition of market dominance and not with the definition. Therefore, the relevant criteria had to be essentially developed by the permanent practice of courts and administration.

687. Market definition is essentially and initially assessed from the demand-side. Demand criteria are based on the functional substitutability of a product or service from the point of view of a purchaser who has already opted for a certain product or service. This test is generally referred to as a demand market doctrine ("Bedarfsmarktkonzept").

Functionally substitutability does not imply physical, technical or chemical identity but a similarity in attributes, application and price, in view of which the reasonable purchaser would consider different products as – also – suitable

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for the coverage of his needs. 656 In this respect, it should be noted that this test takes the de facto perspective of the purchaser into consideration, and not a possible substitution perspective, which would be based on objective or scientific considerations. 657 Furthermore, the test relies on the existence of functional substitutability, which means that the goods and services at stake are the centre of the substitution analysis. On the other hand, the price of the product itself or price differences among products are considered as secondary factors. They are considered to only indicate that there may not be competition between certain products. 658

688. This test is therefore analogous to the cross-elasticity-test which is known at the EU level to assess substitutability. However, it should be noted that contrary to the EU approach, the German initial assessment of market definition relies extensively on the physical and actual characteristics of the products, and not so much on a hypothetical economically-based assessment (SSNIP test for instance).

689. The market definition of the Ministries of Economics upheld at the Länder level generally follows the decisions and findings maintained at the federal level. This results at least from Sect. 74 GWB, which provides that an appeal to the Federal Supreme Court is possible if it is a question of basic importance, or if the further development of the law or jurisprudence requires a decision at the federal level.

Supply side substitutability

690. To a smaller extent, market definition is also appraised in regards to supply-substitutability. To that effect, the criteria looked upon will include the possibility for a supplier to switch production from one product to another. That test will therefore examine, under the terms of Sect. 19 para 2 GWB, the “ability to shift [the] supply or demand to other goods or commercial services”. The test relied upon will also appraise the possibility for the supplier to use alternative distribution channels.

691. The lesser importance given to supply-substitutability for market definition in German competition law is largely similar to the one upheld at the EU level, since the Commission also indicates that it relies essentially and primarily on demand-substitution. That point will therefore not be further commented on in the present section.

657 BGH 26. May 1987 WuW/E BGH 2406, 2408 „Inter Mailand-Spiel“.
658 e.g. KG 28. Aug. 1979 WuW/E OLG 2182, 2183 „Hydraulischer Schreitausbau“.
4.1.1.2 Geographic market

692. Few developments are found under German competition law regarding geographic market definition. In substance, the geographic market is defined by means of analysing the regional substitution possibilities at the disposal of buyers or suppliers. It appears from competition law practice that geographic market definition considerations often tend to be mingled with the territorial scope of application of the GWB. It seems, however, that these two issues should be clearly distinguished as they involve largely different considerations.

693. Legal commercial or technical reasons may also lead to a geographic market definition that is limited to parts of the German territory.659

694. In most cases, due to the above-mentioned tendency to mix the assessment of geographic market definition and the territorial application of German competition law, the upheld geographic market will at most cover the size of the Federal Republic of Germany. However, the competition authorities may take due consideration of economic aspects that extend beyond that area.660 Nevertheless, in 1995 the Federal Supreme Court decided that the geographic market definition should be restricted to the territory of the Federal Republic of Germany, even in cases when the facts of the case could demonstrate the existence of a market that extends beyond its national boundaries.661

695. Furthermore, it should be noted that market definition has internal jurisdiction consequences. Indeed, the dimension of the geographic market upheld will determine whether the antitrust authority involved is the Federal Cartel Office or the Ministry of Economics of the respective Land.

4.1.2 The introduction of more elaborated criteria

4.1.2.1 Product market

696. More elaborated criteria that are taken into account for product market definition includes the appraisal of the existence of neighbouring markets. These markets are the upstream and downstream ones. Due to the very differing conditions of the market that the courts and administration have considered in supply markets and different markets for an identical product because the participants originated from different market levels.663

697. In the same way, this Sect. 19 para. 2 GWB also includes the appraisal of the existence of barriers to market entry by other undertakings, the

660 Comp. 13th Opinion of the Monopolies Commission 1998/1999 short edit No. 61; e.g. power-plant suppliers.
undertaking’s ability to shift supply and demand to other goods or commercial services, and the ability of the other side of the market to resort to other undertakings.

698. However, the legislation only applies to the examination of the existence of a possible dominant position but not to the market definition as such.

699. Time factors are also mentioned. In this respect, dependence on seasons, fashions and technical developments may be considered as critical criteria for a definition by time. No further indication is given, however, concerning the importance of these factors.

4.1.2.2 Geographic market

700. Transportation costs are usually considered to place a natural limit on the boundaries of territorial markets.\(^{664}\)

701. Furthermore, the existence of international competition is examined to assess whether the market boundaries may extend beyond national frontiers. In this respect, Sect. 19 para. 2 GWB mentions the existence of “actual or potential competition by undertakings established (...) outside the area of this Act”. It seems, however, once again, that such criteria pertain to the appraisal of a dominant position test and not to the market definition process. This point of view may be corroborated by the fact that Sect. 19 para. 2 GWB also mentions, along with the existence of international competition, the appraisal of the market share of the concerned undertaking, which is definitely a factor that relates to the potential anticompetitive effect of a behaviour and is not a market definition criterion.

702. Thus, the existence of actual or potential competition from foreign companies seems be taken into account at a later stage, when the Federal Cartel Office and the courts appraise the existence of a dominant position (see section 19 para. 2 No. 2 GWB).

4.1.3 Different approaches based on the type of procedure

703. A main difference when proceeding to market definition regards the procedure at stake and, more particularly, whether the case in question refers to a question of control of concentrations, abuse control or cartel.

704. In control of concentrations the notifying parties have an obligation to define the market. Like at the EU level, this market definition is reviewed and assessed by the Federal Cartel Office. The definition in concentration cases follows an ex ante assessment. So in the assessment it is

determined whether, in the future, the structure of competition may subsist following the transaction or the agreement and whether it will still grant conditions for competition to develop.

As a matter of fact, notifying parties tend to submit a large number of possible market definitions, in order to demonstrate that, whatever the market definition finally upheld, the concentration is not likely to create or strengthen a dominant position. In its decisions, the Federal Cartel Office follows this line with the result that the exact market definition is often left open if the concentration is not likely to raise competition issues. The assessment of all these possible markets is questionable in terms of market definition methodology. Therefore we did not research these cases.

705. The market definition approach in infringement cases is very different. The *ex post or status* assessment requires taking into account the state of the market as it was when the infringement was committed. For this purpose, the company’s competitors, customers and consumers must be identified. *I.e.* this approach consists of identifying demand and supply, and then evaluating the perception of consumers.

706. A common feature of both procedures is derived from the main test that is used for product market definition, which is the functional interchangeability test. In this respect, it appears that the Federal Cartel Office and the Courts have interpreted quite restrictively the existence of such substitutability between products, from the purchaser’s point of view. This approach has led to market definitions that are quite narrow and, consequently, to the increasing likelihood that a market dominance may be upheld.

### 4.2. Comparison with the criteria upheld in the regulatory sector-focused legislation

707. The list of acts regarding sector-focused legislation is much more extensive than the one mentioned for competition law. In this respect, it should be noted that regulation in the telecommunications sector is highly tangled with the one that exists in other electronics media. The complexity of this legal system actually makes it rather difficult for undertakings in the market to comply with all sector-focused provisions. For the purpose of the present study, the acts that can be regarded as the most important are as follows:

- Electronic Communications Act of 22 July 1997, as amended on 14 December 2001 (“Teledienstegesetz” or “TDG”);
- Länder Treaty on Media Services of 20 January 1997, as amended by the so called 6th Modifying Länder Treaty on Broadcasting of 20/21 December 2001 (“Mediendienste - Staatsvertrag” or “MDStV”);
- Länder Treaty on Broadcasting of 31 August 1991, as amended by the so called 6th Modifying Länder Treaty on Broadcasting of 20/21 December 2001 ("Rundfunkstaatsvertrag" or "RSiV");
- Telecommunications Act of 25 July 1996 as amended by the so-called 6th Act regarding the Modification of the Act against Restraints of Competition of 26 August 1998 ("Telekommunikationsgesetz" or "TKG").

708. Apart from these national pieces of legislation, the German legal system entrusts the Länder with several legislative competences regarding broadcasting and the press. Therefore, various acts on media regulation also exist at the Länder level. These are:

- Länder Media Acts ("Landesmediengesetze"),
- Länder Broadcasting Acts ("Landesrundfunkgesetze") and
- Länder Press Acts ("Landespressegesetze").

709. An examination of each of these state acts would overload the present analysis. Furthermore, the main provisions of these acts can also be found in the above-mentioned Länder treaties. Therefore, these Länder acts will not be further examined in the present study.

¹ Institutions

710. The list of sector-focused legislation is as voluminous as the list of institutions that survey the different media markets.⁶⁶⁶ Therefore, a graphic presentation may more easily demonstrate the complexity of the structure of regulation authorities, and may provide useful guidance for understanding the present part of the study:

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711. **Regulation Authority for Telecommunications and Post** (“Regulierungsbehörde für Telekommunikation und Post” or “RegTP”): The RegTP grants licences which, pursuant to the TKG, are necessary to provide certain telecommunications services to the public. In substance, the licence requirement aims at ensuring that only reliable and efficient providers may enter the market in the first place.

Additionally – and more importantly for the purpose of this analysis – the legislator assigned different surveying rights to the RegTP. These include the review of remuneration of certain dominant players in the telecommunications market (Sect. 24 and seqq. TKG), a sector-specific surveillance on misuse (Sect. 33 TKG) and a review on the sector i.e., the possibility to examine carriers’ access to the telecommunications network (Sect. 33 pp. TKG).

As far as telecommunications are concerned, the RegTP controls the allocation of frequencies and telecommunications numbers. By laying down this set of rules and assigning such tasks to the RegTP, the German legislator created a comprehensive sector-specific legislation, which largely interferes with competition law. In this respect, the organisation of the RegTP is to a large extent modelled on the role played by the Federal Cartel Office.

712. As telecommunication rules (and in particular the Telecommunications Act) are “specific” – in so far as they relate to a particular sector of activity – they take precedence over the general ones contained in the Act against
Restraint of Competition. This precedence also applies to the jurisdictions of the authorities. Thus, jurisdiction of the RegTP excludes jurisdiction of cartel authorities, even in cases where such authorities would have jurisdiction under the GWB. Sect. 82 sent. 2 TKG nonetheless provides for a close cooperation between the regulatory and competition authorities.

This is particularly true in the market definition process. Indeed, the identification of market dominance under the Telecommunications Act requires, in the first instance, product and geographic market definitions. For that purpose, it is expressly provided that the RegTP should make such decisions in mutual agreement with the Federal Cartel Office. This mutual agreement also applies to the assessment of market dominance.

Vice versa Sect. 82 sent. 4 TKG provides that in all cases of market dominance, restrictive practices and acts of discrimination that fall under Sect. 19 and 20 para. 1, 2 of the Act against Restraints of Competition, the competent Federal Cartel Office shall “give the [RegTP] before closing the proceedings the opportunity to issue a statement.” Sect. 82 sent. 5 TKG further provides that both authorities shall work towards the establishment of a consistent practice, by establishing a connection with the Act against Restraints of Competition in light of the interpretation of the Telecommunications Act. This allocation of jurisdictions between the RegTP and the Federal Cartel Office consequently leads to the lack of jurisdiction of the Länder cartel authorities in telecommunications matters.

Finally, it should be noted that the specific authority set under the TKG, the RegTP, has jurisdiction to interpret the Telecommunications Act according to European law. The Federal Cartel Office is exclusively competent to directly apply EU competition law and to pursue all breaches of it as far as the GWB is concerned.

In any case, in view of the general cartel law’s aim to regulate competition law in Germany as comprehensively as possible, specific regulations should remain the exception rather than the rule. The Regulatory Authority for Telecommunications, for instance, has thus been obliged to report the progress of its work, and state its position once every two years (Sect. 81 TKG) concerning whether or not specific regulations are still needed with regards to telecommunications, and will be abolished once it is no longer needed.

Several administrative bodies: Pursuant to Sect. 18 para. 1 sent. 3 MDStV, an authority to be named by the law of the Land shall supervise compliance with the rules of the Länder Treaty on Media Services. The jurisdiction of the administrative bodies pursuant to the MDStV includes the supervision of provider identification (Sect. 6 MDStV), the separation between commercials and other media content (Sect. 9 para. 2 sent. 1 MDStV), the prohibition of the use of subliminal techniques (Sect. 9 para. 2 sent. 2 MDStV) and the sponsoring of rules (Sect. 9 para. 3 MDStV). Therefore, there is no conflict and no need for any particular cooperation with the cartel authorities.
715. **Länder Media Institutions** ("Landesmedienanstalten"): The function of the Länder Media Institutions - in total 15 - is to licence and survey private broadcasting entities. The survey includes the prohibition of undue programmes (Sect. 3 para. 1 RStV), compliance with the rules of protecting children and young persons (Sect. 3, 7 RStV), compliance with broadcasting principles (Sect. 41 para. 1 RStV), programme diversity (Sect. 6, 41 para. 2 RStV), standards for commercials (Sect. 7, 44, 45 RStV) and sponsoring (Sect. 8 RStV). Also, the airtime provided to third entities (Sect. 42 RStV) and other provisions, e.g., data protection (Sect. 47 RStV) and opinion polls (Sect. 10 RStV), falls within the jurisdiction of Länder Media Institutions. This allocation of competences and jurisdiction does not lead to particular conflicts, nor consequently to a specific need for an exchange with the cartel authorities.

716. As an executive body of all Länder Media Institutions, the **Conference of the Directors of the Länder Media Institutions** ("Konferenz der Direktoren der Landesmedienanstalten" or "KDLM") has been created (Sect. 35 para. 2 no. 2 RStV) to coordinate the actions of the several institutions.

717. **Commission for the Determination of Media Concentration** ("Kommission zur Ermittlung der Medienkonzentration" or "KEK"): The KDLM acts together with the Commission for the Determination of Media Concentration, which is also an executive body of the Länder Media Institutions (Sect. 35 para. 2 sent. 2 RStV). Their task is to decide the licensing of broadcasting undertakings from a media concentration perspective. The respective jurisdictions and competences of the KDLM and KEK are too complex to be further developed in the present analysis. It may nevertheless be noted that the Monopolies Commission demurred that conflicts in competence damage the work of the surveying institutions. Additionally, the KEK is competent for merger control in private television. The control protects the freedom of information and speech, which is the object of the special protection regime of Art. 5 of the German Constitution ("Grundgesetz"). This goal is in contrast to the one contained in the Act against Restraints of Competition, which relates to the control of economic power. Both Act and Treaty therefore can be applied independently from one another. KEK and cartel authorities serve without regard to their other functions.

718. **Land Government**: The Land governments are responsible for supervising the Länder Media Institutions and public broadcasting undertakings.

719. **Other administrative bodies**: Several other administrative bodies survey data protection matters and rules for protecting children and young persons. They will not be further reviewed and presented, as their core activity does not involve market definition in the media sector.

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4.2.1. Market definition in media focused legislation

720. As explained in the previous section, there is a legislative distinction - at least regarding regulation authorities - between the various telecommunications and media services. In practice this difference lead to several definitions of media services (in its broadest understanding). The sector-focused market definitions follow essentially policy goals, rather than competition law approaches. Most definitions do not follow the product/geographic and supply/demand dichotomies. This situation is actually largely identical to the one which prevails at the EU level, where significant differences between sector-focused and competition law based definitions can be found. German media legislation therefore only provides for a few competition driven market definitions, which are mentioned below.

In this respect, it must be stressed that the media focused legislation is nonetheless not binding for the market definition under competition law. Its influence is indirect as it sets the framing condition of the respective market and therefore it provides only guidelines.

4.2.1.1. Press

721. The press is under a special protection regime, under Art. 5 of the German constitution ("Grundgesetz"), which provides for free press. The single Länder has established rules regarding the exercise of this freedom in their Länder Press Acts ("Landespressegesetze"). According to the Länder Press Acts, the notion of press included in this protection regime includes letterpress products or products of any other duplication technique that is suitable for mass production of "scripts, sound storage media containing language parts, images with or without text, image storage media and music with text or comments" (Sect. 7 para. 1 Press Act Nordrhein-Westfalen).

722. Therefore, the specificity of press is the embodied mass reproduction in contrast to disembodied spreads like broadcasting, TV or radio. Rules that have their origin in press law, like the obligation of a masthead or for counterstatement, have been incorporated in the more recent MDStV.

723. This definition of the press is therefore particularly wide. It does not include any competition law concerns, but relies on a policy goal that relates to the freedom of information. It therefore seems that such definition is too broad to be considered as a “market definition”.

724. Published materials are also subject to particular rules regarding price maintenance. Newspapers and journals/magazines are subject to Sect. 15 GWB. In that respect, in the reasons for its third amendment to the GWB (28 June 1976), the government distinguished daily papers from Sunday papers and weekly papers from magazines. It also upheld the possibility for daily or weekly papers to belong to several relevant markets at the same time, depending on their content, character, readers, mode of publication and

BVerfGE 74, 350 f.
distribution, and other essential criteria for readers. Information distributed by radio, television or films was considered as not being interchangeable with information distributed by the press.

Books and related materials are subject to the newly implemented Act about the Price Maintenance of Published Products ("BuchPrG"). Sect 2 para. 1 BuchPrG defines that in addition to books, sheet music, maps and products that reproduce or substitute them are also comprised by the new Act.

4.2.1.2. Media services

725. The provision of media services does not require a licence. However, these services are subject to a certain Länder control, particularly as regards their content. Media services are defined pursuant to a Sect. 2 para. 1 MDStV as “information and communication services consisting of text, sounds or images directed to the general public and that are transmitted by electromagnetic oscillation without connecting conductor or on or via conductor”.

726. The MDStV also provides examples for media services. Sect. 2 para. 2 MDStV states that media services include in particular:

i. "Distribution services in the form of direct offers to the general public … (Teleshopping),

ii. Distribution services that spread measurement results or data investigation in text or image, with or without accompanying sound,

iii. Distribution services in the form of TV-text, radio-text or similar text services,

iv. On-hold services that transfer presentations of texts, sounds and images for use on demand from electronic stores excepting such services that have the individual exchange of goods and services or the pure transfer of data in the foreground, additionally telegames”.

727. Media services therefore cover communication that is addressed to the general public (mass communication). That core aspect of definition may cause difficulties, particularly as the evolution of convergence tends to blur the difference between services that are addressed to the general public and ones

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670 It will have to be awaited in how far material that is subject to copyright law but is neither mentioned by Sect. 15 GWB nor by the BuchPrG is comprised. The Federal Supreme Court had so far included them in the scope of GWB. (comp. BGH 23. Apr. 1985 WuW/E 2166 et. seqq. "Schulbuch-Preisbindung"; 18. Jan. 1977 WuW/E 1463, 1465 “Briefmarkenalben”). Records will also in future not be regarded according to the jurisprudence of the Federal Supreme Court as subject to price maintenance provisions. (comp. BGH 30. June 1966 WuW/R BGH 795 “Schallplatten” in respect of the old law).
that are addressed to individuals’ requests (see in this respect infra paragraph 4.2.1.3. concerning electronic communication services).

4.2.1.3. Electronic communication services

728. Even though the examination of the legal regime for electronic communication services may (or should) have taken place in a later section of this study relating to the electronic communications framework, we decided to include it in the present section because of its connections both with media services and broadcasting. Indeed, one of the distinguishing features of electronic communications services in German law is the fact that such services are provided for individual use. In this respect, Sect. 2 para. 1 of the Electronic communication services Act (TDG, that has been mostly redrafted due to the E-Commerce Directive) defines electronic communication services (“Teledienste”) as “all electronic information and communication services that are intended for the individual use of combined data such as signs, images or sounds and that are transferred by means of telecommunication”. The supply of electronic communication services requires neither licence nor notification.

729. The TDG clarifies that broad definition of the legislator by providing specific examples. According to Sect. 2 para. 2 TDG, the electronic communication services include in particular:

i. “Services in the field of individual communication (as e.g. telebanking, data exchange),

ii. Services intended for information or communication as long as the editorial arrangement for the opinion-leading for the general public is not in the foreground (data services e.g., traffic, weather, environment or stock exchange data, distribution of information about goods and services),

iii. Services for the use of the internet and other nets,

iv. Services for the use of telegames,

v. Offers of goods and services in electronic data bases with interactive access”

730. Therefore, the main characteristic of electronic communication services is that they are furnished for the purpose of individual use (“individual communication”). It should, however, be noted that no distinction is made based on the type of service at stake. This definition can therefore be compared to the EU one, which is included in the electronic communication services directive.

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671 TDG uses the expression “teleservices” to refer to “electronic communications services.”
4.2.1.4. Broadcasting

731. The regulation of mass communication provides a special set of rules for broadcasting. In contrast to media services, broadcasting presupposes a licence. It is also subject to supervision by the regulation authorities of the respective Land. The main regulatory provision is the Länder Treaty on Broadcasting. Pursuant to Sect. 2 para. 1 sent. 1 RStV, broadcasting is the “performance and distribution of any presentation in words, sounds or images which is addressed to the general public by use of electromagnetic oscillation without connecting conductor or via conductor”.

732. The regulation of broadcasting – together with the one of media services – falls within the legislative jurisdiction of each Land. The respective regulations of broadcasting and media services exclude one another. In this respect, Sect. 2 para. 2 sent. 3 RStV expressly provides that the treaty does not apply to media services. The main difference between these two services is the degree of journalistic significance. This criterion is particularly expressed in the motivations declared by the legislator, which stated that the MDStV only applies to services that provide for limited opinion-leading information to be distributed to the general public, or that transmit images in motion that lack suggestive power.

733. As a result of the above, the following distinction between the various forms of services may be presented as follows. The first and main distinction relies on electronic communication services (individual communication) on the one hand, and media services and broadcasting on the other, as the former covers forms of mass communication. Therefore, the application of a particular legal regime is derived from the recipient of the communication service at stake. In addition to that distinction, there is a further one made that is based on the content provided, i.e., journalistic relevance. It should be noted that this further distinction may raise difficulties in its application (see e.g. the controversial treatment of teleshopping services – which have a low editorial/journalistic input – among broadcasting services).

734. One may wonder whether the main reason for treating broadcasting services separately from other media or electronic services is not derived from plurality requirements that are imposed in broadcasting, which is then imposed upon the government by broadcasting legislative rules. For that purpose, the RStV provides for a definition of a dominant position in the broadcasting sector. Pursuant to Sect. 26 para. 2 RStV, a dominant position as an opinion-leader is deemed to be held when the programmes of an undertaking reach an average audience share of 30% of the viewers, on a yearly basis. Such dominant position would also be upheld when the average audience share exceeds 25% of the viewers, and if the undertaking at stake holds a dominant position on a relevant media market that is linked to a broadcasting market.

Finally, dominant position rules will also apply when an overview assessment of the undertaking’s activities on TV or a related market, shows that the influence of that undertaking’s position as an opinion-leader corresponds to the one of another undertaking that has an audience share of 30% of the TV-
viewers. In case of a dominant position – independent from the implications of the Act against Restraints of Competition (see No. 673 Institutions) – the Länder Media Institutions may reject the granting of further licences, pursuant to Sect. 26 para. 3 RStV.

735. These rules that relate to finding a dominant position in the broadcasting sector are particularly interesting for various reasons. First, a dominant position is deemed to be held when there is an audience share of 30%. Second, the basis for the calculation is the number of viewers and relies therefore on an *ex post* perspective. These provisions thus implicitly seem to admit the existence of a global viewers’ market. Finally, these rules duly take into account the links that may exist between various forms of media (market related to a broadcasting market), and the influence that may be exercised over the public by the media owner. They thus show that some coherence exists among the different medias, and provide for a cross-media/cross-market perspective.

736. In addition to the above-mentioned rules, public broadcasters are also subject to specific provisions that concern the quality and plurality of their programmes. This set of obligations may be one of the factors that distinguishes public broadcasters from private ones in a market definition context. It should also be noted that, pursuant to Sect. 52 a) para. 2 sent. 2 RStV, the public broadcasters may, from July 1, 2002 onwards, meet their plurality and quality-programming obligations either by analogue over-the-air TV or by their digital transmission capacities so that they are – as long as it is not unreasonable – free to choose the means of broadcasting. Therefore, from the regulatory policy point of view, public sector broadcasting is subject to the same set of rules, a factor which may lead to the conclusion that these two forms of broadcasting (analogue and digital TV) pertain to the same market.

737. As regards the acquisition of broadcasting rights by television, broadcasting operators for sport events are subject to the specific provisions of Sect. 31 GWB. Though in this clause only the scope of the exception from the general provisions of the GWB is laid down, the conclusion could be drawn that the content may be relevant for a separate market definition.

4.2.1.5. Radio and music

738. As German law regards radio as a form of broadcasting, no specific definition of this medium is found in the major media legislation.

739. The same applies to the music sector, which is subject to the German Copyright Act. No definition of music is specified, and music is only considered as a protected form of content amongst others.
4.2.2. Market definition in the electronic communications framework

4.2.2.1. Telecommunication services

740. Telecommunication services are defined in the German Telecommunication Act of 1996. The provision of telecommunications services requires a licence from the RegTP, under the conditions set out under Sect. 6 para. 2 no. 1 c) TKG. Pursuant to Sect. 3 no. 18 TKG, telecommunications services correspond to the commercial offering of telecommunications, including the offer of transmission channels for third parties. In this respect, telecommunications is defined as the technical process of sending, transmitting and receiving any notices in the form of signs, language, images or sounds, via telecommunication facilities. In contrast to the definition of electronic communication services, media services or broadcasting – which are defined by reference to the content or recipient of the service – the definition of telecommunications service relies on the particularity in the supply of transportation.

741. Apart from the definition of telecommunications service, the TKG also contains a provision regarding the dominant position in the market. However, Sect. 33 para. 1. TKG does not provide any sector-specific criterion for relevant market definition, but merely refers to Sect. 19 Act against Restraints of Competition. However, as German law must be interpreted in consistence with European legislation, market definitions in the telecommunications sector comply and follow the market definitions upheld at the EU level which are mentioned (as regards medial market definitions in the electronic communications framework) in section 1.2.2 of the present report.

4.2.2.2. Internet

742. The analysis, which was carried out for the purpose of the present study, did not lead to the identification of any provision under German law that would create a definition of an Internet market. Actually, Internet services are covered by the definitions of electronic communications services, media services and telecommunication services. The classification is difficult to set.

743. The identification of applicable legal provisions may sometimes prove delicate. Roughly speaking, the main market definition distinction is made between Internet access on the one hand, and Internet services on the other. This distinction is traditional and has been upheld at the EU level; it shall therefore not be further commented on in the present section. It should, however, be noted that under German law, the distinction between access and service corresponds to different sets of rules. In this respect, Internet access providers are subject to the provisions that relate to telecommunications service. On the other hand, Internet services are mostly subject to the
definition provided in Sect. 2 para. 2 of the Electronic communication services Act but may also underlie as media service Sect. 2 para. 1 MDStV.

744. Furthermore, the spreading of the Internet may lead to its qualification as a mass media for the general public, which would then raise the issue of its qualification as a broadcasting medium.

4.2.3. Respective impacts of sector-specific regulation and competition law on one another.

745. The German sector-specific regulation is a recent one. As we saw earlier in this chapter, the TKG refers to Sect. 19, 20 GWB. Therefore, it applies principles of national competition law. The RegTP’s decisions, in this sense, reflect the standard market definition analysis (based on the demand-side and supply-side substitutability test) and endorse ‘relevant market definitions’ as finally upheld under competition law. This mostly occurs in cases that fall within the Federal Cartel Office’s jurisdiction (which exclude purely telecommunications matters).

746. The recent codification of the TKG starts showing its first effects in the practice of the Federal Cartel Office. In recent decisions the Office referred also to decisions of the RegTP. The future development will depend on the willingness of both authorities to cooperate.

4.3. Practical implementation of the criteria held under German competition law in the media sector

4.3.1. Broadcasting and TV

747. The present section does not aim at providing an extensive overview of all German case law in the broadcasting and TV sector. On the other hand, it does focus on a few (about seven) particularly interesting cases, which deal specifically with the issue of market definition in the broadcasting sector. The reviewed markets include: the feed-in market, the consumer market, the advertising market, the up-stream market for the production and acquisition of TV rights and programmes, and other markets.

748. We also think it is necessary to start the German section with the analysis of the infrastructure, as it gives an overview about the separation line to and overlapping with other media sectors. Strictly speaking, the infrastructure belongs to the telecommunications sector. We will review the parts that are specific for broadcasting.

749. Basically we have three major forms of transmission, namely by oscillation (air TV), by satellite and by cable. In respect of broadcasting, the Federal Cartel Office found that the market definition follows the four
different network levels without stating that therefore each level forms a separate product market. The network levels are:

- transmission of the signal from the content provider to the switch (level 1)
- transmission from the switch via oscillation or satellite to the broadband amplifier (level 2)
- feed-in into the cable network and transmission to the border of the respective piece of real estate of the consumer (level 3) and
- last mile to the input jack (level 4).  

This distinction can in part be traced back to the characteristic German fact that the network level 3 and 4 are owned by different undertakings. Therefore, one level can be found more than in other countries.

4.3.1.1. The upstream market for provision of content - and - the market for coverage

i. Product market

The market for the provision of content to the different transmission channels is literally defined under German case law as the “feed-in market” ("Einspeisemarkt"). This market corresponds to the upstream level of the value chain, where all channels (broadcasting the content they acquired or produce) compete to enter into commercial relationships with network operators.

This market actually represents a jurisdiction conflict area between the RegTP and Federal Cartel Office. The definition of this market was upheld for the first time in 1996 in the “Pay-TV-Durchleitung” decision of the Federal Supreme Court, where the court had to examine the supply of over-the-air transmission of content to radio and TV broadcasting stations. The court upheld the existence of different markets that covered over-the-air transmission and transmission via other means, such as broadband network transmission. In this respect, the court relied essentially on two findings.

First, it considered that there was no competition between these different forms of transmission. Second, the court took into account the fact that there was no contractual relationship between the content providers on the one hand and the real estate owners, which decide upon the installation of receiver hardware, on the other hand. The relationship exists at a lower level of the value chain, between the network carriers and the real estate owners. Therefore, the content providers themselves do not have the opportunity to promote different means of transmission.  

672 BKartA 4. Apr. 2001 (B7-205/00) V. 1. „Callahan/NetCologne“
This view has recently been confirmed by the Federal Cartel Office. Its 2001 “Callahan/NetCologne” decision dealt with the network carrier of network level 3.\(^674\) The Office found that the transmission of programmes via satellite or over-the-air ways, form separate markets from transmission on cable TV.

To support that finding, the Office relied essentially on a supply-side substitution test. In this respect, the Office found that on the cable TV network market, the network carrier offers transmission service to different content providers. Therefore, the customers of the network provider are free- and Pay-TV providers, and media services providers, especially teleshopping and electronic services providers.

On the other hand, the Office considered that product market definition from a demand side point of view was more difficult to establish. Both parties depend on one another: the network carrier depends on the content, and the content provider depends on consumer access. The direction of the value chain to be upheld (i.e., who is the supplier and who is the demander), will thus depend on the attractiveness of the content: the trading relationship is either established between the network carrier and the content provider when the programme is attractive, in which case the latter pays for the programme transmission; or on the other hand, the trading relationships may occur in the other direction when the programme lacks attractiveness, in which case the “paying party” is the content provider who wants the programme to be transmitted. Also, the coverage provided by the network carrier influences the direction of the value chain. A big coverage improves the position of a network carrier.\(^675\)

(ii) Geographic market

Regarding the geographic market, the Federal Supreme Court and the Federal Cartel Office unanimously found that the territorial reach of each conveyor defines the geographic boundaries of each market. This leads to the fact that each conveyor is monopolist by definition.\(^676\) This has become constant practise of the regulative and cartel authorities since.\(^677\)

Moreover, both authorities considered that distribution by satellite was not an interchangeable alternative from the content provider’s point of view, since it strives for maximum coverage and aims at accessing certain customers.

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\(^{674}\) The network carrier of network level 3 is the undertakings that feeds-in the content into the cable network and transmits it to the border of the respective piece of real estate of the consumer.


\(^{676}\) According to the practice of the Federal Cartel Office, there is an assumption according to which the conveyor’s territorial scope of activity lacks of competition.

and not any one customer.\textsuperscript{678} This means that the provider will prefer the transmission mode with the highest coverage, independently from whether by satellite or by cable. The coverage therefore affects the choice of the transmission path.

### 4.3.1.2. Upstream markets of production of programmes and acquisition of rights

756. The market for the production of programmes is related to the broadcasting sector. This market is generally considered to form one single market. In particular, it has not been divided into separate markets for the production of programmes for satellite TV rights and cable TV rights. That view was confirmed in the recent “\textit{Liberty}” decision of the Federal Cartel Office, where no distinction was made between the different forms of broadcasting for that purpose. However, the Office found that the broadcasters - as purchasers - follow different strategies regarding the attractiveness of programmes, and focus on particular types of programmes.\textsuperscript{679}

757. For the time being, one cannot say whether this view is likely to be challenged in the future. There may be an opinion that to some degree, outstanding productions are not substitutable to other forms of productions.

This exception has been made for instance by the \textit{Federal Supreme Court}, for the acquisition of broadcasting rights for outstanding sporting events in Germany and other countries whenever German competitive sports personalities are included, or for events that are particularly attractive for other reasons.\textsuperscript{680} This view is consistent with Sect. 31 Act against Restraints of Competition, which was inserted later. It stipulates that its provisions that relate to cartels do “\textit{not apply to the central marketing of rights to TV broadcasting of sports competitions organised to by-laws, by sports associations which, in the performance of their socio-political responsibilities, are committed also to promoting youth and amateur sports activities ...}”.

Whereas Sect. 31 GWB only provides for central marketing but leaves it to the marketer to decide whether the broadcasting right is sold to a Pay-TV or a free-TV provider, Sect. 5 a RStV allows the Länder to define events that must be broadcasted on free-TV for reasons of public interest.\textsuperscript{681} These events include at present, pursuant to Sect. 5 a para. 2 RStV, the Olympic Summer and Winter Games and the important football matches (i.e. all matches with German teams in World Cup and European Championship in football, the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{681} This provision implements Art. 3 a of the Directive TV without frontiers 97/36/EC.
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opening match, semi-final and final of the national football cup, all home and away matches of the national team and all finals in the Champions League and UEFA Cup).

4.3.1.3. Market definitions according to the form of broadcasting

(i) Product market

758. Broadcastings’ substitutability via network, satellite and over-the-air has been examined. The Federal Cartel Office concluded that the market for broadband Internet access and telephone services offered by network carriers is distinct and independent from the market for free and Pay-TV offered via cable network. This conclusion was further supported by the fact that the revenues derived from electronic commerce via broadband networks (teleshopping) and other electronic services did not belong to the broadcasting market. The Federal Cartel Office concluded that the market for broadband Internet access and telephone services offered by network carriers is distinct and independent from the market for free and Pay-TV offered via cable network. This conclusion was further supported by the fact that the revenues derived from electronic commerce via broadband networks (teleshopping) and other electronic services did not belong to the broadcasting market. These activities shall be dealt with in the analysis of the Internet related sector.

759. The criteria that distinguish different forms of broadcasting can be examined along the following lines.

Remuneration and contractual relationship

760. The contractual relationship is one of the criteria upheld for the distinction of the various broadcasting service markets. This criterion was applied in particular for the market definition purposes in the Federal Cartel Office’s “Premiere” decision. There, free-TV on the one hand, and pay-TV in its various forms (including inter alia pay-per-channel, pay-per-view etc.) on the other hand, were found to be separate markets. The Office expressly relied on the EU precedents MSG Media Service, Bertelsmann/CLT, Bertelsmann/Kirch/Premiere.

The Federal Cartel Office elaborated on that distinction in its annual 1997/1998 report. In particular, it mentioned that Pay-TV involved a direct contractual relationship between the broadcaster and viewer (or consumer of the service) against payment, whereas in free-TV, the content was paid for by advertising companies. This reasoning is in line with the one upheld at the EU level in the Commission’s decisions. In contrast to this finding, the Monopolies Commission adopted a slightly different view. Being of the same opinion regarding the distinction between free and pay-TV, it stressed that the broadcasters nonetheless compete with one another for the same time budget of the consumer and, therefore, that they are competitors in this respect.

References:

682 BKartA 22. Feb. 2002 (B7 – 168/01) No. 34. “Liberty”.
685 See above.
This position seems in line with the upholding of a global viewers’ market where all broadcasters ultimately compete, which has already been upheld at the EU level.  

761. Another criterion which is taken into consideration to distinguish between the various forms of broadcasting seems to be remuneration, even though traditionally it is only a secondary criterion used for market definition purposes. This criterion was applied in particular in the “Premiere” decision, as mentioned above. It was also used by the Federal Cartel Office in 2002 in the “Liberty” decision, as a reason for dividing transmission via satellite and via cable networks into two separate markets. According to this criterion, the consumer regards the monthly fee for access to the broadcasting network as a relevant difference, in comparison to the one-time investment in a satellite dish. This finding is corroborated by the low willingness of consumers to switch from network to satellite transmission and vice versa.  

The remuneration criterion is also applied to support the distinction between the markets for network transmission and transmission via free-to-air TV as, in the former one, consumers do not have to pay either a monthly fee or buy a satellite dish as a one-time investment.  

Quality and quantity  

762. Market distinction also relies on the technical features of the respective forms of transmission. In “Callahan/NetCologne” (2001), the Office used the criterion of quality of image and sound in transmission to distinguish between the market for terrestrial transmission and the one for network broadcasting. This criterion was confirmed in the 2002 “Liberty” case. The Office further added that the supply of interactive services in the future might even consolidate that distinction. However, according to the Office, the development of this feature must be awaited before further conclusions are drawn.  

It actually appears that this criterion, essentially based on time considerations, is rather innovative since it has not been upheld at the EU level. Furthermore, this consideration – and the likely evolution/confirmation of market definitions depending on the supply of innovative services – actually applies to the whole multi-media sector.  

763. However, this product market distinction made based on quality criteria has raised a few controversies in Germany. In particular, in addition to the prohibition of the sale of German Telekom’s network to Liberty, the RegTP received several complaints regarding rising costs for network TV and

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687 See above.  
690 BKartA 4. Apr. 2001 (B7-205/00) V. 1. c. .“Callahan/NetCologne”..  

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increasing programme interruptions. This is one reason why in its recent opinion 2000/2001, the Monopolies Commission pleaded in favour of a review of the market definition.\footnote{14th opinion of the Monopolies Commission 2000/2001 short edit No. 7.} The Commission’s opinion highlights the importance of the “remuneration” and “quality” criteria for the purpose of market definition.

764. Finally, the distinction of cable TV from markets for satellite and free-to-air TV is also based on the number of channels offered. In this respect, the Office noted that the number of channels in terrestrial transmission is lower than the number on cable TV and satellite, and thus considered it to be a distinctive criterion for market definition purposes.\footnote{BKartA 4. Apr. 2001 (B7–205/00) V. 1. c. „Callahan/NetCologne“; 22. Feb. 2002 (B7 – 168/01) No. 41. “Liberty”.}

765. No distinction has been made within the free-TV market between public and private broadcasters.

\textit{De facto accessibility}

766. The Federal Supreme Court and the Federal Cartel Office consider unanimously the de facto accessibility as a distinguishing criterion for product market definitions. The Federal Supreme Court mentioned this aspect for the first time in its 1996 “Pay-TV-Durchleitung” decision. Dealing with the transmission market, the Court also assessed the substitutability of different access to customers. There, the Court stated that the decision to create an alternative reception channel depended on the real estate’s owner, who is not necessarily the consumer. The consumer himself has no possibility to decide upon the erection of a roof antenna, satellite dish or installation of a line.\footnote{BGH 19. Mar. 1996 WuW/E 3058, 3062 “Pay-TV-Durchleitung.”} The fact that there is no direct contractual relationship with the consumer in terrestrial transmission or transmission via satellite also lead to the distinction between these markets and the market for network transmission in the “Liberty” case in 2002.\footnote{BKartA 22. Feb. 2002 (B7 – 168/01) No. 35. “Liberty”.}

767. In this context, we would once again like to point to a diverting opinion of the Monopolies Commission. In its 13\textsuperscript{th} Opinion of 1998/1999, it favoured a wider approach to infrastructure competition. In its view, the Federal Supreme Court did not give enough consideration to the fact that alternative transmission channels – broadband cable, satellite transmission and digital terrestrial broadcasting (DVB-T) – do exist and provide alternative access to consumers.

To support that position, the Monopolies Commission relied essentially on three considerations. First, it considered that the content supplier had the possibility to exert influence on the access chosen by the consumer e.g., by subsidising the necessary access hardware. Second, there is currently no danger that due to unreasonably high prices there will not be enough demand
for capacities. And third, the Commission expects that the digital future of TV will create new ways of transmission. The Commission especially refers in this respect to the Internet and Digital Video Broadcasting - Terrestrial (DVB-T).

768. The Federal Cartel Office still maintains, as of today, the above-mentioned market definition. Furthermore, in its latest decisions, it elaborates on the two reasons why reception of broadcasting via satellite does not represent an alternative for consumer access via network.

First, the satellite dish needs a direct “eye contact” to the satellite. The establishment of such contact can prove to be impossible if there is no way to install the dish on the southern side of the house, or if trees or other obstacles disrupt the direct line. Second, the landlord may refuse to give his consent for the installation of such satellite dish.

In addition, the Federal Cartel Office does not see any contradiction in its argumentation with the practices of the EC Commission. Although the distinction between both markets might decrease over time, the above-mentioned criteria still show that there is no substitutability between these various means of broadcasting. Finally, according to the Federal Cartel Office, the distinction between pay- and free-TV is in accordance with the merger control practice of the EC Commission.

\[ \tilde{y} \quad \text{Transmission signal} \]

769. In contrast to these findings, the transmission signal as such does not lead to a market distinction. In the “Pay-TV-Durchleitung” decision, the Federal Supreme Court found that it makes no difference for the consumer whether or not the signal is cryptographically secured and includes a decoder signal. Furthermore, there are also no separate markets for analogue and digital transmission. According to the Federal Cartel Office, the (pay-) TV market forms one market, as digital (pay-) TV is just an improvement of analogue (pay-) TV. The Office expects analogue pay-TV to be superseded by digital pay-TV in the future. This is in compliance with the latest modification of the RStV.

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698 BKartA 4. Apr. 2001 (B7-205/00) V. 1. c. „Callahan/NetCologne”; 22. Feb. 2002 (B7 – 168/01) No. 41. “Liberty”
703 See above No. 692.
(ii) Geographic market

770. Geographically, Germany was basically deemed to be the relevant market, at least as regards free- and pay-TV. In this respect, the Federal Cartel Office relied on its 1996 “Premiere” decision concerning the fact that there are different national rules for broadcasting, as well as language barriers and cultural particularities.\textsuperscript{704}

771. The 2002 “Liberty” decision did not deal with the free- and pay-TV market but amongst others with the consumer broadband and feed-in market. Nonetheless, it should be pointed out that the Federal Cartel Office found that in those markets each network was subject to a separate limited geographic market because consumers did not presently have the possibility to choose between several network carriers.\textsuperscript{705}

4.3.1.4. Advertising market

772. The market for TV advertising is separate from the downstream viewers market. Unanimously, the authorities considered in several decisions that the medium itself, as a whole, was to be regarded as a criterion to define separate markets. In this respect, the Federal Cartel Office and the Civil Courts decided that advertisements on the radio, on TV and in the press were different markets, due to the varying possibilities of presentation and perception. This issue will be analysed later.\textsuperscript{706}

773. Additionally, the Federal Cartel Office considered in its 1999/2000 report that a combination of the advertising time of all TV broadcasting stations in congested urban areas may compete with the advertising market of nationwide broadcasting stations. In the opinion of the Office, the necessary accretion in the case Kirch/Hamburg\textsuperscript{1} had however not been reached.\textsuperscript{707} In the cases decided so far, this advertising time forms a separate market in the opinion of the Federal Cartel Office.\textsuperscript{708}

4.3.1.5. Other Markets

774. According to the Federal Cartel Office, another product market can be found between the network carrier of the network level 3 as supplier and signal provider, and the carrier of the network level 4 (provider of the last mile).\textsuperscript{709} However, this view was criticised by the Monopolies Commission. It is the opinion of the Commission that the distinction between both levels is

\textsuperscript{706} See infra No. 734 et seq.; No. 756 et seqq.
\textsuperscript{709} BKartA 4. Apr. 2001 (B7-205/00) V. 1. b. „Callahan/NetCologne“; 22. Feb. 2002 (B7 – 168/01) No. 96. “Liberty”.
exclusively historically founded, and does not comply with today’s requirements.\textsuperscript{710} No relevant definition criteria have been developed in this respect. Geographically, the carriers of network level 4 have the possibility to a small extent to choose between different signal providers.\textsuperscript{711}

775. Finally, markets for Pay-TV platforms\textsuperscript{712} and set-top-boxes as receiving hardware for Pay-TV\textsuperscript{713} have been detected. However, no definition criteria were elaborated on to precisely characterise such markets.

\section*{4.3.2. Music/Radio}

\subsection*{4.3.2.1. Product market}

776. Three decisions seem to be of particular relevance to appraise the criteria upheld to define markets in the radio sector. All three deal with the advertising side of the market.

777. The decisions go back to 1991. In “Radio NRW”, the Court of Appeal of Berlin decided that radio advertising formed a separate market from other forms of advertising. Using the demand market doctrine, the court focused on the needs of the advertising industry. This industry generally uses a media mix to reach as many customers as possible. As the customers have different preferences regarding the media used and the effect of the advertisement depends on its specific content, a concentration on one medium does not guarantee sufficient success.\textsuperscript{714}

778. The market for print advertising was held to form a separate market in “Radio NRW” since the printed medium visually transports information, whereas radio advertisements are restricted to concise messages.\textsuperscript{715} In the same year, the Court of Appeal of Munich took the same objective approach in “Hörfunkwerbung”. Printed advertisements may contain comprehensive and complicated messages, which the reader can deal with as long as he wants to. In contrast, audio advertisements are momentary. The Court of Appeal proves this (to its conviction) with advertisements that appeared in the papers. The success of an advertisement was not considered as a decisive factor.\textsuperscript{716}

779. Important differences in perception between TV and radio determine the advertising aim of the medium and, therefore, ultimately, the non-substitutability from the purchasers’ view. While the audio-visual presentation captures the full attention of the viewer, radio advertisements are

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mostly faded in during music programmes (so called music carpets). Consequently, it reaches a listener who is in general not fully concentrating. Therefore, both types of media are used to complement each other.\textsuperscript{717} The \textit{Federal Cartel Office} repeated that market definition in April 2002.\textsuperscript{718}

780. Finally, the distinction made in the TV advertising market follows the jurisprudence of the Court of Appeal of Berlin from the significant price differences.\textsuperscript{719} Once again, this generally secondary criterion has been used to define a market.

781. Regarding music itself, the major decision seems to be the one that originates from the Court of Appeal of Berlin, which deals with the access of a ticket agency to tickets for Rock & Pop concerts.\textsuperscript{720} In that decision, the Court found that these tickets formed one market. As consumer demand is not directed to tickets in general but to certain tickets, the ticket sector market is divided into different markets. This also applies to classic concerts, musicals and sporting events that also form separate markets.

782. Cinemas also generally form one market. As an exception, debut performance cinemas have been regarded as a separate market by the Court of Appeal of Berlin. This finding was based on the time, location, technical features and price of those cinema theatres.\textsuperscript{721} It is impossible to say, in view of the current evolution of case law, whether this market definition should be considered as out of date due to a change in the conditions upheld to distinguish that product market, although one could wonder whether such cinema theatres still have an outstanding position today. Drive-in cinemas were also found to be a separate market.\textsuperscript{722}

\begin{quote}
4.3.2.2 Geographic market
\end{quote}

783. The geographic market is defined by the coverage of the radio station. This applies both for public and private radio stations. According to the practise of the \textit{Federal Cartel Office} and the jurisprudence, the area in which supply and demand coincide is decisive and not the advertising concept of the demand side.\textsuperscript{723}

\begin{itemize}
\item \textsuperscript{717} OLG Munich 11. Mar. 1999 WuW/E DE-R 313, 314 et. seq. \textit{„Hörfunkwerbung“}.
\item \textsuperscript{718} BKartA 25. Apr. 2002 (B6 – 159/01) No. 37. \textit{„RSL Radio“}.
\item \textsuperscript{719} KG 26. Jun. 1991 WuW/E OLG 4811, 4825 et.seq. \textit{„Radio NRW“}; also compare in the media sector BKartA 4. Feb. 1979 WuW/E BKartA 1475, 1476 \textit{„Haindl/Holtzmann“} (the paper for the production of newspapers is above all non-substitutable with other paper due to significant differences in price).
\item \textsuperscript{722} Report of the Federal Cartel Office 1977 p. 76 Filmwirtschaft.
\end{itemize}
4.3.3. Books and publishing

4.3.3.1. Product market

(i) Books

784. The German market of goods and services in the press sector shows a voluminous practice of courts and administrative decisions. The only leading case regarding the book sector was decided in 1982 by the Court of Appeal of Berlin. In this particular case, called “Taschenbücher”, the court did not restrict the relevant market to a title or a narrowly drawn subject area but upheld the area of general entertainment or information as a decisive criterion. From this market, the Regional Court distinguished other media, which also serve the need for entertainment and information.

This market was distinguished from the markets of radio, films and TV, which can be considered a pretty straightforward distinction. However, and more interestingly, it was also distinguished from audio and videotapes with book contents. These were considered separate markets since they have different embodiments, which does not allow reading and resting at any pace or the easy repetition of passages like books do.

Finally, the court upheld that newspapers and journals were not substitutable to books, as the latter generally have more detailed content.724

785. In the “Taschenbücher” decision, the court also relied on the objective criteria that related to the different appearances of several types of books, and consequently considered that because of their different formats, binders and bindings, paperbacks and hardcover books had to be distinguished from one another. This distinction was corroborated by the secondary criterion of price difference between both sorts of books.725

(ii) Press

786. The practice in the press sector focuses on newspapers and journals. For the purpose of the present study, twelve major decisions were identified and analysed. As far as the cartel authorities of the Länder had to deal with the media sector, they were involved in press cases.

787. Before going into the press market definitions, a primary distinction needs to be made between Internet non-printed information products and the traditional written press itself. The narrow legal definition of press products limits “press” to goods that have been produced by duplication; therefore, non-printed information is not considered nor treated as press, and shall therefore not be considered in the following paragraphs. Such form of information

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pertains to the analysis of the (Free- and Paid-) content market under No. 777 et. seq.

788. The market for newspapers and journals is also separate from the radio, TV or film markets. This distinction, which will be developed in the following paragraphs, corresponds to the declared intention of the legislator’s draft for the Act against Restraints in Competition of 1974.

789. Due to the different needs in information and entertainment on the one hand, and advertisements on the other hand, case law practice distinguishes between a readers’ market and an advertisement market. The distinction goes back to 1977 when the Court of Appeal of Berlin decided upon the “Kombinationstarif” case, which was then followed by the 1978 Kaufzeitungen and “Bertelsmann/Deutscher Verkehrsverlag” Federal Cartel Office decisions. Confirmation by the Federal Supreme Court followed in 1981 in the leading “Zeitungsmarkt Muenchen” case. Both markets must be distinguished as they address different purchasers, which are respectively the advertising industry and consumers. They nonetheless are closely tied together, as a rising number of readers have a strong influence on the upstream advertising market; in the same way, a growing offer of advertisements improves the sale of newspapers.

790. The market for the distribution of press products to the wholesaler, which was identified by the Federal Cartel Office in 1981, does not seem to prove press specifics and therefore will not be analysed.

791. The various criteria upheld by case law practice are mentioned hereinafter.

\[\text{Readers’ market}\]

792. The readers’ market itself is not a uniform one. It must be split into the market for newspapers on the one hand, and journals on the other. The newspaper market itself is subject to the major division into the markets for subscription newspapers and for newspapers that are sold “on the street”.

793. The market for journals was thoroughly examined for the first time in 1978 in the Federal Cartel Office’s decision “Bertelsmann/Deutscher Verkehrsverlag”. There, the Office found that from the readers’ point of view, professional journals are separate markets from markets of popular journals.

\[\text{\textsuperscript{727} Draft of the Act of 1974 p. 5.}
and daily newspapers. The latter provide for general topics content, whereas professional journals focus exclusively on a certain sector. Moreover, the general business press (e.g. the Financial Times) was identified as a separate market. Indeed, in such types of publications, the reporting on the economy is very broad and covers all business sectors; it thus addresses a bigger target group than professional journals. This difference is also highlighted by the fact that the depth of the reporting in the general business press is significantly lower. The Federal Cartel Office thus upheld two main criteria for the market definition.\(^{730}\)

794. Regarding the sub-market of the special business newspapers, in this case the Office examined in detail the professional status of the reader, the timeliness of information, the topics dealt with and the language; it therefore essentially relied on the demand market doctrine.\(^{731}\)

795. In the “Burda/Springer“ (1981) decision, the Office also found that TV-magazines were due to an extensive reporting which, from the readers’ perspective, was not substitutable to the programme part of a general newspaper.\(^{732}\) This finding can be extended to different markets of special interest journals.\(^{733}\) In “Gruner + Jahr/Zeit II“, the Federal Supreme Court identified a market for weekly political newspapers. The Court rejected the allegation that daily newspapers also had to be included in that market, on the finding that demand focused on more thorough weekly information and comments, and not on daily up-to-date news.\(^{734}\) The distinguishing criterion was thus the consumers’ expectations, which does not consider different levels of analysis as substitutable to one another.

796. Apart from that content-based distinction, in an early leading 1981 case “Zeitungsmarkt Muenchen“, the Federal Supreme Court divided the readers’ market by distinguishing the market for daily subscription newspapers from the one for newspapers sold “on the street”. However, for that purpose, the court also relied on demand differences in breadth and depth of the reporting, presentation, choice of news reported, topics dealt with and frequency of edition.\(^{735}\) Since that time, this separation line that results from the “Zeitungsmarkt Muenchen” case has corresponded to unchallenged practise of the Federal Supreme Court and the Federal Cartel Office.\(^{736}\) The Office further added in “Burda/Springer” that newspapers sold “on the street” differ from subscription newspapers in style, images, layout, and for its ‘daily’

\(^{730}\) That have been picked up later in “Zeitungsmarkt Muenchen”.


value which renders the purchase a sort of customer’s habit. The last time these distinction criteria were applied was in the 2002 “WAZ/Schachenmayer” case.

797. The market of subscription newspapers was then again divided into the daily subscription of nationwide newspapers and local and regional newspapers. The Court of Appeal of Berlin (“KG”) – as appellate court in “Zeitungsmarkt Muenchen” – made it clear for the first time in this case that demand for special local and regional information was different from reader demand of nationwide newspapers. This finding was later upheld, e.g. by the Federal Cartel Office in the “Springer/Kieler Zeitung” case and has corresponded ever since to the jurisprudences’ constant practise.

798. The market for daily newspapers was also divided by the Federal Cartel Office in the “Burda/Springer” case (1981) into a market for weekday newspapers and Sunday newspapers. The distinction is based on the fact that Sunday newspapers have a significant amount of news, especially regarding sports, which will be published by the weekday newspapers on Monday earliest. Saturday newspapers also offer feuilleton information like Sunday newspapers, and therefore they are substitutable to one another. This view was confirmed by the Federal Supreme Court in the “Gruner + Jahr/Zeit II” case (1987). The latter case also made it clear that Sunday newspapers do not belong to weekly political newspapers.

799. The combined analysis of all such market distinctions leads to market definitions that are rather narrow. Therefore, the overall market assessment should take into account the existence of low barriers for competitors to enter the market and exchangeable competition.

Advertising market

800. In addition to the readers’ market, there is a separate press advertising market. As already mentioned, both markets are closely linked. Therefore, the arguments upheld in one market are to a certain degree similar in the other.

801. In the “Bertelsmann/Deutscher Verkehrsverlag” case, the Federal Cartel Office defined the advertising market in professional journals as forming one market. The advertisers have the possibility to address their favoured target group in these journals. The Office based its findings on

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738 BKartA 28. May 2002 (B6 - 33/02) No. 10. „WAZ/Schachenmayer”.
empiric research that demonstrated that advertisements in professional journals had a significant influence on the purchase decision of executives. In contrast, advertisements in other printed media, especially in public journals and general newspapers, were not held to be comparable in their presentation, content and price. In particular, the precise definition of the professional journal advertising market shall depend on the intensity of correspondence between the advertisement for a certain product and the target group of the paper. Interchangeability will thus depend on the comparison between two professional journals in terms of suitability for the specific advertisement, degree of use by the reader and success rate.  

802. The issue concerning whether daily subscription newspapers, newspapers sold “on the street” and pure advertising papers form one single common market must be decided on a case-by-case analysis. This is the case as long as such papers offer similar coverage and similar advertising units. 

The fact that daily newspapers do not reach all households does not represent an argument against the incorporation thereof into a single broad market, as long as the circle of advertisers remains the same.  

803. We identified the following major decisions. In the “Muenchener Wochenblatt” case, the Federal Supreme Court considered that the coverage of only a district of a city was sufficient to uphold the existence of a separate market. And in the 1987 “Singener Wochenblatt” case, the Federal Supreme Court found that there was one single market for both - daily newspapers and advertising papers - due to the similarity in the products offered. The different frequency of the publishing is not in contrast to this finding. Though it usually indicates different markets, the Court found in this case that most advertisers were interested in a weekly appearance and that the offer of both papers is therefore substitutable. Also, the different editorial environment was not regarded as not being reasonable enough to lead to separate markets. The assessment in “Abwehrblatt II” in 1985 had already lead to the same result.  

804. In 1981 in “Burda/Springer”, the market for advertisements in public journals was considered as a separate market. This decision provides a detailed market definition along the following lines. In the understanding of the Federal Cartel Office, public journals are inter alia widely spread journals like TV-newspapers and magazines on the one hand, and target group journals or special interest journals on the other. From the advertisers’ point of view,
this market contrasts other forms of media advertising markets. Advertisers decide upon their media-mix based on the accessibility of the recipient to the respective media, the means that are provided to design and present the specific advertisement, the spreading loss and the price for 1000 contacts. In view of these objective factors, the medium is then chosen based on a cost/benefit analysis. Therefore, the existence of a general competition for media budget is irrelevant.  

It may be noted that in this sector, the Federal Cartel Office relied twice (in the “Bertelsmann/Deutscher Verkehrsverlag” and in “Burda/Springer” cases) on the secondary “price” criterion for market definition purposes.

Advertising in public journals also differs from other electronic media such as TV or broadcasting, due to the consumers’ perceptions. While a reader has the possibility to deal with advertisement content for a longer period of time and the advertisement can be linked to the editorial content, the viewer and listener may decide to stay away from commercials. For these reasons, advertisers use several forms of media with different objectives that compete with one another.

Finally, advertisements in nation-wide newspapers are not within the advertising market of public journals, since only 10% of all the advertisements relate to nation-wide products, and therefore the overlap is not big enough; furthermore, the price for the latter is three times higher than for public journals. Again, the price criterion is used for indication of market definition. The Office also mentioned that the lower quality of paper and printing technique often excludes nationwide newspapers from ordering advertisements with nation-wide newspapers. It points out, however, that newspapers improve their printing techniques in order to attract advertisers from the public journals market.  

Rotogravure market

Finally in the “Burda/Springer” case, the Federal Cartel Office distinguished the rotogravure market for journals and other advertising printed matters as a separate market. Other rotogravure sectors like gravure of packaging or forms do not belong to the same product market, as they are offered for different conditions to different purchasers.
4.3.3.2. Geographic market

808. The substitutability test in respect of the geographic market is tied unanimously by jurisprudence and the Federal Cartel Office to two criteria. First, the content of the press product in question can determine a regional market. Local and regional reporting will generally only be found attractive by consumers that live in the region being reported about.\(^{754}\) Therefore, market definition relies once again on the demand market doctrine. Second, tracing it back to the “Muenchener Wochenblatt” decision, the distribution area may lead to a restriction of the geographical market.\(^{755}\) This applies to the readers’ market as well as the advertising market.\(^{756}\)

4.3.4. Internet related sectors

809. For the purpose of media market definitions linked to the Internet sector, the present study focuses essentially on eight major decisions.

4.3.4.1. Product market

810. As a preliminary statement, it should be mentioned that German case law presently considers that content transmission via the Internet is not substitutable to broadcasting offers. That separation line is linked to the different ways to access the medium.

However, along the same lines identified in terms of broadcasting, Internet related sectors are divided between access on the one hand, and the supply of content, goods and services on the other hand.

(i) Access market

811. In addition to the provision of content market in broadcasting, access market is the second market area where the RegTP and Federal Cartel Office competence of both authorities must be thoroughly analysed as the distinction line is difficult to draw. As mentioned in No. 668, jurisdiction of the RegTP excludes jurisdiction of cartel authorities, even in cases where such authorities would have jurisdiction under the GWB.

812. For the purpose of market definition, the Federal Cartel Office used the transmission capacity as its distinction criterion. In the 2001 “Callahan/NetCologne” decision, the Office examined the access market for the first

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\(^{755}\) KG 22. Nov. 1980 WuW/E OLG 2457, 2458 „Muenchener Wochenblatt”.


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time. The basic distinction was made between narrow band access and broadband access.\textsuperscript{757} With this decision, the \textit{Federal Cartel Office} confirmed the view held by the \textit{RegTP}, which had defined a market for narrow band access.\textsuperscript{758}

According to the \textit{Federal Cartel Office}, transmission techniques like SkyDSL, Powerline, UMTS or WLL are not alternatives to broadband and DSL access, due to technical and economical reasons/criteria.\textsuperscript{759} On September 4, 2002, \textit{RWE} even announced that it was withdrawing from further development of Powerline. The DSL product of Deutsche Telekom was expressly found to be part of the broadband market. The Office further stated that the broadband access market is independent from the supply of network access generally used for broadcasting.\textsuperscript{760} It may, however, be worth noting that even though the narrow band/high bandwidth capacity distinction is a common product market division, the issue of including the UMTS or WLL within the broadband market was not, to our knowledge, thoroughly examined by other EU and national authorities.

813. For the sake of completeness it shall be noted that the \textit{Monopolies Commission} basically upholds the same view. The broadband access with 10 Mbit/s is 200 times faster than a narrow band connexion, and still faster than ADSL. It allows the download of software, films and music in reasonable time, and generally for a flat rate. The Commission considers that there is competition for the broadband access among different xDSL techniques (advancements of the DSL technique).\textsuperscript{761} In this respect, it takes a slightly different emphasis than the \textit{Federal Cartel Office}, in so far as it considers that the broadband technique and the UMTS or Powerline are not efficient enough nor sufficiently spread yet to present an alternative to the telephone net.\textsuperscript{762}

814. In its 2002 “\textit{Liberty}” decision, the \textit{Federal Cartel Office} even specified the definition of the broadband market and divided this market into two markets: the market for access as such and the market for Internet use. This distinction is derived from the fact that the market leader, \textit{Deutsche Telekom}, offers both services separately so that the user has the choice to purchase both services from different suppliers.

815. One month later, in March 2002, a different chamber of the \textit{Federal Cartel Office} adopted a slightly different view regarding the access market. In the “\textit{T-Online/Bild}” decision, it underlined – without properly defining a market – that there were two different supply approaches. Either the customer is permanently contractually bound to the Internet-Service-Provider (ISP), or he uses the so-called Call-by-Call tariff. Using the demand market doctrine,

\textsuperscript{757} BKartA 4. Apr. 2001 (B7-205/00) V. 1. d. bb. „Callahan/NetCologne“.
\textsuperscript{758} BKartA 4. Apr. 2001 (B7-205/00) V. 1. d. bb. „Callahan/NetCologne“.
\textsuperscript{759} RegTP 15. Nov. 2000 (BK 3b – 00/033), p. 21 „DTAG Flatrate“; diff. but probably due to a less developed Internet access techniques RegTP 13. May 1998 WuW/E DE-V 36, 39 „Zusätzliche Leistungen“.
\textsuperscript{760} BKartA 22. Feb. 2002 (B7 – 168/01) No. 34., 113. “Liberty”.
\textsuperscript{761} 13th Opinion of the Monopolies Commission 1998/1999 BT.Drs. 14/4002 No. 640.
the Federal Cartel Office thus identified an advantage for the customer in the simple and uncomplicated access, and in the fact that there was no need to handle the settlement of an additional account.

The Office, however, did not draw a final conclusion from this analysis, according to which there would be different markets due to different contractual relationships.

(ii) Supply on the Internet market

816. Few cases relate to market definitions for Internet services; most decisions and opinions indeed relate to Internet portals and electronic marketplaces. The definition regarding digital products and services is, as the Monopolies Commission admits, difficult to draw, due to possibilities of diversification and individualisation. In other words, Internet-related services may easily be differentiated or combined with one another in such a way as to amount to a new product market which is distinguishable from the original.

817. Case law concerning the electronic distribution of goods and services, excluding content, does not provide for clear market definition criteria, as the findings upheld in these decisions are relatively inconsistent. For instance, in one decision, the Federal Cartel Office regarded the goods and services traded on the marketplace as a relevant market as such. On the other hand, in other decisions, the electronic marketplace or portal was considered as an independent market. These decisions include, in particular, the ones commented upon in the following paragraphs.

818. In the “MB Portal” decision, the Federal Cartel Office examined the existence of a market for an Internet portal in which DaimlerChrysler AG addressed itself to consumers (so-called B2C Portal). The products offered on this portal were planned to be information about DaimlerChrysler, as well as the distribution of goods and services. In that decision, the Office did not restrict the relevant product market to only automobile-specific Internet portals. As even within a narrow market definition no dominant position was considered, the Office found - without defining the market - the portal to be in competition with other online-services that have no or a less specific orientation.

819. An Internet platform for business between undertakings (so-called B2B-Portal) has been subject to the “Covisint” decision of the Federal Cartel Office. This decision dealt with a joint venture between DaimlerChrysler AG, Ford Motor Company and General Motors Corp., which was about to set up an electronic marketplace for automotive providers. The Office did not
examine the market of automobile-specific platforms, but considered that other industry-specific platforms and non-specialized platforms were included in the general market.\textsuperscript{767}

820. On the other hand, in the decision regarding the joint venture between the tyre manufacturer Goodyear Tyre & Rubber Company and Compagnie Générale des Établissements Michelin named “RubberNetwork.com”, the Federal Cartel Office based its reasoning on the goods and services as such that were traded on the electronic marketplace. The Office argued that the respective traded goods and services did not have the characteristics of a specific sector, and did not show specific characteristics in respect to trade via Internet. On the contrary, mainly Maintenance Repairs Operations (so called MRO-products) for bigger undertaking needs were items of the marketplace. These are purchased via very different ways and therefore are not closely related to Internet trade. The Office thus relied on a criterion based on the specific properties that result from the very fact that the product was traded on the Internet; as that criterion was not met in the present case, the Office considered that the electronic marketplace was not to be regarded as a separate market.\textsuperscript{768}

The \textit{Federal Cartel Office} concluded from that analysis that at least three separate markets were to be identified in electronic marketplaces:

- Internet marketplaces \textit{i.e.}, the supply of IT-services for the electronic procurement of contracts on the Internet;
- Sector specific goods and services that directly enter into the end product;
- The general market for MRO goods and services.\textsuperscript{769}

821. As far as the supply of content is concerned, the Office identified a market for paid-for content in its 2002 “\textit{T-Online/Bild}” decision. As most content is available without any remuneration from the consumer, the identification of a separate product market will ultimately depend on the Office’s opinion, as the amount paid by the consumer to identify a separate product market. However, the “\textit{T-Online/Bild}” does not provide for a precise and detailed analysis of the market, nor of the criteria necessary to uphold its existence. Regarding the relationship between the supply of free-Content and other services, the Office merely states that both offers cannot be offered on a profitable basis, which is the reason for the development of paid-for content.\textsuperscript{770} The \textit{Federal Cartel Office} further admits that the market is still under construction. The reason for a separate market is obviously seen in the fact that the providers need to gain revenues. Therefore, the Office assumes that the content provider will have to split their offer: standard content will be free while premium content must be paid for. This is merely an expectation

\textsuperscript{767} BKartA 25. Sept. 2000 (B5 34100 – U 40/00) D. 1. 2., 3. “Covisint”.
\textsuperscript{768} BKartA 26. Jan. 2001 (B3 25130 – 110/00) No. 22 et seq. “RubberNetwork.com”.
\textsuperscript{769} BKartA 26. Jan. 2001 (B3 25130 – 110/00) No. 25 “RubberNetwork.com”.
\textsuperscript{770} BKartA 7. Mar. 2002 (B6 – 144/01) No. 34. “T-Online/Bild”.

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which is uttered in the market, but cannot be proven on today’s basis. Therefore, in our opinion, the Office somehow anticipates the issue.

822. Concerning free content, the “berlin.de” decision also proves particularly interesting. This decision did not deal with the consumer market. However, in that decision, the Office upheld the existence of a market for regional portals as a separate market.

Indeed, the Internet user chooses a regional portal only to find information about the particular region. In that case, this finding was corroborated by an opinion poll.\footnote{BKartA27. Feb. 2002 (B6 – 136/01) No. 14. “berlin.de”.
}

(iii) Advertising market

823. The market for advertising on the Internet was defined as a relevant product market in the Federal Cartel Office’s 2002 decision “berlin.de”. In that decision, the Office explicitly states that the advertising market in the press is a separate market from the one for advertising on the Internet.\footnote{772}

However, in that specific case, the Office uses the demand market doctrine to purport the conclusion that the market for advertising on the Internet had to be reduced to a separate market of regional portals. The service and information offered concerning a specific region may only be compared to a supply that refers to the same region. According to a poll, a percentage of 75 – 95 % of the advertising clients were Berlin undertakings or Berlin representatives of national undertakings. National clients – the Office added - mostly aim at Berlin customers.\footnote{773} The Office in this respect obviously relied on a Berlin-specific product offer.

That reasoning of the Federal Cartel Office may be compared with its argumentation that supports the existence of a regional press market, even though no reference is made to that case law in the decision.

4.3.4.2. Geographic market

824. The definition of the geographic market must be read in light of the possibility for goods and services offered over the Internet to be accessible throughout the world. Consequently, the Federal Cartel Office regards the relevant market to be at least Germany. In the “T-Online/Bild” decision, the Office applied this definition in compliance with the constant decisions of the EU Commission that relate to the Access market.\footnote{824. However, the Office tends to take an economic analysis into account, particularly as shown in the BKartA 7. Mar. 2002 (B6 – 144/01) No. 16. “T-Online/Bild”.}
2001 “RubberNetwork.com” decision, which led it to consider the market as European-wide or worldwide.\textsuperscript{775}

However, this market definition suffers an exception, as mentioned in the “berlin.de” decision of the Federal Cartel Office. In that decision, the Federal Cartel Office held that even though the Internet can be accessed on a worldwide basis and throughout Germany, the Internet advertising market is actually restricted to the area in which purchasers are located. This different approach of the Office can be traced back to the fact that in “berlin.de”, it was the advertising market that was in question whereas in the other decisions it was the supply market that had to be assessed.

The restriction of the user of a portal to one region is reflected in the location of the advertising clients.\textsuperscript{776} Again, that finding is in line with practice concerning the press advertising market.

\textsuperscript{775} BKartA 26. Jan. 2001 (B3 25130 – 110/00) No. 26. „RubberNetwork.com“.
\textsuperscript{776} BKartA27. Feb. 2002 (B6 – 136/01) No. 16. „berlin.de“.
5. **ITALY**

826. The objective of this chapter is to give a general overview (though less in-depth than the ones for France, Germany and the U.K.) of the legal framework as applied to the media sector in Italy\(^{777}\), along the original scheme of analysis as delineated in chapter 1 of this Study. As the following analysis will demonstrate, the Italian model for both competition law and sector-specific legislation shares the same principles and methodology as the EC system.

5.1. **Origin and criteria for market definition in Italian competition law**

827. Competition law is covered in Italy by a single and unique piece of legislation, the “Competition and Fair Trading Act” of 1990\(^{778}\) [hereinafter “the **Italian Competition Act**”], within which we analysed the provisions that relate strictly to market definition.\(^{779}\)

828. The authorities in charge of applying / enforcing Italian competition law are:

i. **Autorità Garante della Concorrenza e del Mercato** [hereinafter “the AGCM”]: \(^{780}\)

This is the national competition authority to which Law. No. 287 of 10 October 1990 accords exclusive investigatory and jurisdictional power (with the exception of the NRA’s concurring jurisdiction in the communications field attributed to the NRA) over agreements restricting competition, abuses of dominant position and concentrations that may create or strengthen a dominant position, as well as in matters involving misleading advertising\(^{781}\); the AGCM

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\(^{777}\) The documents at our disposal and on the basis of which the present research and analysis have been conducted, include Italian competition law and its regulatory statutory materials as well as case law. The major part of these documents are enlisted in the Bibliography of Italian Competition law, Sector-specific Statutory Materials and case law in annex to the present report, Annex IV.1


\(^{779}\) These provisions are enlisted in the Bibliography, Annex IV.1 In particular, see Competition and Fair Trading Act of 1990; the AGCM’s Guidelines for the notification of a concentration between undertakings pursuant to law No. 287 of 10 October 1990 and presidential decree No. 461 of 10 September 1991, of 1 July 1996 (as amended by AGCM’s Resolution No. 6538 of 5 November 1998 and AGCM’s Resolution No. 10770 of 30 May 2002), in Supplement No. 2 to the Bulletin No. 19/1996; the AGCM’s Guidelines for the notification of agreements pursuant to law No. 287 of 10 October 1990 and presidential decree No. 461 of 10 September 1991, of 1 July 1996, in Supplement No. 2 to the Bulletin No. 19/1996; Law No. 153 of 1 March 1994; Law No 481 of 14 November 1995; and Decree Law No. 15 of 30 January 1999 (as amended by Law No. 78 of 29 March 1999).

\(^{780}\) The Italian National Competition Authority [« NCA »].

\(^{781}\) This latter part is included in the part dedicated to sector-specific regulation of this Report (infra chapter 5.2)
also has the right to petition both the Parliament and Government, and exercises advisory powers towards the NRA as will be explained further in chapter 5.2. of this Report.

ii. Autorità per le Garanzie nelle Comunicazioni [hereinafter “the AGCOM”].

This body is charged with overlapping competition-based tasks in the broadcasting and publishing field. In particular, under Law No. 249 of 31 July 1997 which institutes the AGCOM, the NRA possesses investigating and ‘jurisdictional’ powers for prohibiting dominant positions (but not abuses thereof) in the sound and television broadcasting sectors (Section 2 of Law No. 249 of 31 July 1997). The AGCOM has a pre-emptive advisory power with regard to the NCA’s decisions that involve undertakings in the communications field (Section 1, para. 1(6)(c)(n°11) of Law No. 249 / 1997). The national regulatory regime in the communications field is expressly qualified as ‘complementary’ to the antitrust one governed by Law No. 287 of 1990. The relationship between the Italian NCA and NRA will be discussed later on in this Report (infra chapter 5.2.2.)

iii. Latium Regional Administrative Tribunal (“Tribunale Amministrativo del Lazio”):

In its quality as administrative court of first instance, this is the judicial appeal body of the AGCM’s decisions on competition law

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782 The Italian National Regulatory Authority [« NRA »].
783 In particular, Section 2, paras. 3 and 7 attribute full jurisdictional power (also to impose pecuniary sanctions, behavioural and structural remedies) to the AGCOM in cases where a dominant position is created or already exists. The mechanism set up by Law No. 149 of 1997 provides for a double-pre-notification requirement of both a concentration and agreement to the NCA (according to the Italian Competition Law procedural rules), and to the AGCOM (the requirement to notify, both concentration and agreements, also to the NRA represents an unique feature among other jurisdictions).
784 In other words, the NCA is subject to the AGCOM’s preliminary opinion in the communications field. The NRA’s opinions rendered under this power are, however, not binding upon the AGCM, though it must take into account the findings and respective conclusions thereof. See for all Latium Regional Administrative Tribunal, RAI, Radiotelevisione Italiana / Vari Impianti Radiofonici, No. 8339, 18 October 2000. An example of concurring jurisdictional powers between the AGCM and the AGCOM is where any one party acquires or holds 60% or more of exclusive encoded broadcasting rights for the League A Football Championship matches. In this case, the AGCM has a duty to rule on whether the sole fact of holding such a portfolio of broadcasting rights amounts to an abuse – provided it takes into account the findings and conclusions of the AGCOM rendered in a preliminary opinion (Section 2 of Law No. 78 of 29 March 1999).
785 Latium Regional Administrative Tribunal, RAI, Radiotelevisione Italiana / Vari Impianti Radiofonici, cit. See also AGCM, Relazione Annuale sull’Attività Svolta nel 2000, part II, chapter 3, at 155.
enforcement (interpretation of competition law\textsuperscript{786}) and misleading and comparative advertising.

iv. **Supreme Administrative Court** ("Consiglio di Stato"): 

As the administrative court of last resort, this represents the judicial body that has reviewing power of the AGCM’s provisions in second instance of appeal.

829. The present study also relied on the AGCM’s yearly reports ("Relazione Annuale"), which do not have legislative value but embody the Authority’s findings and conclusions (covering both the purely legislative part and case-law developments).

830. Italian competition law can synthetically be divided into three parts: agreements, abuses of a dominant position and concentrations:

831. Section 2 of the Italian Competition Act covers “agreements restricting freedom of competition”, and is the Italian equivalent to article 81 EC\textsuperscript{787}. It should be noted, however, that it includes a quantitative approach to such agreements (‘appreciability’ of the market share and the anti-competitive nature of the agreements), thus inserting in its very wording concerns that are expressed at the EU level in the *De minimis* Notice, where the Commission identified a degree of ‘restrictiveness’ of agreements, in terms of market shares of the parties and the ‘collusive’ nature (the so-called hard-core restrictions) of the agreement itself.\textsuperscript{788}

832. Section 3 of the Italian Competition Act, as Article 82 of the EC Treaty, does not prohibit a dominant position as such\textsuperscript{789} but places restrictions

\textsuperscript{786} It was clearly stated that the judicial review by the Latium Regional Administrative Tribunal and the Supreme Administrative Court with respect to the NCA’s market definition statements are limited only to errors in law and not to verifying the correctness of the NCA’s findings and related conclusions in law ("giudizio di legittimità"). See Supreme Administrative Court, *Italcementi*, No. 1348 of 14 March 2000.

\textsuperscript{787} Section 2, para. 2 states that “agreements are prohibited between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it” (emphasis added). This article should be read in parallel with Article 81 of the EC Treaty which states that “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the Common Market […]”

\textsuperscript{788} EU Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty, 2001/C 368/07.

\textsuperscript{789} However, under Law No. 78 of 29 March 1999, in the field of broadcasting rights the AGCM has jurisdictional power to decide whether a dominant position by itself (which is assumed to exist where any one party acquires or holds 60% or more of exclusive encoded broadcasting rights for the League A Football Championship matches) may be restrictive of competition. In this case, the NRA (the AGCOM) has concurring power to deliver a preliminary, non-binding opinion.
on the possible behaviour of an undertaking that occupies a dominant position.  

833. Under the Italian regime for merger control (Part I of the Italian Competition Act, Sections 5 to 7), the NCA examines the effects on competition of all notified operations. The substantive test for the competitive appraisal of a concentration over a given market is very similar to the one formulated in article 2 paragraphs 2 and 3 of the EC Merger Regulation, since the NCA examines whether a concentration “creates or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis.” (Section 6 of the Italian Competition Act).

5.1.1. The standard approach of demand and supply

834. The criteria used in the Italian approach of market definition mostly reflects those used at the EU level, since section 1 para. 4 of the Italian Competition Act specifically provides that the “provisions [therein] shall be interpreted in accordance with the principles of the European Community competition law”, which include both legislation and case law. The Italian Competition Authority has therefore elaborated an EC-oriented bulk of competition law principles, along with general principles of national law according to the needs and peculiarities of the single case. EC competition law

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790 “The abuse by one or more undertakings of a dominant position within the domestic market or in a substantial part of it is prohibited. It is also prohibited: a) directly or indirectly to impose unjustifiable burdensome purchase or selling prices or other contractual conditions; b) to limit or restrict production, market outlets or market access, investment, technical development or technological progress; c) to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; d) to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” It is deducible from the wording of Section 3 of the Italian Competition Act that the Italian regime in this regard is almost identical to the EU one.

791 Section 6 para. 1 reads as follows: “The Authority shall appraise concentrations subject to notification under section 16, to ascertain whether they create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis.” Similarly, under the EC regime, the EU Commission’s task is to determine whether “a 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” and thus whether it is compatible or incompatible with the common market (article 2 of EC Merger Regulation – Council Regulation EEC No. 4064/89 as amended by Council Regulation No. 1310/97 of 30 June 1997 on the control of concentrations between undertakings).

792 The Act therefore requires advance notification of all mergers and acquisitions when the gross turnover in Italy of all the companies involved exceeds 387 million Euros or the gross aggregate turnover on Italian territory of the acquired company exceeds 39 million Euros (as revised by the AGCM’s Resolution No. 10770 of 3 June 2002). These thresholds are updated each year to take account of inflation.

793 See AGCM, Prima Relazione Annuale sull’Attività Svolta (nel 1990), chapter 3.1. at 16; but also AGCM, Relazione Annuale sull’Attività Svolta nel 1999, part I, chapter 6, at 34 which endorses the expression “structural and functional independence” from EC Competition law, to underline that where there is a consolidated ‘dependence’ upon EC law and principles there
law principles are thus thoroughly applied for the purposes of defining the relevant market, though the competition authority sometimes provides for a more developed market examination, by the introduction of additional parameters or elements to the traditional EU methodology.

835. The present study divides the standard criteria upheld for (i) product and (ii) geographic market definition between demand-side and supply-side substitutability along the lines provided for in the 1997 EU Commission Notice of 1997, and also includes market definition criteria that have assumed a specific role in the antitrust appraisal under Italian competition law. The present study will not, however, comment on those criteria that have already been examined under and are identical to the EU model.

836. Similar to other jurisdictions (for instance France and the U.K.), the Italian Competition Act does not provide for a definition of the relevant market. This task was attributed to secondary legislation that implements the procedural system of national competition law. In Italy, the standard market definition approach is given by the so-called Guidelines for the notification of concentrations and agreements.

5.1.1.1. Product market

837. Under the AGCM’s Guidelines for the notification of concentrations and agreements, the relevant product market includes "all the products and services which consumers see as interchangeable or substitutable by reason of their characteristics, prices and intended uses." (i) Demand

838. Under Italian competition law, the major criterion for defining the relevant product market is the hypothetical monopolist test, and is applied
by the AGCM to identify possible substitutions (among potentially competing products), both at demand (customers’ perspective) and supply (perspective of suppliers of potentially competing products) levels.

This test consists of assessing whether, as a result of a small, non-transitory change in relative prices (in the range of 5%-10%) above the competitive level, the number of customers likely to switch is large enough to prevent a hypothetical monopolist who exercises market power. This criterion directly refers to the one applied under the EU merger regulation and the U.S. Merger Guidelines of 1982. The evidence used and its corroborating value reflect the EU approach.

839. Clear examples of rigorous applications of the demand-side substitution criterion are the Stream vs. Telepiù, RAI-RTI-CGC and RAI-RTI cases, where the AGCM opposes a pay-TV market to the free-TV one. These decisions (also later confirmed at the appeal level) will be analysed in greater depth in chapter 5.3.1. of the present Report.

840. The AGCM, however, acknowledges the limits of such a criterion due to its lack of concreteness and the high level of subjectivity involved in its application (thus allowing for a greater margin of interpretation and discretion). Furthermore, the hypothetical monopolist test is inadequate for market definition purposes in cases of missing or unreliable information, where the NCA endorses a number of complementary criteria.

(ii) Supply

841. The hypothetical monopolist test is also used under the supply-side substitutability, whose examination, however, has a very limited application in Italy for the purpose of market definition. According to both Guidelines, the market definition essentially focuses on demand, though supply is taken into account in order to assess the overall competitive conditions of a market; in this respect the AGCM considers the “possibility for other producers to easily reconvert their own capacity, to enable them to place products or services on the market in substitution of those offered by the parties to the agreement.”

However, demand-side substitutability is used to confirm the findings obtained at the demand level, and is relied upon as a fully qualified market definition


AGCM, Relazione Annuale sull’Attività Svolta nel 1993, chapter 4, at 72.


See chapter 5.1.2..

Guidelines (both for the notification of concentrations and agreements) in Chapter 3, Section 1 on « Information on the relevant market for the agreement ».

AGCM, INA / Banca di Roma, , Bollettino 30/93.
criterion when its application would take place easily taking into consideration a relatively short time horizon of substitution.\(^{804}\)

842. Thus, in parallel with other jurisdiction and EU competition law, supply-side substitution is mostly used at a second stage of the appraisal of any given behaviour (under Section 2 and 3 of the Italian Competition Act) or operation (under the Italian merger regime), in order to assess market power.\(^{805}\)

(iii) Potential competition

843. Under a commonly accepted formulation, the “scope of the relevant product market is identifiable in that area where, given a product or a string of potentially substitutable products, the undertakings supplying such a product or string of products compete with one another.”\(^{806}\) Potential competition is thus described as an area of products that corresponds to/overlaps an already identified market, in a demand-side or supply-side substitution perspective. Thus, potential competition is seen as a method for delineating the boundary between two markets.\(^{807}\)

844. However, under the Guidelines for notification of agreements, potential competition is also viewed as a factor used for determining whether an agreement has the object and/or effect of restricting competition. Indeed, potential competition is used to “estimate the likelihood that any new competing undertakings have to enter the markets affected by the agreement, particularly following a substantial increase in prices of more than 10 per cent, indicating: (a) whether there exist significant economic entry barriers, with particular reference to the ratio between the minimum optimum scale of production and the size of the market, the exclusive availability of raw materials, the importance of research and development and promotional activities, the possession of industrial and trade property rights, and lastly the vertical integration of the undertakings operating on the market or the existence of long-term contractual agreements between undertakings operating at different levels of the production chain; (b) whether there exist significant institutional entry barriers, with specific reference to the requirement of government authorisations or any other kind of legal or regulatory controls; (c) whether, in the past three years, any new competing undertakings have entered the market, specifying which undertakings have entered and where available the market share they have acquired; (d) whether

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804 AGCM, Relazione Annuale sull’Attività Svolta nel 1994, chapter 4, at 167.
805 AGCM, Relazione Annuale sull’Attività Svolta nel 1993, cit., at 72.
806 See, for example, Supreme Administrative Court, Istituti vigilanza Saredgna, cit.; Supreme Administrative Court, RAI-RTI-CGC, No. 150 of 14 January 2002; Latium Regional Administrative Tribunal, Latte artificiale per neonati, No. 7451 of 23 and 30 May 2001, at 12.
807 This approach was found with regard to the definition of future or developing markets. In the Stream vs. Telepiù case, for example, the NCA gave much emphasis to the role of digital services and convergence as a tool for either (i) blurring the boundaries of the existing product market in a forward-looking fashion; and (ii) diluting the undertakings’ market power. Infra chapter 5.3.1. of this Report.
it is likely that undertakings operating on the same product market but in distinct geographic markets are able to enter the relevant market.”

In that perspective therefore, the SNIPP test, which is traditionally applied to market definition, aims at assessing whether a given and already defined relevant market is still capable in the long term of hosting further sustainable competition. In this case, as opposed to the one described above (which still appears to be an exception), potential competition is not used as a standard criterion for market delineation.

5.1.1.2. Geographic market

845. Under both Guidelines, a relevant geographic market “is the area in which the parties (...) supply the relevant products and services, and which may be regarded as distinct from neighbouring geographic areas because of the absence of significant possibilities of geographic substitution.”

Generally speaking, the Italian NCA endorses the same approach as the one used under EU Competition law for defining the relevant geographic market.

846. In terms of evidence, the Guidelines suggest looking at “the nature and characteristics of the products and services concerned, transport costs, the existence of other entry barriers, consumer preferences, the existence of appreciable differences between neighbouring geographic areas, and the existence of significant price differences.” A clear analogy with EU case-law practice can be inferred – as confirmed by Italian precedents.

847. Practice shows that under Italian merger law practice, the geographic scope of the relevant market often extends the national boundaries. On the other hand, it appears that in infringement procedures, the market is more likely to be national than international. This issue will be further developed in chapter 5.1.3.

5.1.2. The introduction of more elaborated criteria

848. Even though Italian competition law is largely based upon EU competition law principles, the NCA has in some instances developed a number of different adjustments to the EU tests. Therefore, under the label “more elaborated criteria”, the present study also includes those market

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808 Guidelines for notification of agreements, Chapter 4, section 3 on « Information on the object and/or effect of the agreement and on the position of the parties on the market ».

809 In this sense, cf. AGCM, Pozzuoli Ferries / Gruppo Lauro, No. 2379, Bollettino 42/94. It must be noted, however, that this line of reasoning (i.e., that potential competition only measures the competitive effect of any behaviour or operation) is mostly applicable with regard to appraisal of agreements and dominant positions (such as the case herewith mentioned).

810 See supra.

811 See supra.

812 AGCM, Relazione Annuale sull’Attività Svolta nel 1993, cit., at 70.
definition tests that depart from the standard approach of demand-side and supply-side substitutability, and introduces either (i) a variation thereof or (ii) a totally new parameter.

849. It should also be noted that the Italian communications law field organises a *de jure* ‘functional separation’ of tasks between the national competition and national regulatory agencies, under the terms of which the former is only responsible for the application of competition rules in the communications sector, whereas the latter is only invested with regulatory functions. However, in practice, it appears that the AGCM and the AGCOM simultaneously apply both regulatory and competition law enforcement powers. The NRA thus renders preliminary opinions (according to its power of consultation), which include market definition assessment 813, whereas the NCA renders opinions to the AGCOM that involve specific sector analysis.

This *de facto* situation leads, as also occurred in other jurisdictions (for example, the U.K.), to the elaboration of an additional set of criteria for market definition that, because of their ‘hybrid’ nature, we called “border-line” criteria between competition law and sector-specific regulation. 814 For organisational purposes, we have included such border-line criteria in the chapter dedicated to the «more elaborated criteria». 815

5.1.2.1. Criteria that amount to a mere ‘variation’ of the standard approach according to the needs of a specific case

(i) Product market

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813 The RAI-RTI-CGC and the Groupe Canal Plus / Stream cases are clear examples of such reciprocal interference (especially in the side of the NRA).

814 As they are endorsed in sector-specific procedures but involve the application of competition law principles for the definition of the relevant market. However, there is a difference between border-line market definitions under U.K. law and those found under Italian law: where, in fact, the former are upheld in accordance to specific law provisions, the latter derive from the Italian NRA’s over-inclusive interpretation of its powers – that may result in an unduly extensive exercise of its consultation powers. As we said above, the Italian experience rests on a de facto situation

815 See, for example, the U.K. review in chapter 3 of this Report.

816 Latium Regional Administrative Tribunal, *Latte artificiale per neonati*, cit.
sub-markets into a broader single product market] complies with a need to simplify” the appraisal process.\textsuperscript{817}

\begin{itemize}
\item «The intrinsic nature of the product »: an objective test
\item The NCA may also define the market with respect to the sole physical and technical characteristics of the products, when their nature is so peculiar that the hypothetical monopolist test could be disregarded as superfluous.\textsuperscript{818} These criteria are thus “factual-based”.
\item The consumers’ habits: a more subjective test
\begin{itemize}
\item Due to the inadequacy of the hypothetical monopolist test and its mathematical application, the Italian NCA has often stressed that any relevant market definition criteria should give particular consideration to the “consumers’ preferences and habits”.\textsuperscript{819} This amounts to a more subjective type of reasoning which focuses on how users or consumers of certain products would react \textit{in concreto} to a possible alternative offering\textsuperscript{820}, given the underlying economic conditions.
\item The AGCM also noted that products that are technically interchangeable as a result of a non-transitory relative price increase, may nevertheless fall into separate markets because of differences between categories of users.\textsuperscript{821} This criterion is also part of the category of factual-based criteria.
\item A competitive relationship between two products may lead to the conclusion that they are substitutable
\begin{itemize}
\item It was recently upheld that a relationship of competition between two products might lead to the conclusion that they are substitutable. This implies that in order to be substitutable, two products are not required to be absolutely interchangeable but rather ‘sufficiently’ interchangeable so that to compete with one another.\textsuperscript{822}
\end{itemize}
\end{itemize}
\end{itemize}

\begin{flushleft}
817 Ibidem, at 13 (emphasis added).
818 In this sense, cf. AGCM, Ducati / Sip, No. 1028, Bollettino 6/93. See for example also the NCA’s decisions Seat Pagine Gialle / Cecchi Gori Communications, Stream vs. Telepiù and Groupe Canal Plus / Telepiù / Stream to be further analysed in chapter 5.3.1. of this Report.
819 AGCM, SIP / Sistema telefonia cellulare GSM, No. 1532, Bollettino 32/93.
820 See also AGCM, Relazione Annuale sull’Attività Svolta nel 1993, cit., at 72.
821 AGCM, SIP / Sistema telefonia cellulare GSM, cit. See also the RCS Libri / Casa Editrice “La Tribuna” and Tiscali/Albacom vs. Telecom Italia decisions, to be further analysed in chapter 5.1.3. of this Report.
\end{flushleft}
Asymmetric substitutability

As a further specification of the SNIPP test, it was held that the substitutability relationship between different products does not need to be symmetric (product B is a good substitute for product A, but the same does not need to be inferred for product A). In that case, the market for product A will consist of A plus B, but the market for product B will only consist of B (because A is not a substitute for product B).\(^\text{823}\)

Such an approach refers to the need to analyse the substitutability, on a case-by-case basis, under both the demand and supply side, and requires in practice the addition or exclusion of analogous products from a given product market definition, depending on whether such products are capable of affecting the price levels of the those products that form the initial market, within a limited time period.\(^\text{824}\) The NCA’s approach appears to conform with the EU practice.\(^\text{825}\)

(ii) Geographic market

Narrowing the geographical scope: the requirement for which the national market should reflect an area with a «significantly different competitive equilibrium»

In a case involving regional and local service offerings, the AGCM applied the SNIPP test, though it noted that this test would lead to a geographic market definition that was too broad. The issue was whether a local or national relevant market could be found according to the sole fact that there is “an offer and demand limited to that local or national area”, but also that the “geographic area considered is characterised by a significantly different competitive equilibrium.”\(^\text{826}\) The matter was further confirmed in appeal before the Latium Regional Administrative Tribunal, which upheld the NCA’s approach to narrowing the relevant geographic market as opposed to the appellants’ claim to define the market more broadly.

«The intrinsic nature of the product»: an objective test

As for the product market definition (see above), the NCA also uses the product-characteristics test to identify the geographic boundaries of the market. The geographic market upheld corresponds to the one found on the basis of the traits involved in the product offering, given to the products’

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824 AGCM, Schemaventuno-Promedès / Gruppo GS.
825 See for example, as cited in the above-mentioned decision, the EU Commission decision, La Rinascente / Colmark, OJ C 92, 1 April 1999.
826 Latium Regional Administrative Tribunal, Latte artificiale per neonati, cit., at 13. See also AGCM Decision No. 8087, Latte artificiale per neonati, 2 March 2000, Bollettino 9/2000, para. 119.
Part 5 – Italy

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wholesale price and weight (for assessing the amount of transport costs and opportunity costs for switching production).  

\[\text{wholesale price and weight (for assessing the amount of transport costs and opportunity costs for switching production).}\]

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\[\text{\textit{Markets in transition: where demand and supply-side substitutability often disagree}}\]

858. As for developing markets, a conflict may arise when demand and supply-side substitution lead to opposite conclusions. This is the case where the market appears to be national from the demand point of view, and worldwide in terms of supply-side substitution. The first major Italian case dealing with such issue concerned public transportation. 

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859. The same problem was dealt with by the U.K. national regulatory authority, the OfTEL (however, in its role of competition body), with regard to Internet connectivity issues. There, as it is explained in chapter 3, of the present Report, relevant market definition often proved to be controversial when applying the SNIPP test since the market varied according to whether the perspective was that of the supplier or the ultimate user.

5.1.2.2. Criteria that amount to a new or additional parameter on the methodology of market definition

(i) Temporal factors

860. Temporal factors are taken into consideration when within a given time period, customers cannot switch from one service to another and suppliers’ capacity varies between time periods. The practice of taking seasonal variations or peak and off-peak offerings into consideration for the purpose of market definition is not common under Italian competition law, though the NCA recognises that they may provide some guidance in the fact-finding process.

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861. With regard to the so-called inter-generational products (i.e., those for which a future development is prospected – and thus also described as “developing and/or future markets”), the Italian competition law does not provide for specific guidance. There is, however, a string of cases that have

827 Latium Regional Administrative Tribunal, Consorzio qualità veneta asfalti, No. 7289, 7 September 2001; see also AGCM, 3C Communications, No. 412, Bollettino 5/92.

828 See for example the Consorzio Capri decision where the authority clearly recognised that “the market for the manufacturing of rail transportation material has, on the supply-side, an international dimension. However, under the demand-side, such a market results to be in fact very fragmented into the different national areas […]” AGCM Decision No. 8087, Consorzio Capri, 22 December 1993, Bollettino 40-41/1993, para.5.

829 AGCM, Assoutenti / Alitalia, No. 2169, Bollettino 30-31/94. However, in Pozzuoli Ferries / Gruppo Lauro, (cit.), it was held that a relevant market may be identified if the time necessary to consume the services is considered (the time to reach one place to another).

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marked the area and that will be analysed further on in this Report in chapter 5.3.830

(ii) Complementary services / products

862. The existence of group of complements (i.e., products that are either consumed together and/or produced together) may lead to three market definition scenarios:

- a “single market” comprised of the whole group of complements;
- a “dual market” situation consisting of a separate primary market and a separate secondary market (also called “after-market”); and
- “multiple markets” -- one for each primary and secondary product.

863. The key question, as regards the existence of complementary services or products, is to determine whether competition to supply one particular product constrains the prices charged for the other complementary products. Thus, in a ‘group of complements’ situation, the AGCM looks at the whole-life cost of a product: if a customer takes into account the whole-life cost of a product, which in turn belongs to a group of complements, then the market comprises the whole ‘package’, which includes both primary and secondary products. If the whole-life cost of that product shows instead that little weight is given to the other complements, then the relevant market comprises solely either the primary or the secondary product.831

5.1.2.3.Border-line Criteria of market definition – between Italian competition law and sector-specific regulation

864. As mentioned earlier, the mechanism of a ‘functional separation’ of tasks between the NRA and the NCA is not always clear in Italian practice. More particularly, the AGCOM has sometimes appraised operations or behaviours in light of a competition law based analysis, thereby leading to the definition of the relevant market832. This was particularly the case in the AGCOM opinion833 (for which it has a preliminary advisory power834) which was rendered recently to the AGCM in the case Groupe Canal plus / Telepiù /
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835 Stream (concentration)\textsuperscript{835} of May 2002, as well as in the cases RAI-Cecchi Gori Communications\textsuperscript{836} (restrictive agreements), Telecom Italia / Excite\textsuperscript{837} (concentration), and RAI-RTI / Emittenti private\textsuperscript{838} (concentration); these cases cannot be commented on as they are not published.\textsuperscript{839} In the same way, the AGCOM goes through a competition law based analysis in article 2 of Law 249/1997 proceedings (power to prohibit dominant positions as such), as shown for instance in the decision rendered against Telepiù [hereinafter “the Telepiù opinion”]\textsuperscript{840} following a complaint by Stream and Ibiscom.\textsuperscript{841}

865. In both instances, the NRA offers a detailed analysis for market definition purposes. The rationale for this analysis is mentioned in the Telepiù opinion, where the AGCOM observed that, notwithstanding that its intervention was confined to legally pre-defined sectors\textsuperscript{842}, it was nevertheless necessary to identify a number of ‘related markets’ within each predefined sector. Thereby, the AGCOM actually upheld a broader number of markets than those found by the NCA (in the correlated competition law proceedings).\textsuperscript{843}

866. At a preliminary stage, it distinguished among three categories of relevant markets, according to their respective positions in the value chain. The first category covers all upstream content markets (the actual raw material: the sporting event or the movie)\textsuperscript{844}, the second involves the intermediate markets, and the third refers to the downstream distribution markets.\textsuperscript{845}

\textsuperscript{835} Groupe Canal Plus / Telepiù / Stream, AGCM Decision, 23 May 2002  (clearance of concentration subject to conditions – conforming preliminary Opinion of AGCOM).
\textsuperscript{836} RAI Radiotelevisione Italiana / RCS Editori (Sport Set Spa), AGCM Decision, 15 March 2001  (clearance of concentrative joint venture).
\textsuperscript{837} Telecom Italia / Excite, AGCM Decision, 19 November 1998  (first phase decision for clearance of concentration).
\textsuperscript{838} RAI-RTI / Emittenti private, AGCM Decision, 19 November 1998  (first phase decision for clearance of concentration).
\textsuperscript{839} Even though not published, it appears that the AGCOM underwent a market analysis, since such analysis is partly reported in the AGCM decisions.
\textsuperscript{840} AGCOM Decision 401/01/CONS, 10 October 2001  (proceeding under article 2 of Law 249/97, dominant position of Telepiù, pay-TV market).
\textsuperscript{841} The proceeding relates to, but is formally and procedurally independent from, the Italian competition authority’s decision Stream vs. Telepiù of 14 June 2000  where the AGCM fined Telepiù for abuse of dominant position (under article 82 of the EC Treaty) in the pay-TV market (to be dealt with in chapter 5.3.1. of this Report).
\textsuperscript{842} These market areas defined ex ante to which the NRA refers in its Telepiù opinion are: (i) the sound and television broadcasting realised with any technical means, also its most developed applications; (ii) the multimedia sector intended as a combined use of a number of communications means, transmission paths and distribution systems; and (iii) publishing, also in an electronic format. These market-areas will be analysed further on in this Report in chapter 5.2.
\textsuperscript{843} For an overview of the Italian NCA’s assessment of the relevant markets upheld in the Groupe Canal Plus / Telepiù / Stream case see further in chapter 5.3.1. of this Report.
\textsuperscript{844} That category of markets was, however, not analysed in the context of the operation.
\textsuperscript{845} Specific reference to these markets are analysed infra in chapter 5.3.1. of this Report.
5.1.3. Different approaches according to the type of procedure

867. Under Italian competition law, relevant market definition practice does differ based on the procedure involved.

5.1.3.1. Difference between restrictive agreements and abuse of dominant position procedures

868. The Guidelines for notification of agreements states that a relevant market (product and geographic-wise) for Section 2 (restrictive agreements) purposes “[…] determines the scope within which any restriction on competition deriving from the agreement must be appraised.”

869. In this respect, the Supreme Administrative Court has recently confirmed the distinction between market definition, depending on whether operated under a Section 2 (restrictive agreements) or Section 3 proceeding (abuse of dominant position). In particular, it noted that in Section 3 cases, there is a peculiar strong link between the appraisal of a dominant position and the “structure of the undertaking subject to review.”

In other words, the ‘structure’ of the allegedly dominant undertaking shall be deemed as the centre for investigation in terms of relevant market definition. In turn, such a relevant market strongly affects the finding of a dominant position. On the other hand, in a proceeding involving restrictive agreements, the “identification of the relevant market is, instead, aimed at delimiting the scope within which the agreement is capable of restricting or distorting competition.”

The Supreme Administrative Court further explains that such difference does not imply that Section 2 cases should lead to the upholding of as many markets as the number of agreements or practices concerned, but rather that the two proceedings involve different market definition criteria. The difference, therefore, rests on the “qualitative test adopted and not on its quantitative outcome.” However, the AGCM stated that the “anticompetitive effect [arising from a concerted behaviour enacted through a series of agreements] should be assessed with respect to each contract concluded thereof.” Therefore, a single coordinated practice may be scrutinised within the boundaries already defined by the contract, whereas an

846 Guidelines for notification of agreements, cit.
847 Supreme Administrative Court, RAI-RTI-CGC, cit. In the same sense, see also Supreme Administrative Court, Italcementi, No. 1348, cit.
848 Supreme Administrative Court, RAI-RTI-CGC, cit., at 16-17.
849 Ibidem, at 17.
850 Ibidem.
851 Stream vs. Telepiù, AGCM Decision, 14 June 2000, para. 164. (emphasis added). In this case, the NCA was directly applying article 82 of the EC Treaty and the above-mentioned distinction between the two procedures refers respectively to article 81 and 82 of the EC Treaty.
‘abuse of dominant position’ should be appraised globally within the context of a broad marketplace.

Therefore, it may be that in practice, abuse of dominant position cases lead to broader market definitions, whereas restrictive agreements cases lead to market definitions that match the activity covered by the agreement or practice at stake.

5.1.3.2. Differences between infringement and merger procedures

870. Market definition under Italian merger law plays a distinctive and important role. Indeed, under Section 5 of the Italian Competition Act, any concentration “[…] shall be appraised taking into account the possibilities of substitution available to suppliers and users, the market position of the undertakings, the access conditions to supplies or markets, the structure of the relevant markets, the competitive position of the domestic industry, barriers to the entry of competing undertakings and the evolution of supply and demand for the relevant goods or services.”\textsuperscript{852} Demand and supply substitutability assessment therefore have a ‘normative’ function, which is binding upon the NCA.

871. The Guidelines for notification of concentrations offer some guidance in this respect, in that the relevant product and geographic markets aim at determining “the scope within which the market power of the undertaking resulting from the merger must be appraised. They are, respectively, the smallest group of products and the smallest geographic area in which, given the existing substitution possibilities, may be created or strengthened a dominant position.”\textsuperscript{853} The Guidelines therefore specifically entail the search of the narrowest possible market definition.

872. Finally, Italian merger practice tends to delineate the geographic market beyond national boundaries\textsuperscript{854}, whereas infringement procedures tend to confine it to national frontiers.

\textsuperscript{852} Emphasis added.
\textsuperscript{853} Guidelines for notification of concentrations, cit.
\textsuperscript{854} AGCM, Relazione Annuale sull’Attività Svolta nel 1993, cit., at 70.
5.2. Comparison with the criteria upheld in regulatory sector focused legislation

873. The statutory instruments regulating the Italian media sector are classifiable according to their respective area of discipline. Only measures relevant in the market definition process (i.e., providing for methodology, criteria, tests, definitions) are included in the present Report.\footnote{855}

874. The regulatory enforcing powers between the AGCOM (the actual NRA for the communications sector) and the AGCM (the sole antitrust agency) are divided as follows:

(i) The AGCOM:

875. The “Autorità per le garanzie nelle comunicazioni” was established by Law 249/1997 to carry out the tasks assigned under EU directives, both in the telecommunications market and audiovisual de-regulation fields. The NRA has absorbed the functions of the former Authority on Publishing and Press, and as a consequence is also responsible for regulatory affairs in those sectors, with broad responsibilities in supervising and enforcing compliance with legislation in the telecommunications, media and press-publishing sectors.

According to Law 249/1997, the AGCOM’s tasks shall support several policies including competition, pluralism, quality content, respect for linguistic and cultural diversity, minor protection, and the fostering of European audiovisual production and digital convergence. With respect to the market-areas enlisted and predefined in paragraph 1, the AGCOM’s role is to “superintend […] the trend and the development of the[se] markets” and to “permit[…] the start up of [such] markets in which the principles of pluralism and competition are fully respected” (emphasis added).\footnote{856}

(ii) The AGCM:

876. Among its institutional task of enforcing and applying Italian competition law, the AGCM maintains a number of sectorial powers in the media field. Its right to petition involves the possibility to suggest sector-specific regulatory measures to the Parliament and Government.\footnote{857} The AGCM also has a pre-emptive advisory power, and renders non-binding opinions on the AGCOM’s provisions that shall have an impact on the competitive structure within the communications field (e.g., with reference to the definition of the operators with a significant market power, the

\footnote{855}{Therefore, a number of Italian sector-specific provisions are not included in the present Report. See Bibliography of Italian Competition law, Sector-specific Statutory Materials and case law in Annex IV.1 of this Report.}

\footnote{856}{Respectively Section 2 para.1(4) and Section 2 para.1(8)(c) of Law 249/1997.}

\footnote{857}{Sections 21, 22 and 24 of the Italian Competition Act.}
interconnection offer, etc.)\textsuperscript{858}. Finally, it has exclusive jurisdiction in the field of misleading advertising, which is governed by Legislative Decree No. 74 of 25 January 1992\textsuperscript{859}.

5.2.1. Market definitions in media focused legislation

The following analysis relates to the market-areas upheld \textit{ex ante} by the AGCOM in applying its regulatory tasks. We have not therefore included those market definitions derived from the NRA’s extensive application of competition law principles, which we instead included in the chapter dedicated to “more elaborated criteria” under Italian competition law (infra chapter 5.1.2.).\textsuperscript{860}

5.2.1.1. Television and Broadcasting

(i) Broadcasting

According to Law 249/1997, the AGCOM is competent to prohibit any act or behaviour whose objective or effect is the creation or maintenance of a dominant position “\textit{in the sectors of sound and television broadcasting, also in the most developed forms, realised with any technical multimedia publishing means whatsoever, including electronic means.”}\textsuperscript{861}

As explained in the Telepiù opinion, these market-areas define the scope of intervention of the AGCOM when dealing with dominant position cases. These sectors of intervention are (i) the sound and television broadcasting realised with any technical means, as well as its most developed applications; (ii) the multimedia sector which is intended as a combined use of a number of communications means, transmission paths and distribution systems; and (iii) publishing, also in electronic format. The scope of jurisdiction of the AGCOM for the monitoring of ‘dominant positions’ is rather broad, and includes a protracted time horizon that certainly covers inter-generational products, as well as developing and future markets.

\textsuperscript{858} Pursuant to 20 para. 7 of the of the Italian Competition Act states that “[...] where the agreement, abuse of dominant position or concentration relate to undertakings operating in sectors falling within the competence of more than one authority, each of those Authorities may adopt measures falling within its competence” (emphasis added).

\textsuperscript{859} As amended by Legislative Decree No. 67 of 25 February 2000.

\textsuperscript{860} For the sake of consistency of the Report, the expression “market-areas” is used along with the wording of the new Draft Commission Recommendation on Relevant Product and Service Market in accordance with Directive 2002/21/EC of June 2002, which distinguishes between ‘relevant economic market’ and ‘market-areas’ included in Annex 1 of the Framework Directive. See page 2, para. 2 of the Draft Recommendation. The EU Commission explicitly reckons that “these [market] areas have been delineated in the applicable directives, but are not always « markets » within the meaning of competition law and practice.”.

\textsuperscript{861} Section 2, para. 1 of Law 249/1997.

880. In 2000, the AGCOM approved a White Paper on Digital Terrestrial TV, which highlights the difficulties (frequencies for broadcasters and set-up boxes for users) of the transition operation from analogue to digital television. In this document, the NRA refers to those services as defined at the EU level, and more specifically: the conditional access services, the information society services and the provision of programming electronic guides.

881. In March 2001, the Italian government adopted an Act on digital terrestrial TV broadcasting, which invests the AGCOM with the power to reallocate the frequency plan. Most importantly, this Act declares the jurisdictional power of the NRA under Section 2 of the Law 249/1997 as to cover a number of pre-defined markets, both at the content and distribution level. Section 2-bis of that Act recognises the status of relevant product market to the following areas: (i) the market for digital terrestrial TV programming; (ii) the market for the provision of digital terrestrial TV services (i.e., the digital terrestrial broadcasting); and (iii) the market for digital terrestrial sound and radio programming. In addition to such segmentation of the digital TV market, the Act provides for a distinction between network operator and content and/or service provider. Such distinction amounts in practice to a further subdivision of the relevant market.

The existence of narrow market-areas offers AGCOM the possibility to exercise its jurisdictional power in a large extent. Indeed, the narrower the market and the more likely a possible dominant position is to be held, this in turns triggers the conditions for imposing ex ante obligations.

882. Soon afterwards, the NRA enacted a piece of legislation the “Digital TV Regulation,” which governed the provision of digital television and implemented the provisions of the Act. The Regulation pursues two main objectives. The first one is to separate obligations, limits and commitments between the network operator holding a license and the content provider holding an authorization. The second objective defines the path that bridges a transitional phase from a concession regime to a license/authorization one.

883. The network provider is the person entitled to install and provide an electronic communications network, whereas the content provider is the person in charge of the editorial responsibility for the realisation of programmes to be distributed via broadcasting or sound retransmission. A

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863 See also Ministerial Decree No. 307 of 25 July 1997 (Regulation concerning decoding technology, so-called ‘‘set top box’’) and AGCOM Decision 127/00/CONS, 1 March 2000 (implementing regulation concerning satellite television broadcasting pursuant to art. 3 of Law 249/97).
864 Infra chapter 1.2. of this Report.
865 Law No. 66 of 23 March 2001 (implementing regulation concerning the concessions for private television broadcasting on terrestrial frequencies at the local level).
866 AGCOM Decision 435/01/CONS, 6 December 2001.
service provider is the person providing conditional access services to end users through the network, according to the standards set by the relevant EU Directives thereof.

884. Furthermore, among the definitions provided for by the Digital TV Directive, some emphasis is given to the geographic reach of these digital television services so that a sort of geographic market-area definition is upheld. These refer to the provisioning of content or network services either at the local or national level, by setting percentage thresholds to define the “local” or “national” scope of these activities.

885. In this perspective, the Regulation also defines those contents with “European” value when few conditions are met (generally, its connections with one of the Member States other than Italy).

5.2.1.2. Market-area definitions in the Publishing sector

886. No major provision in the publishing sector makes the Italian model different from other jurisdictions. The only measure that may seem relevant in this respect is Section 25 of the basic Italian publishing law\(^{867}\), which distinguishes editorial content between so-called normal cultural value and “high cultural value”, the latter being reached if “the editorial contribution is conducted in light of some scientific rigor.” The policy goal behind such distinction is to set the criteria for awarding extra financing.

5.2.1.3. Market-area definitions in the Advertising sector

887. The Italian NCA has been responsible for enforcing the misleading advertising regulation since 1992\(^{868}\).

888. Advertising is defined as “any form of message which is disseminated in any form or manner in the course of commercial, industrial, craft or professional activities to promote the sale of movable or immovable property, or to transfer rights and obligations in respect of such property, or to provide services”; misleading advertising is “any advertisement which, in any way whatsoever, including its presentation, misleads or is likely to mislead any natural or legal person to which it is directed or which it reaches, and which by virtue of being misleading is capable of adversely affecting their economic behaviour or, for this same reason, harms or may harm a competitor”; and comparative advertising is “any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.”

\(^{867}\) Law No. 416 of 5 August 1981

\(^{868}\) Legislative Decree No. 74 of 25 January 1992, as amended by Legislative Decree No. 67 of 25 February 2000.
889. Under Section 1 of the Decree, advertising must be “clear, truthful and fair”. Section 4 in particular refers to the transparency of advertising, which must be “clearly recognisable” as such.

890. On July 26, 2001, the AGCOM adopted a Regulation concerning advertisement and teleshopping (under its duties to ensure that existing codes of conduct will adopt an identical signal for all channels during programmes destined to minors). The Regulation applies to both public and private broadcasters. The main provisions concern the identification of advertising and teleshopping messages, and the modalities of their insertion during programmes.

891. Advertising and teleshopping must be kept completely separate from other parts of the programme and identifiable as such by the insertion on the screen, at the beginning and end of the message, of specific signs such as "advertising" or "teleshopping". In programmes that consist of autonomous parts, or in similarly structured events and performances containing breaks, advertising and teleshopping messages shall only be inserted between the parts or during the breaks. A period of at least 20 minutes must elapse between each successive advertising break within the programme.

892. In the event of broadcasting sporting events, advertisement and teleshopping may be inserted during the breaks foreseen by the official regulation of the sport being broadcasted, or during its pauses insofar as the advertisement message does not interrupt the sport action.

5.2.2. Market-area definitions in the electronic communications sector: the Internet access

893. The Internet access regulation was recently aligned with the telecommunications regulation in Italy. The No. 59 Act of 8 April 2002 extended the sector-specific provisions for telecommunications operators to Internet service providers (among which were also the measures on the attribution of the significant market power status).

894. In July 2002, the AGCOM adopted a decision (No. 219/02) for the purpose of implementing the above-mentioned Act. In its press release, the NRA identifies two separate markets within the “larger Internet access sector”: (i) an upstream intermediate market for provisioning interconnection services at the termination level and (ii) a downstream retail market for dial-up Internet access services.

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869 AGCOM Decision 538/01/CSP, 26 July 2001.
870 See also AGCOM, Decision No. 9/02/CIR of June 26, 2002 (measures implementing article 1, para.1, of Law No. 59 of April 8, 2002: ISPs offerings and their economic conditions).
871 Press Release of AGCOM, Decision No. 219/02 of July 10, 2002 (updating the list of SMP in the market for Internet access).
872 The final decision was not yet published at the time the present Report was conducted.
895. With respect to a single technology, the NRA upheld a number of market-areas derived from x-DSL type of applications for Internet access.

896. The first distinction is the one made at the ADSL technology level. In its decision No. 407/99, the NRA distinguished between the market for the provision of ADSL services at the retail level and wholesale level. A further segmentation was found within the retail and wholesale x-DSL services.

897. As regards to the type of technology used, a market definition was found for x-DSL services applied to Virtual Private Network (“Canale Virtuale Permanente”, or “CVP”) modalities.

5.2.3. Respective impacts of sector specific regulation and competition law on one another

898. Since 1997, the Italian legal framework in the media sector has undergone a major reorganisation trend centred on the principle of “functional separation”, which invested the NCA and the NRA with tasks in both regulatory and competition law related matters. The issue therefore remains as to the exact boundaries of their respective powers, their coordination as well as the extent of their overlapping jurisdictions.

899. Under the 249/1997 Act, the AGCOM “will adopt the measures necessary for the elimination or prevention of the creation of positions […] or which are in any way harmful to pluralism.” It shall also intervene “for purposes of permitting the start up of markets in which the principles of pluralism and competition are fully respected” and for the “observance of the principles of openness, competition and non discrimination between public and private subjects.” The NRA exercises these competition law forms of assessment (and therefore the definition of markets) in the following areas: (i) public utilities; (ii) advertising; and (iii) all communications activities.

873 AGCOM, Decision No. 407/99, 21 December 1999, para. 2 (authorising Telecom Italia to provide broadband Internet access through ADSL technology).

874 See for all, AGCOM, Decision No. 217/00/CONS, 5 April 2000 (on the provision of broadband Internet access through ADSL technology). Cf. also AGCOM, Decision No. 15/00/CIR of December 21, 2000 as modified by AGCM Decision No. 4/01/CIR. There, the NRA distinguished between broadband Internet access via the “Ring” offering and a broadband Internet access via the “Full business company” contract as differently packaged respectively under the retail or wholesale format.

875 AGCOM, Decision No. 4/01/CIR of 22 February 2001.

876 See supra chapter 5.1.2.3.

877 See also the respective competences of each body in chapters 5.1. and 5.2. of this Report.

878 Section 2, para. 7 of Law 249/1999 (emphasis added).

879 Section 2, para 6 of Law 249/1999 (emphasis added).

880 Section 2, para 19 of Law 249/1999 (emphasis added).

881 See Law No 481 of November 14 1995 (Competitions rules and regulation of public utilities).

882 Pursuant to Section 7, para. 5 of Legislative Decree No. 74 of 25 January 1992 “when an advertisement has been or is to be disseminated through periodicals or daily newspapers, or by radio or television or by any telecommunications medium, before issuing any measure, the
In practice, the NRA has indeed included “competition-focused” analyses in its inquiries. However, as provided under the 249/1999 Act, the involvement of both the AGCM and the AGCOM is aimed at allowing them to “carry[ ] out their respective activities.”

900. The administrative court recently upheld that ‘complementarity’ should be the parameter governing the relationship between the AGCM and the AGCOM. More specifically, the Italian Administrative Tribunal held that sector-specific regulations should be applied together with the antitrust discipline “so that the non-compliance with a specific regulatory measure does not imply ipso facto also an infringement of competition law and vice versa.”

The Latium Administrative Tribunal also stressed the need to separate respectively the roles of the NCA and the NRA, and underlined that any concentration affecting the audiovisual and publishing sector should comply with the rules set in Section 2 of Law 249/1997, together with those set under Section 5 of the Italian Competition Act. Any decision made thereof by the competent body should be subject to the consultation mechanism, under whose terms the AGCM and the AGCOM respectively have advisory power on one another’s decisions.

901. Nevertheless, even though the tendency is towards a greater integration and concern of competition law and sector regulation on one another, some cases show discrepancy between the two authorities, since the AGCOM shapes its own relevant market definitions. Such was the case for instance in the Seat Pagine Gialle / Cecchi Gori Communications case, where the Italian NCA ruled in favour of the concentration (imposing conditions) whereas the

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883 As confirmed in section 1, para. 6(c)(No. 11) of Law 249/1999 by which the AGCOM “expresses [...] its opinion as required by law, on the measures taken with regard to operators in the communications sector by the Authority instituted to guarantee competitiveness and fair market conditions following the application of articles 2, 3, 4, and 6 of law October 10th 1990, n. 287.”

884 Section 2, para. 3 of Law 249/1999 (emphasis added).

885 Latium Regional Administrative Tribunal, Stream - Telepiù, No. 7100, 14 September 2000.

886 [in this case the law 78/99, applicable to broadcasters established in Italy pursuant to Directive 89/552/EEC]

887 Latium Regional Administrative Tribunal, RAI, Radiotelevisione Italiana / Vari Impianti Radiofonici, cit..

888 AGCM, Relazione Annuale sull’Attività Svolta nel 2000, cit., at 156.

889 The consultation procedure is set forth in Section 1, para. 1(6)(c)(n°11) of Law No. 249 / 1997. Another example is the AGCOM’s preliminary opinion to the AGCM when the latter investigates a possible abuse of dominant position due to the acquisition by a person of 60% or more of exclusive encoded broadcasting rights for the League A Football Championship matches. In this case, the AGCM has a duty to rule on whether the sole fact of holding such a portfolio of broadcasting rights amounts to an abuse – provided that it takes into account the findings and conclusions of the AGCOM rendered in a preliminary opinion (Section 2 of Law No. 78 of 29 March 1999).

890 Seat Pagine Gialle / Cecchi Gori Communications, AGCM Decision, 23 January 2001 (clearance of concentration subject to conditions).
AGCOM rendered a dissenting opinion\textsuperscript{891}. However, such differences do not necessarily entail clashes between the two authorities, as shown for instance in the \textit{Groupe Canal plus / Telepiù / Stream} case where the different perception of the product markets involved in the operation\textsuperscript{892} did not lead to dissenting opinions, since the AGCM implemented most of the recommendations contained in the AGCOM’s opinion.\textsuperscript{893}

5.3. Practical implementation of the criteria under Italian competition law in the media sector

902. The analysis of Italian case law in the media sector reflects the EU approach.\textsuperscript{894} Indeed, the AGCM often endorses the same market definition criteria as the ones upheld at the EU level and often reaches the same outcome, though it sometimes developed in parallel an alternative “more elaborated” test of analysis.

903. As regards the internal consistency of media cases (market definitions upheld at regulatory level and in competition law proceedings), some conflicting solutions could appear. This analysis, however, was practically impossible to conduct because of the non-availability of the NRA’s opinions.\textsuperscript{895}

904. For the stake of consistency within the present report, the following analysis is carried out in a ‘bottom-up’ fashion, starting from the single market definition upheld in case-law, moving then to the analysis of the corresponding criteria and finally, by comparing the national and EU models.

5.3.1. Broadcasting and TV

905. The analysis of the Italian broadcasting and television sector shows the existence of six product market definitions: (i) packaging and production of sport-related content for audiovisual purposes; (ii) broadcasting rights for

\textsuperscript{891} AGCOM Decision 51/01/CONS, 16 January 2001 (dissenting preliminary Opinion rendered to the AGCM in the matter concerning the concentration \textit{Seat Pagine Gialle / Cecchi Gori} Communications).

\textsuperscript{892} The AGCM upheld the following markets: (i) the market for pay-TV services; and (ii) the market for administrative and technical services for pay-TV. Instead, the following are the markets found by the AGCOM: (i) broadcasting rights of premium films, (ii) broadcasting rights of premium sport events, (iii) repackaging of television ‘generic’ programs, (iv) digital interactive TV, and (v) conditional access services to the public (see supra chapter 5.1.2.3.). See AGCOM Decision 146/02/CONS, cit., paras. 7-16.

\textsuperscript{893} See \textit{Groupe Canal Plus / Telepiù / Stream}, AGCM Decision, cit., chapter V (“\textit{Valutazione giuridica}”).

\textsuperscript{894} See supra our discussion on the conformity of Italian competition law with EU principles in chapter 5.1.1. of the present Report.

\textsuperscript{895} Among the AGCOM’s opinions, we found publicly available the AGCOM Decision 51/01/CONS, cit., on the \textit{Seat Pagine Gialle / Cecchi Gori} Communications case and the AGCOM Decision 146/02/CONS, cit., on the \textit{Groupe Canal Plus / Telepiù / Stream} case. Some guidance on the AGCOM’s approach is given to us from the AGCM’s decisions where the NRA’s opinion is referred to.
sporting events with large audiences transmitted on free-TV; (iii) un-encoded television broadcasting and the related advertising market; (iv) pay-TV; (v) administrative and technical services for Pay-TV; and (vi) new markets deriving from the convergence of telecommunications and broadcast television. The present section does not examine the geographic market definition, as it is prominently identified with the national area and no particular criterion is used for this purpose. 896

5.3.1.1 Packaging and production of sport-related content for audiovisual purposes

906. This product market was upheld in the RAI Radiotelevisione Italiana / RCS Editori decision 897, on the basis of a factual-based criterion for market definition relating to the “intrinsic nature of the product” test. No reference to demand-side or supply-side substitutability is made. The NCA nevertheless supports the existence of a market for the packaging and production of sport-related content for audiovisual purposes, regardless of the type of transmission-path chosen; this market is distinguishable from both the wholesale supply of sport-related programmes and from their distribution at retail level. 898 In this sense, the Italian authority refers to the EC decision BiB/Open.

5.3.1.2 Broadcasting rights for sporting events with large audiences transmitted on free-TV

907. In a Section 2 decision, RAI - Cecchi Gori Communications 899, the AGCM upheld a rather narrow product market, derived from a segmentation of the larger market for free-TV services. The criterion adopted is the hypothetical monopolist test, used for the purpose of distinguishing between broadcasting rights for sporting events with large audiences distributed over free-TV (free-to-air TV) and other broadcasting rights (either sport-related and non sport-related) distributed over free-TV.

908. As an assumption, the NCA considers that broadcasting rights may be sub-divided according to the transmission path employed for their distribution. Thus, the market for broadcasting rights for open-to-air TV is separate from the one for pay-TV. 900

896 The geographical market is defined by taking into consideration the language, the customers’ cultural habits, and the regulatory barriers that have a national reach.
897 RAI Radiotelevisione Italiana / RCS Editori (Sport Set Spa), AGCM Decision, cit. (clearance of concentrative joint venture).
899 RAI - Cecchi Gori Communications, AGCM Decision, 3 December 1998 (agreement infringing section 2 of Competition Act – refusal to grant individual exemption – conforming preliminary opinion of the AGCOM).
900 Ibidem, at 42.
909. Moreover, on the basis of demand-side substitutability, the market for broadcasting rights for open-to-air TV largely corresponds to the market for advertising space. In this respect, the NCA, by reference to the EC decision European Broadcasting Union (EBU), considers the market for broadcasting rights for sporting events as identifiable and separate from other broadcasting rights (not sport-related) due to the lack of demand-side substitutability between the two.\footnote{901} The AGCM, however, employs this test in the context of pay-TV services. More specifically, the AGCM supports that the substitutability criterion should be applied according to the perspective of two types of customers: the advertisers, on the one hand, and the subscribers, on the other.\footnote{902} Thus, the NCA transposes the reasoning adopted for the pay-TV market to the free-to-air TV market.

910. Within the market for broadcasting rights for sporting events, the NCA makes further distinctions based on a more factual-based criterion between broadcasting rights for sporting events with large audiences and other less attractive broadcasting rights for sporting events.\footnote{903} The test that was mainly used considers the consumers’ habits and the degree of ‘subjective’ attractiveness of these events.

911. The market for broadcasting rights was generally ascribed among the so-called “intermediate” markets, according to the Italian regulatory authority’s classification.\footnote{904} Indeed, in its opinion to the Stream vs. Telepiù case [the Telepiù opinion’]\footnote{905}, the AGCOM identified a further subset of narrow market definitions, thus distinguishing it from the AGCM. The following paragraphs will offer a synthetic overview of the markets upheld by the NRA in its opinion.

\textit{\textbf{The market for broadcasting rights of premium films}}

912. For the purpose of defining a separate market for broadcasting rights of premium sporting events, the AGCOM introduced a criterion in addition to the one endorsed by the AGCM (mainly based on the hypothetical monopolist test). The criterion is the acknowledgement that broadcasting cinematographic rights imply a considerable amount of concentration of power in the hands of a few major production studios. Such a feature renders these rights particularly difficult to obtain and negotiate.

\textit{\textbf{The market for broadcasting rights of premium sporting events}}

913. Here, to distinguish from the market for premium films, the NCA further adds the fact that it is possible for pay-TV operators to broadcast premium sporting events in a pay-per-view or video-on-demand modality in order to dedicate the whole offering to a single sporting event, to the criteria established by the AGCM.

\footnote{901} Ibidem, at 45.  
\footnote{902} Ibidem, at 46.  
\footnote{903} Ibidem, at 47.  
\footnote{904} See supra chapter 5.1.2.3, commenting the AGCOM’s Stream/Telepiù Opinion.  
\footnote{905} AGCOM Decision 401/01/CONS, cit. (see supra chapter 5.1.2.43).
The market for repackaging of television ‘generic’ programs

914. The regulatory authority found that the practice of repackaging basic television programs amounts to a relevant product market separate from the offering of premium programs. The test used here consists of the fact that basic package offerings of generic types of programs (irrespective of the type of TV: pay or free-to-air) involves the ownership of a “library of self-produced programs or audiovisual works already copyrighted” for which there is no need of further editing. In other words, the NCA pointed out that in any such market, the same broadcaster himself (and not third parties) makes the editorial programming.

5.3.1.3. Un-encoded television broadcasting and the related advertising market

915. The market for un-encoded television broadcasting and related advertising corresponds to what was defined at the EU level as the market for free-TV services to the public (retail). In Seat Pagine Gialle / Cecchi Gori Communications (a concentration case), the AGCM supports the view that the retail market for free-TV services largely corresponds to the market for advertising space, since they are “interconnected”. The NCA did not recur to the demand-side substitutability test (as it did, for example, in the RAI-Cecchi Gori Communications decision), but rather sought the ‘intrinsic nature’ of the service to matter the most.

916. Interestingly, the geographical scope of the market is derived from the characteristics of the market for advertising space.

5.3.1.4. Pay-TV

917. For the definition of the pay-TV market, the NCA adopted a combination of both the traditional SNIPP test and more factual-based criteria (such as the ‘intrinsic nature’ of the service and the consumers’ habits).

918. The Italian case law regarding Pay TV follows a consistent line of market analysis throughout a number of cases. Similar to the EU and other national experiences, the AGCM employed the typical ‘X vs. Y’ parameter to highlight the differences between the pay-TV and the free-TV markets. There, the NCA invariably applies the demand-side substitutability test: by reference

906 Seat Pagine Gialle / Cecchi Gori Communications, AGCM Decision, 23 January 2001 (clearance of concentration subject to conditions).
907 Ibidem, at 12.
909 See in particular, Seat Pagine Gialle / Cecchi Gori Communications, Stream vs. Telepiù, and Groupe Canal Plus / Telepiù / Stream.
to a number of EC decisions in that field\textsuperscript{910}, the type of financing and differences in programming are the main distinguishing factors.\textsuperscript{911}

919. Moreover, in the \textit{Groupe Canal Plus / Telepiù / Stream} decision the NCA also refers to the NRA’s market definition analysis provided in its opinion of the \textit{Stream vs. Telepiù} case.\textsuperscript{912}

920. Particular emphasis is given to the role of new developing markets in a rather short time horizon. Interactive services (both informational and entertainment-related) over TV sets or personal computers are deemed to create strong competitive pressure to existing markets.\textsuperscript{913} In particular, it was clearly affirmed that no distinction should be made between digital and analogue television, as the former is a “technological evolution” of the latter.\textsuperscript{914}

921. With regard to the further segmentation of the pay-TV market according to the typology of the content, the AGCM mostly adopted factual-based criteria for defining the relevant market (such as the ‘intrinsic nature’ of the service and the consumers’ habits)\textsuperscript{915}

922. The trend of segmenting the relevant product market went further to add, besides different premium-related content distinctions, a potentially distinctive market for ‘public interest’ programs. This was pointed out in the \textit{Groupe Canal Plus / Telepiù / Stream} decision. Indeed, by referring to a number of national and EU sector-specific legislation\textsuperscript{916}, the AGCM concluded that a “\textit{certain group of sport events, for which there is a ‘must-carry’ obligation on free-to-air TV},” could amount to a separate relevant market given their specific public value.\textsuperscript{917}

\textsuperscript{910} For example in both the \textit{Stream vs. Telepiù} and \textit{Groupe Canal Plus / Telepiù / Stream} decisions reference is made to the EC decisions MSG \textit{Media Service, Bertelsmann/Kirck/Premiere}, and Bib/Open.

\textsuperscript{911} \textit{Seat Pagine Gialle / Cecchi Gori Communications}, AGCM Decision, cit., at 18-20; \textit{Stream vs. Telepiù}, AGCM Decision, cit., at 71-76; and \textit{Groupe Canal Plus / Telepiù / Stream}, AGCM Decision, cit., at 13-17. However, it must be recalled that in the \textit{Stream vs. Telepiù} decision the NCA directly applied article 82 of the EC Treaty to upheld the abuse of dominant position.

\textsuperscript{912} \textit{Groupe Canal Plus / Telepiù / Stream}, AGCM Decision, cit., at 14. See supra chapter 5.1.2.3.

\textsuperscript{913} \textit{Seat Pagine Gialle / Cecchi Gori Communications}, AGCM Decision, cit., at 20; \textit{Stream vs. Telepiù}, AGCM Decision, cit., at 85-90; \textit{Groupe Canal Plus / Telepiù / Stream}, AGCM Decision, cit., at 10-12.

\textsuperscript{914} \textit{Groupe Canal Plus / Telepiù / Stream}, AGCM Decision, cit., at 8.

\textsuperscript{915} In the \textit{Groupe Canal Plus / Telepiù / Stream} case, to distinguish between premium broadcasting rights of sporting events and premium broadcasting rights of films, the NCA mentions the former’s characteristics (e.g., durability, exclusivity, regularity of transmission, high attractiveness of the events). See \textit{Groupe Canal Plus / Telepiù / Stream}, AGCM Decision, cit., at 21-23. In the \textit{Stream vs. Telepiù} case, to distinguish between premium broadcasting rights and non-premium (or ‘basic’) broadcasting rights, the NCA refers to the differences in quality and timing (e.g., the first or the second window) of the programs. See \textit{Stream vs. Telepiù}, AGCM Decision, cit., at 77-79.


\textsuperscript{917} See \textit{Groupe Canal Plus / Telepiù / Stream}, AGCM Decision, cit., 22.
Even though the criteria are generally the same, some differences may exist in their use between merger and infringement case approaches to market definitions. Under merger review, the NCA conducted a rather detailed analysis of all the possible sub-markets linked to the pay-TV sector, in order to appraise the effects of the concentration. In the context instead of an abuse of dominant position case, the competition authority did not carry out any such segmentation, and concluded that premium broadcasting rights of sporting events and broadcasting right of films should be included within the same market.

5.3.1.5. Administrative and technical services for pay-TV

This market has the same boundaries as the sector-specific regulation governing conditional access. The NCA, in the Groupe Canal Plus / Telepiù / Stream decision, makes explicit reference to the EC Directive 95/47 and its national implementing provisions.

It is interesting to note that the NRA has further segmented this relevant product market by identifying a downstream market for conditional access services to the public. As for the former (i.e., the administrative and technical services for pay-TV), this product market belongs to the so-called “distribution area”. This was found in the AGCOM’s Telepiù opinion.

According to the NRA, conditional access services also include the pay-per-view offering – thus distinguishing itself from both the AGCM’s approach and the EU Commission (which, has not yet upheld a market for pay-per-view services in relation to conditional access services).

5.3.1.6. New markets derived from the convergence of telecommunications and broadcast television

In the Seat Pagine Gialle / Cecchi Gori Communications decision, the AGCM offered an innovative application of the temporal factor criteria, as it identified a separate product market based solely on its likely future evolution. For definition purposes, the NCA referred to the EC Commission’s Green Paper on Convergence. In broad terms, the market is the one of new informational and entertainment services distributed through TV sets or personal computers.

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918 For example the Groupe Canal Plus / Telepiù / Stream decision.
919 For example, by upholding a further segmentation of the market for premium broadcasting rights into a market for premium broadcasting rights of sporting events, on the one hand, and a market for premium broadcasting right of films, on the other hand. See Groupe Canal Plus / Telepiù / Stream, AGCM Decision, cit., 18-24.
920 Such as in Stream vs. Telepiù.
921 Stream vs. Telepiù, AGCM Decision, cit., at 84.
923 AGCOM Decision 401/01/CONS, cit. (see supra chapter 5.1.2.43).
924 Seat Pagine Gialle / Cecchi Gori Communications, AGCM Decision, cit.
925 Ibidem, at 56.
928. The competition authority conducted a further segmentation of the ‘convergence’ market, by identifying a market for digital interactive television and a potential market for the distribution of audiovisual content over the Internet. The test adopted is rather factual-based, and focuses on the technological and commercial characteristics of the offering.

929. It is interesting to note that, in the context of “downstream distribution” markets (as identified by the NRA), the AGCOM also upheld a market for digital interactive TV. In the Telepiù opinion, digital interactive TV is comprised of the whole bundle of “e-commerce” services, irrespective of their entertainment or purely informational nature – thus distinguishing them from the EU Commission BiB/Open decision. Moreover, time horizon is particularly considered in view of enlarging the scope of the product market to include the Internet access services market. The regulatory authority in fact states that the “technological evolution, especially thanks to the transmission paths and conditional access technology, […] the boundaries between [Internet access services market and digital interactive TV] are likely to blur.” For this purpose, the AGCOM makes the example of the U.K. experience with the Open platform.

930. This clear identification of such a developing market is not present in the competition authority’s reasoning.

5.3.2. Music

931. The music sector analysis is essentially focused on the AGCM’s decision Associazione Vendomusica / Case Discografiche Multinazionali-Federazione Industria Musicale Italiana, which has a clear-cut analysis of market definition.

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926 Ibidem, at 61-76.
927 For the purpose of defining the market for digital interactive television, it highlights two distinguishing factors: (i) the level of bi-directionality of the service; and (ii) the quantity of content-related programming involved. See Ibidem, at 65-70. To define the potential market for distribution of audiovisual content over the Internet, the AGCM considers distinguishing elements the modality of transmission (streaming), the need for the supplier to have simultaneous connections and the bandwidth capacity. See Ibidem, at 71-76.
928 AGCOM Decision, 401/01/CONS, cit. (see supra chapter 5.1.2.43).
929 Ibidem.
930 Associazione Vendomusica / Case Discografiche Multinazionali-Federazione Industria Musicale Italiana, AGCM Decision, 9 October 1997 (agreement infringing section 2 of Competition Act).
5.3.2.1. Production and distribution of disks to resellers

(i) Product market

932. Here, the NCA fully endorses the SNIPP test at the demand level. In the specific case, a number of major music producers [hereinafter the “majors”] were involved in price fixing and market sharing, vis-à-vis local and national resellers of phonographic products. The NCA sought to find a relevant product market in the commercial relationship between these majors and the resellers. The analysis of the demand-side substitutability was therefore examined under the perspective of such resellers. In accordance with EU case law, the AGCM also considered the ultimate consumers’ preferences to discern the resellers’ pricing policies and commercial choices in purchasing from the majors.

933. On that basis, the NCA did not find any sort of substitutability between different types of hardware (whether CD, tape or black disk), titles (the actual song contained in disk) and different genres of music (e.g., classical or rock) – though it acknowledged the consumers’ different perspectives. Thus, the market upheld was the one for the production and distribution of disks in general.

(ii) Geographic market

934. At the geographic level, the AGCM upheld a national relevant market, based on the commercial characteristics and usages of the industry. Though the majors were multinationals, they indeed operated through their local subsidiaries, which apply local and national practices for the distribution of the product within the territory. Moreover, it noted that imports were almost inexistent.

5.3.3. Books and publishing

935. In the publishing sector the NCA upheld four potential relevant markets. These are: (i) distribution of books at the retail level; (ii) distribution of books at the wholesale level; (iii) professional and technical publishing; and (iv) legal publishing.

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931 The AGCM, here, refers to the EC Commission decision, Thorn EMI / Virgin Music, No. IV/M202. See Ibidem, at chapter III.A.
932 See Ibidem, at chapter III.B.
5.3.3.1. Market for the distribution of books at the retail level

(i) Product market

936. In Associazione Librai Italiani / Editori, the Italian agency applied a rather factual-based test for defining the market. Here, it maintained that a retail market for the distribution of books should not be further subdivided according to the different types of outlets (libraries, department stores, news sailing-points) because the "characteristics of such outlets cannot justify the identification of separate markets." 

(ii) Geographic market

937. The NCA affirmed the national scope of these product markets given «their nature», and particularly the linguistic barrier and scarce mobility that such product offering involves.

5.3.3.2. Market for the distribution of books at the wholesale level

(i) Product market

938. In the same decision, the AGCM also identified a separate market for the distribution of books at the wholesale level. The NCA applied the SNIPP test under both demand-side and supply-side perspectives. On the demand-side, the NCA distinguished wholesale distribution of books via bookstores from wholesale distribution of books via the Booksellers Association’s points of sale. It used the different ways for managing the distribution, and the amount of publishing typologies involved, as corroborating factors. On the supply-side, the NCA found that some substitutability might occur between the two different channels of distribution. However, in practice this does not happen due to the stringent exclusivity contractual regime that exists between publishers and distributors.

939. In upholding such a market, the NCA makes an explicit reference to the EU Commission’s decision Aérospatiale-Alenia/de Havilland.

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933 Associazione Librai Italiani / Editori, AGCM Decision, 19 June 1996 (agreement infringing section 2 of Competition Act).
934 Ibidem, at 22.
935 Ibidem, at 33.
936 Ibidem, at 31.
937 Ibidem.
938 Ibidem.
(ii) Geographic market

940. From the geographic point of view, the Italian authority sought the market as national, given the structural characteristics of the activity and the national scope of the management.939

5.3.3.3 Professional and technical publishing market

(i) Product market

941. In RCS Libri / Casa Editrice “La Tribuna”, the AGCM clearly departed from the traditional hypothetical monopolist test by addressing the relevant market in terms of “the specific consumers habits and their typology”.940

(ii) Geographic market

942. The geographical scope is national because of the language and the specificity of subject-matter involved.941

5.3.3.4 Legal publishing market

943. A potential relevant market for sectorial professional publishing (in this case, legal-related books) was also identified on the basis of the foregoing criteria. The issue was, however, left open.

5.3.4 Internet related sector

944. The Internet related sector shows an interesting application of the market definition methodology. As for the pay-TV market, the NCA adopted a combination of both the traditional SNIPP test and more factual-based criteria (such as the ‘intrinsic nature’ of the service and consumers’ habits).

945. Five market definitions may be distinguished: (i) retail market for termination of telecommunications services offered by “Other Licensed Operators [“OLO”] to end users; (ii) wholesale market for the provisioning of telecommunications networks to ISPs; (iii) wholesale market for the supply of Internet access services; (iv) retail market for the provision of Internet access services; and (v) retail market for data transmission services and Internet access to end users.

939 Ibidem, at 33.
940 RCS Libri / Casa Editrice “La Tribuna”, AGCM Decision, 3 May 2000 (Concentration pursuant to Section 5, para 1, lett. B of Competition Act), at chapter 4.
941 Ibidem.
5.3.4.1. Retail market for termination of telecommunications services offered by OLOs to end users

(i) Product market

946. In Tiscali/Albacom vs. Telecom Italia (which is an abuse of dominant position case), the AGCM proceeded in the first place by distinguishing between network access services and final services to consumers, on the basis of the EU Commission’s Notice on access agreements in telecoms of 1998. Therefore, the so-called “market for termination of telecommunications services offered by OLOs to end users” amounts to a ‘final service market’ within the meaning of that EU Notice. It is also a retail market since it involves a direct offering to the end user.

947. The Italian authority upheld the existence of such market essentially by relying on the ‘intrinsic characteristics’ of the services involved, the basis of the applicable sector-specific regulation in the interconnection field and liberalisation of the telecommunications industry. In particular, it referred to the EC Directive 97/33 and its national implementing measure (the Presidential Decree No. 318/1997), which identify the relevant market operators and their respective roles and obligations. The test used in this respect appears to focus on the role and status of the market players.

948. The substitutability-test is applied for the purpose of segmenting the relevant market into two further sub-markets, according to the customers’ preferences and their typology, so that a retail residential market is distinguished from a retail business market.

(ii) Geographic market

949. The geographic market upheld is national on the basis of the standards used in the EU Commission’s Notice on access agreements in telecoms of 1998, according to which the geographic scope of the market in the telecom sector should be measured on the basis of the effective extension of the infrastructure, the global reach of clients, and the existing national provisions.

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942 Tiscali/Albacom vs. Telecom Italia, AGCM Decision, 13 July 2000 (abuse of dominant position infringing section 3 of Competition Act).
943 In this sense see also the EU Commission Decision No. IV/M 490, Nordic Satellite Distribution, 19 July 1995, para. 72.
944 See Ibidem at 77.
945 Ibidem, at 78.
946 Ibidem, at 83.
947 Ibidem, at 87. Most specifically, greater consideration is given to the geographical scope of the license for the provision of telecommunications services.
5.3.4.2. Wholesale market for the provisioning of telecommunications networks to ISPs (access market)

(i) Product market

950. In the same decision, the AGCM defines a wholesale market for the provisioning of network access to ISPs according to the same criterion, so that the latter are able to provide Internet and telecommunications services to the end users. The characteristics of the service are also identified on the basis of the EU Commission’s decision Worldcom/MCI of 4 May 1999.

(ii) Geographic market

951. The same rationale endorsed for the definition of the geographical scope of the retail level is also applied at the wholesale level.

5.3.4.3. Retail market for the provision of Internet access services

(i) Product market

952. A broad market for retail Internet services was found in Telecom Italia / Seat Pagine Gialle, Seat Pagine Gialle / Cecchi Gori Communications and in Infostrada vs. Telecom Italia (Tecnologia ADSL).

953. With regard to the first two decisions, no distinction was made between ‘network access’ and Internet ‘services to end users’ as in the Tiscali/Albacom vs. Telecom Italia decision. There, the NCA sought a market definition criterion based on the two-fold distinction of (i) a network access market that includes all upstream activities at the wholesale level; and (ii) a services market comprised of downstream offerings at the retail level. Therefore, under the above-mentioned criterion, the provision of Internet access services amounts to an ‘out-put’ relevant market at the retail level.

954. On the supply-side, the NCA defines the product market by taking into account the intrinsic characteristics of the offering and the role and status of the players involved.

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948 In this sense, see also AIIP / Telecom, AGCM Decision, 28 January 2000, at 22-27.
949 For example the modality for accessing, such as reverse interconnection and dedicated connectivity. See Ibidem, at . 84-85.
950 Ibidem, at 83.
951 Telecom Italia / Seat Pagine Gialle, AGCM Decision, 27 July 2000 (clearance of concentration subject to conditions). The expression “out-put” market is borrowed from the U.K. Competition authority’s terminology (see chapter (on Internet access – UK part) of this Report).
952 Ibidem. See also Seat Pagine Gialle / Cecchi Gori Communications, AGCM Decision, cit., at 31-34.
With the exception of *Seat Pagine Gialle / Cecchi Gori Communications*, the AGCM only employs the hypothetical monopolist test (though ‘altered’ in its nature) at the demand level. For this purpose, in accordance with the previous decisions, it identifies a “retail” business market and a retail “residential” market.

In the *Infostrada vs. Telecom Italia (Tecnologia ADSL)*, the NCA further clarified that the retail (“downstream”) market for Internet access services should be distinguished from the offering of data transmission services. This was achieved by the SNIPP test, which showed a lack of substitutability between the two services. To support such an outcome, the authority found that data transmission and Internet access to end-users differ from one another because of their distinguishing ‘goal’ (i.e., the customers’ expectations of the use of the service).

With regard to developing services, the *Infostrada* decision supported the view that it is not yet possible to define a separate market comprised of new broadband technologies for Internet access. The NCA quoted here the ECJ’s decision in *United Brands*, addressing the fact that “to have a separate relevant market one should consider the specific characteristics of the product so that to render it less interchangeable with other products.”

**Geographic market**

The relevant geographical market here is national on the basis of the same rationale endorsed in the previous Internet-related decisions.

A market for the supply of local network transmission capacity (which is upstream and at a wholesale level) was upheld the *Infostrada vs. Telecom Italia (Tecnologia ADSL)* decision. There, the NCA did not clearly distinguish between narrowband and broadband services. On the basis of an ‘intrinsic characteristics’ test, it found that broadband services, through the use x-DSL...
technologies, were the result of “technological developments” in the field of narrowband access services.\footnote{960}{Ibidem, at 16.}

960. Moreover, within the market for the supply of local network transmission capacity “through x-DSL technologies”, the NCA also included another typology of Internet connectivity, which is the so-called “direct circuits” or “circuiti diretti”.\footnote{961}{Ibidem, at 17-19.} The full substitutability between these two types of services/technologies is due \textit{inter alia} to the same or similar level of bandwidth capacity and digital modality for transmission. The NCA excludes those direct circuits with mere analogical capacity from this market.

961. Wireless local loops and cable TV are also considered by referring to a national sector-specific measure (the AGCOM’s decision No. 2/00/CIR), which highlights the differences thereof.

962. Finally, it is interesting to note that some potential competition (as a means for measuring the scope of the product market) is considered with regard to the fibre optic connections. However, given its scarce impact on the industry, fibre optic types of connectivity and related services are not included in the same market.\footnote{962}{Ibidem, at 20.}

\textbf{5.3.5. Advertising sector}

963. In the advertising sector we found the following relevant markets: (i) the sale of advertising space in television; (ii) the sale of advertising space in telephone directories and yellow pages; and (iii) the sale of on-line advertising space.

\textbf{5.3.5.1. Market for the sale of advertising space in television}

964. In \textit{RAI - Cecchi Gori Communications}, the AGCM distinguished a market for the sale of television advertising space from the one in ‘printed’ format.\footnote{963}{RAI - Cecchi Gori Communications, AGCM Decision, cit., at 60.} There, the former was not substitutable with the latter because of their respective intrinsic characteristics (\textit{i.e.}, the type of public, the regularity of the offering, the prices).\footnote{964}{Ibidem, at 61-62.}
5.3.5.2. Market for the sale of advertising space in telephone directories and yellow pages

965. Two concentration decisions appear particularly significant in this field: the Telecom Italia / Seat Pagine Gialle and Seat Pagine Gialle / Cecchi Gori Communications.

966. The NCA identified such market on the basis of an 'intrinsic nature' test: by merely spotting the characteristics of the services (for example, the capillarity of the distribution and annual duration). For the same factors, the geographical scope corresponds to the national territory.

5.3.5.3. Market for the sale of on-line advertising space

967. Here too, the AGCM adopted the objective criterion as mentioned above. In particular, it addressed the characteristics of the Internet tool (first, the need for a banner and a web page at the technology level, secondly the peculiarities of the content conveyed thereof). As regards the geographic market, the authority supports that it is national given the language barriers.

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966 Seat Pagine Gialle / Cecchi Gori Communications, AGCM Decision, 23 January 2001 (clearance of concentration subject to conditions).
968 Ibidem, at 40.
969 Ibidem, at 42.
970 Ibidem, at 43.
6. CONCLUSIONS

By going through a jurisdiction-by-jurisdiction approach, this pilot study covers, in each of the Member States studied and at the EU level, the analysis carried out at a given geographic level on market definition in the media sector. This leads in practice to assessing the extent to which the market definitions upheld by such jurisdictions evolve and take due care of “Convergence” factors.

As defined by the OECD, convergence is a process under which, due to underlying technological changes, economies of scope increase to the point where two or more products or services which were previously produced by separate firms are produced within the same firm. This set of specific technological developments that occurs within the media industry embraces an interplay of (i) digitalisation and increasing processing power, combined with a general decline in the price of computing (allowing data--of audio-visual, text or voice communicative content--to be captured, stored and manipulated in a common binary format in a cost-efficient manner); (ii) an increasing network capacity (increasing bandwidth and improvements in switching technologies allows for the handling of increased digital data flows such as a combined audio-video content of high quality); (iii) the development of conditional access technologies (providing the opportunity to use relatively low cost point-to-multipoint networks for the individual delivery of information-based products by granting access that is conditional upon payment); and (iv) the liberalisation of telecommunication (allowing new firms to enter previously protected markets).

Convergence is often viewed as an ineluctable process, which would ultimately lead to all services being provided through a unique means of communication. Such thought leads to contemplating whether market definitions are converging/will also converge. It should be noted that, under strict competition law concepts, this approach basically relies on a “supply side” approach rather than a demand side one. However, one could potentially consider that the argumentation could have been developed in the time of the electric power revolution. Nevertheless, generalisation of the usage of electricity does not mean that all products created, thanks to its versatility, may belong to the same markets.

Enthusiasm for the technological path should not hide the fact that economics and the pattern of the demand, even in modern society, do not evolve at the same speed as technology. The unification of technologies (digitalisation of content and convergence in the conveyance means) does not necessarily entail unification in the offers, which are dictated by the users’ wishes. This is particularly true when realising that the digitalisation process itself has not yet deeply affected the way to reach the consumers.

\[971\] See OECD, Regulation and Competition Issues in Broadcasting in the Light of Convergence, April 28, 1999, DAFFE/CLP (99) 1; see also the Commission’s Green Paper on Convergence of the telecommunication, media and information technology sectors, COM (97) 623.

\[972\] For instance, digital TV is currently provided under cable and satellite; the format of the content is thus identical. This does not necessarily mean that cable and satellite offers are substitutable. On the other hand, some offers do converge and tend to propose analogous services via different means.
Such process actually relates more to the conditions of content production than to the way such content is delivered to the users. TV sets are still analogue even if satellite devices are digital. Movies are only beginning to be distributed digitally in the picture theatre. Digital video-on-demand is still in early stages on cable and ADSL networks. Except for music, the distribution of content by digital means has not yet begun.

972. Keeping these basic patterns in mind, and then putting aside the convergence perspective, the study demonstrates the difficulty of comparing and assessing each type of media market alone between the various EU States and even the difficulty of reconciling the EU general approach with its own case law.

973. These difficulties raise issues as to whether and when “true” convergence will appear, i.e., a convergence that would reduce the borders between various markets. Even though such global convergence has not yet appeared, parties on the markets and their lawyers nevertheless need to rely on “pre-convergence case law” to assess how their operations or their behaviour will be treated by the competition law authorities. Should each piece of case law of any NCA or NRA be seen as a valid precedent to be relied upon, then a lack of legal certainty could arise; this could in turn jeopardize the ability of the whole EU media industry to catch the convergence opportunity to deliver its promises to the consumers. In this respect, the present study shows that there are dozens of possible markets or market definitions actually upheld in the media area. An overall cross-comparison of these markets, amongst Member States and with the EU practice, therefore proves difficult.

974. Nevertheless, when analysing globally these market definitions, some divergences appear. Some of these differences are not of much relevance. Some are even inherent to such type of studies. In addition, the evolution and the structure of the media are distributed unevenly amongst member States: for instance, some Member States have a broadcasting structure that is pre-eminently dominated by cable (e.g. Germany), whilst in others, over-the-air broadcasting corresponds to an important means of transmission (e.g., France). The mere existence of market definitions upheld by case law actually depends on the types of cases that were ultimately submitted to the jurisdiction of the competition authorities. It may thus well be that no case arose in a particular Member State with regard to a particular subject matter, and therefore that the national competition authority has not drafted its positions on it.

975. Others are more substantial. Our conclusions aim to identify the causes of these “divergences” by assessing the media market and assessing some of the remedies which are proposed, such as the use of quantitative economics. Such thinking would have been theoretical if conducted in consideration of any type of media markets.

976. We have thus chosen certain types of markets among the ones analysed in the study, to draw a basic cross-analysis table, showing a national and EU approach to such markets. The markets chosen are some of the ones we viewed as those where the borders could quickly be questioned in consideration of the convergence. They are namely: (i) analogue and digital TV, (ii) distribution of music / download of music, (iii) broadcasting

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973 Which have already been digital for several years (i.e. music recording…)
974 When discussing with some players, a general feeling emerges which is that since quite a few outcomes may be inferred from competition case law, some issues are also thought to be becoming political and not only legal.
rights for sports events and (iv) digital terrestrial TV. These topics are examined under the chart hereunder. This analysis is followed by a commentary of cases where the Commission itself reserved its opinion in consideration of the Convergence (6.1).

977. Contemplating such specific markets, our conclusions address the following issues:

- whether the peculiarities of the market under a geographical point of view are accurate, as these definition will be fundamental in the context of cross analysis of the case law between the various NCA’s and NRA’s involved and the EU Commission (6.2);
- the search of a coherent and unique market definition test in the media environment and the use of economic analysis for that purpose (6.3);

### 6.1. Synthesis with respect to some of the markets which will be the markets most likely affected by the Convergence.

978. The comparison of the EU and national positions held with regard to these sectors (6.1.1) is actually particularly revealing as a lack of pan-European consensus may sometimes appear on these fast-evolving issues (6.1.2).

#### 6.1.1 Comparative chart

979. Analogue and digital TV, distribution of music / download of music, broadcasting rights for sports events and digital terrestrial TV can be considered as representative of some of the core issues that arise from the evolution of the markets in the media sector. Indeed, the distribution of digital TV via cable or satellite questions the possible differences which may have been drawn between these two forms of broadcasting. Even more, the new services that are available through digital TV, which are addressed to one recipient in particular and at his request, raise the issue of the very definition of broadcasting, and the corresponding link between electronic services and broadcasted services. Such is also the case for digital terrestrial TV. However, digital terrestrial TV also raises the issue of the so-called “emerging markets”, which require anticipating the likely evolution of technology and its acceptance in the public to appraise the boundaries of market definitions.

980. Music downloading is probably one of the few areas within the media sector in which, for the time being, the Internet can provide a large number of consumers with access to services under technologically acceptable conditions. Indeed, even though such possibility is currently technically feasible for some content that requires very high bandwidth capacity (movies for instance), this possibility is still practically limited to very few users. Music distribution and downloading thus appear to be a good example of an early form of convergence between various means of media.

981. Finally, the acquisitions of sport rights addresses the more general issue of the relation between the media itself and the upstream markets for contents.
The present chart focuses on the sports rights for two main reasons: first, the acquisition of movie rights is often linked to the production issues and to the relationship that exists between the producer and the broadcaster, it therefore encompasses broader issues and may not, for that reason, be illustrative of the convergence/divergence of solutions held at the national level. Second, broadcasting of sports events is a subject which has been considered under case law but which also is regulated at the EU level in the TV without frontier directive (provisions relating to the broadcasting of major events), as implemented in the various Member States, and it thus provides a good example of the relationship between regulation, competition law and case law in a context of neighbouring markets.

975 See the notion of “independent” production and the requirements on behalf of certain broadcasters to acquire a certain amount of rights from independent producers.
## Digital / Analogue Broadcasting (regulation and case law)

<table>
<thead>
<tr>
<th>EU</th>
<th>France</th>
<th>Germany</th>
<th>U.K.</th>
<th>Italy</th>
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<tr>
<td>• Directive 95/47 and Directive 98/47 on the use of standards for the transmission of television signals: no specific digital TV transmission system or service requirement. Initial regulatory framework for the nascent digital TV industry. Conditional access obligations applicable to both analogue and digital broadcasting.</td>
<td>• Decrees 2001-1332 and 2001-1333: broadcasters subject to different requirements depending on whether the channels are free to air or Pay TV, broadcast over the air in analogue or digital mode, or by cable or satellite.</td>
<td>• Sect. 52 a) para. 2 sent. 2 RStV: public sector broadcasting subject one and the same set of rules for both analogue and digital TV broadcasting.</td>
<td>• OFTEL 1999 Notice on SSSL: market for digital interactive TV services distinguished from the market for digital pay TV (which is comprised of all digital pay-TV services).</td>
<td>• AGCOM 2000 White Paper on Digital Terrestrial TV: digital television considered a further technological evolution of analogue television (they belong to the same market).</td>
</tr>
<tr>
<td></td>
<td>• Regulatory Package on Electronic Communications Networks and Services (Framework Directive, para.30; Access Directive, Annex I, Part I): maintained.</td>
<td></td>
<td>• Digital TV (within the pay-TV market) does not amount to a relevant market that is distinctive from analogue transmission. See MSG Media Services, BIB/Open, BSkyB / Kirch Pay TV; Bertelsmann/ Kirch / Première; and TPS I.</td>
<td>• AGCOM 2001 Digital TV Regulation: two set of rules provided within the digital TV sector according to whether the broadcaster holds a license (the network provider) or an authorization (the content provider).</td>
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<td></td>
<td>• Infrastrucure market for the operation cable-TV includes both the analogue and digital transmission. See Judgement of the Paris Court of Appeal of 17 June 1992 against the decision n°91-D-51 of the Council. Digital TV (within the pay-TV market) amounts to a relevant market that is distinctive from analogue transmission. Decision n°98-D-70, of 24 November 1998, TPS and Mutivision: digital TV enables the creation of pay-per-view offerings. However, 1998 Havas opinion: possible unification of the markets in light of the coming technological convergence. See TPS and Mutivision; Havas and Cite Générale des Eaux; and Planete cable.</td>
<td>• Digital TV (within the pay-TV market) does not amount to a relevant market that is distinctive from analogue transmission. See Premiere (BKarA 1. Oct. 1998 WuW/E DE-V 53).</td>
<td></td>
<td>• Digital TV (within the pay-TV market) does not amount to a relevant market that is distinctive from analogue transmission. See BiB/ Open (if taking the EU Commission’s decision as a ‘national’ precedent).</td>
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<tr>
<td></td>
<td></td>
<td>• Digital TV (within the pay-TV market) does not amount to a relevant market that is distinctive from analogue transmission. See BiB/ Open (if taking the EU Commission’s decision as a ‘national’ precedent).</td>
<td></td>
<td>• The CC considers digital TV (in all its versions, also comprising its ‘interactive’ format) to be part of a wider market for pay-TV services, which includes Internet access via TV screens or via PCs. See NTL Incorporated and Cable &amp; Wireless Communications Plc.</td>
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<td></td>
<td>• Digital TV (within the pay-TV market) does not amount to a relevant market that is distinctive from analogue transmission (Groupe Canal Plus / Telepiù / Stream and Stream vs Telepiù).</td>
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<td></td>
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<td>• Digital TV is a “technical evolution” of analogue TV.</td>
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## Broadcasting rights of sports events

<table>
<thead>
<tr>
<th>EU</th>
<th>France</th>
<th>Germany</th>
<th>U.K.</th>
<th>Italy</th>
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<tr>
<td>• Difference between different types of premium content because: (i) popular sports achieve high audience ratings; (ii) popular sports are suited to carrying advertising; (iii) TV rights for sports must be acquired in advance of the event because of their 'perishable' nature. See Bertelsmann / CLT (merger decision, first phase, 1996).</td>
<td>• Specific market for the acquisition of transmission rights for sports events. See RMC Info (which made an analogy between broadcasting and radio).</td>
<td>• Acquisition of broadcasting sport rights subject to a specific regime, provided for under Sect. 31 GWB. • Separate market for broadcasting rights for sports events upheld for events including German sports personalities, or for events which are for particularly attractive some other reason. See Fußball-Fernseübertragungsrechte (1994); Sportübertragungen (1990).</td>
<td>• DGOF: two separate markets for premium films and sports channels, due to the different traits of the two offerings, including their durability and method of payment. See BskyB Group plc/Manchester United plc. (merger, 1999); OFT’s Review of BskyB’s Position in the Wholesale Pay TV Market (1996).</td>
<td>• AGCM: by reference to the EC decision European Broadcasting Union (EBU), considers the market for broadcasting rights for sports events as identifiable and separate from other broadcasting rights (not sport-related) due to the lack of demand-side substitutability between the two. See RAI-Cecchi Gori Communications (infringement decision, 1998). • Another market for the packaging and production of sport-related content for audiovisual purposes: identified on the basis of sole factual-based criteria (such as the “intrinsic nature of the product” test). See RAI Radiotelevisione Italiana/RCS Editori (merger, 2001).</td>
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## Distribution of music/ download of music

<table>
<thead>
<tr>
<th>EU</th>
<th>France</th>
<th>Germany</th>
<th>U.K.</th>
<th>Italy</th>
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<tr>
<td>• Distinction made on the type of distribution of music content. The Commission identified an “emerging market” for traditional or on-line music. See <em>AOL / Time Warner</em> (second phase merger decision).</td>
<td>• Competition Council: overall market for the <strong>resale of disks</strong>, even though the musical products differed according to the type of support (tapes, disks, cds). See Decision n°97-A-18 of the French Competition Council, of 8 July 1997.</td>
<td>No corresponding case law</td>
<td>No corresponding case law</td>
<td>• AGCM: market for the <strong>production and distribution of disks</strong> in general, essentially based on a demand-side substitutability analysis (under the resellers’ perspective). In accordance with EU case law (<strong>Thorn EMI / Virgin Music</strong>, No. IV/M202), the AGCM also considered the ultimate consumers’ preferences to discern the resellers’ pricing policies and commercial choices in purchasing from the majors. See <em>Associazione Vendomusica / Case Discografiche Multinazionali-Federazione Industria Musicale Italiana</em> (infringement, 1997).</td>
</tr>
<tr>
<td>• The market for traditional or on-line music is further segmented into a market for <strong>downloading</strong> and a market for <strong>streaming</strong>. See <em>Ibidem</em>.</td>
<td>• Within the resale of disks, the market can be divided between the two forms of distribution corresponding to (i) <strong>specialists</strong> (independent shops and department stores) and (ii) <strong>other stores</strong> where music distribution is only a secondary activity. However, it does not seem that these forms of distribution actually correspond to different market definitions. See <em>Ibidem</em>.</td>
<td></td>
<td></td>
<td>• The NCA did not find any sort of substitutability between different types of hardware (whether CD, tape or black disk), titles (the actual song contained in disk) and different genres of music (e.g., classical or rock) – though it acknowledged the consumers' different perspectives.</td>
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<td>• The geographic market for music recording and distribution is <strong>national</strong>; the parties held that the recording and distribution market were national in scope, due to of specific supply-side features (distinct repertoire policies, growth rates, structure of the retail business (all retailers purchase their requirements from local outlets of the record companies), record distribution, pricing policy). See <em>Seagram/Polygram; Thorn EMI / Virgin Music</em>.</td>
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<td>• <strong>National</strong> market for the production and distribution of disks: based on the commercial characteristics and usages of the industry (it was also noted that imports were almost inexistent). See <em>Ibidem</em>.</td>
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<td>EU</td>
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<td>• Further segmentation of the broadcasting retail market with respect to the different transmission paths (e.g., cable network, DTH satellite, digital terrestrial TV) used or delivery technologies employed to transmit the service (pay-per-channel, pay-per-view and video-on-demand). See MSG Media Service, Nordic Satellite Distribution (all phase II merger decisions).</td>
<td>• The Competition Council currently does not distinguish between the market for digital terrestrial and for pay-TV by cable or satellite. The substitutability between these two markets results from the fact that they have similar characteristics: obligation for the consumer to pay for the service, supply of numerous TV programmes, need for decoders, importance of developing the public’s loyalty. However, this definition was squashed by an infringement decision where the ex post review gave greater scope to the role and status of the players in the market rather than to the characteristics of the transmission paths. See BiB/Open; TPS I.</td>
<td>• The Federal Cartel Office distinguished between a market for terrestrial transmission (or transmission via satellite) and a market for network cable transmission on the basis of the fact that there is no direct contractual relationship with the consumer in terrestrial transmission (or transmission via satellite). See Liberty.</td>
<td>• Pay-TV services available via satellite, digital terrestrial or cable platforms are therefore all within the same product market, irrespective of whether pay-TV is supplied as part of a bundle or not. (see OFTEL, Conclusions of Consultation on Open Access to Communications Networks, April 2001; Statement of OFTEL Director General - Digital Television and Interactive Services ensuring access on fair and reasonable and non-discriminatory terms; Pricing of conditional access and access control services, of April 1999. • Conditional access duties are provided irrespective of the means of transmission (cable, satellite or terrestrial). See OFTEL Notice: Sky Subscribers Services Limited (SSSL) as a regulated supplier, 12 November 1999. • Cross-media ownership rules regulate private TV broadcasting by distinguishing: (i) analogue; (ii) cable; (iii) satellite; or (iv) digital transmission of terrestrial TV. • In its Review of BskyB’s Position in the Wholesale Pay TV Market, the DGFT, rather than applying the demand-side SSNIP test, chose a more factual-based approach that highlighted the inherent characteristics of the products and took into consideration the perspective of the ultimate consumer as to whether they view terrestrial TV or other forms of audio-visual entertainment as close substitutes for subscription to cable and satellite TV (pay-TV). For this purpose, no distinction was raised between different transmission paths.</td>
<td>• The AGCOM was awarded with the power to reallocate the frequency plan in light of the transition to digital broadcasting. Several relevant market-areas are defined: (i) the market for digital terrestrial TV programming; (ii) the market for the provision of digital terrestrial TV services (i.e., the digital terrestrial broadcasting); and (iii) the market for digital terrestrial sound and radio programming. See Law No. 66 of 23 March 2001.</td>
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6.1.2. **Similarities and divergences amongst the Member States**

982. The above grid shows some similarities as well as some variations that exist between national and EU approaches to market definitions in converging areas. All authorities now seem to be in accordance as regards the identification of sports rights as a distinct market amongst other forms of premium contents, such as films.

However, in the broadcasting sector, does digital terrestrial TV belong to the other pay-TV markets? How come some channels distributed over digital terrestrial TV are free? Obviously, the answer lies in the different perspective, *i.e.* if the market analysis approach concerns the upstream relation between the content provider/channel editor and the broadcaster and not the one that exists between the audience and such broadcaster.

In the same way, should one consider that Internet access via TV screens and PC’s is substitutable? Where would the frontier be between Internet services and broadcasting?

Finally, as far as music downloading is concerned, it seems that among the jurisdiction examined in the course of the study, only the Commission has so far adopted a position on the existence of an emerging market for traditional or on-line music. Is that market definition compatible with the finding that different types of hardware, titles and genres of music are not substitutable?

983. The above-mentioned divergences exist also for various markets examined throughout the study. These differences explain why it was particularly difficult to strictly follow the same outline for each jurisdiction; basically, an important part of these differences comes from the fact that the authorities were not asked the same questions: the position of a given authority on a particular point often arises on the occasion of a particular case that was submitted to it in which that issue arose.

Therefore, most markets are identified in a given context, *i.e.,* by comparison to another product or service. It may well be therefore that in a given Member State, the issue is to determine whether A and B are interchangeable, while in the neighbouring Member State the case would involve the substitutability between A and C.

984. However, the difficulty to determine a common and unique line of reasoning may also have deeper roots.
First, some EU decisions sometimes do not have any definitive conclusion on the substitutability that exists between converging technologies. This often arises in phase I merger decisions which are rendered under a considerable time pressure, and in cases which do not raise any specific competition concerns. This is also the case in some infringement cases, as a large part thereof is solved by administrative letters.

The second reason for the difficulty to reach a perfect consensus at the European level on market definition in converging sectors is derived from the very difficulty to proceed to the anticipation of the evolution of the market and of the consumers’ behaviours. This difficulty is shown in particular in the Vizzavi case\(^{976}\), where the Commission was concerned that the parents could use their positions in mobile telephony and pay-TV together with a proprietary link to the Vizzavi portal, as a means of dominating the Internet portals market via mobile phones and televisions. The Commission thus required that third parties be given the same non-discriminatory access to the parents’ mobile telephony and pay-TV services as the one enjoyed by Vizzavi. Consumers could then choose content and access providers separately. However, the recent failure of the Vizzavi portal shows the difficulty in the \textit{ex ante} evolution of a market and of the success of services.

In view of these positions and in light of convergence, it appears that the unification of means of communications may lead to two possible outcomes. Either market definition endorses a narrow oriented approach, so that each technology or new distribution mechanism corresponds to a relevant market definition; or it encompasses a broad market definition so as to cover all multi-purpose delivery networks and services. For the time being, most of the decisions relating to convergence concern on-line distribution (and not the services as such), which makes it difficult to draw conclusions at the present stage. It nevertheless shows the need to anticipate market evolutions.

\(^{976}\) Decision of 13/10/2000 Case No IV/M.2050.
6.2. The geographic market issue: are geographical concerns neglected in market definition approaches in the media?

988. One of the striking factors of market definition is the somehow limited place given to the geographic appraisal of market definitions, both under competition law criteria and resulting case law, and under regulatory measures.

6.2.1. The need for market definition in light of the reform of regulation n°17/62

989. The geographic market issue takes a particular importance in light of the coming decentralisation of the application of competition law, through the revision of Regulation n°17/62. In substance, the new system about to be set up will entrust that national competition authorities and courts will be able to apply Article 81 in its entirety (as they currently do with Article 82). In this new system, both the prohibition rule set out in Article 81(1) and the exception rule contained in Article 81(3), can be directly applied by national courts and national competition authorities. As stated by the Commission in its proposal, “national competition authorities, which have been set up in all Member States, are generally well equipped to deal with Community competition law cases. In general, they have the necessary resources and are close to the markets”.

990. Therefore, the increased involvement of the national competition authorities and courts is at the heart of the proposal, in order to bring the decision-making bodies closer to the individuals. That decentralisation in the application of competition law should not lead to a nationalisation of its application. To that effect, the new proposal provides for information and cooperation mechanisms, in order to guarantee the consistent application of the rules within the Community.

991. A greater cooperation between national authorities may thus be needed as regards market definitions in order to ensure the consistent and coherent application of EU rules since different methodologies for market definition do lead to different conclusions in competition law. Such is particularly the case concerning the appraisal of dominant positions, whether under concentration cases (not a subject of the proposed reform, which essentially focuses on Article 81) or under Article 82 cases.

977 See “Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87” (“Regulation implementing Articles 81 and 82 of the Treaty”)

978 Page 6, emphasis added.
In addition, under the proposed reform, the competition authorities and the Commission will form a network and work together to punish infringements of the Community competition rules. The network will provide an infrastructure for mutual exchange of information, including confidential information, and assistance, and thereby expand the possibilities of the network members to effectively enforce Articles 81 and 82. In this respect, Article 3 of the proposed Regulation provides that only Community competition law applies when an agreement, decision or concerted practice within the meaning of Article 81 or an abuse within the meaning of Article 82 may affect trade between Member States.

This network will ensure an efficient allocation of cases, which should ensure that the Commission focuses only on the cases that have a pan-European dimension or effect. That network – and the consequent thorough application of EU competition law – should promote a level playing field for companies. The cooperation to be set between the national authorities and the Commission is set under Article 11; the details of this cooperation will be developed in a notice.

From our point of view, such cooperation cannot be effective if market definition processes – and consequently, market definitions themselves – are not commonly set. More importantly, as far as geographic markets are concerned, an effective assessment of geographic markets may lead to the conclusion that the markets at stake do not necessarily correspond to the national territory – or part thereof – where the undertaking party to the proceeding is based. The due examination of geographic market definitions is thus a prerequisite for the allocation of cases not between the Commission and the national authorities (since, allocation is decided on other criteria such as e.g., the pan-European dimension of a case) but amongst national competition authorities, within the European network about to be set up.

The geographical definition of the market is thus essential in at least two respects:

- to allocate cases, (except in the context of merger appraisals), between the various NCA’s/NRA’s when several markets are actually affected due to the common effect of the case at stake;

- to provide the pattern for a comparison of the decisions that result from case law themselves.

However, our study revealed that both sector-focused legislation and even competition law tend to show a lack of consideration for geographic market definition.
6.2.2. The overall relative absence of geographic market definition in sector-focused legislation

996. As far as regulatory measures are concerned, market definition is largely left alone. Indeed, the EU regulatory measures are meant to be applied throughout the EU and, in cases of directives, by means of their implementation in national law. This does not correspond to a geographic market definition but to the territorial application of regulatory measures. On the other hand, the existence of a European regulatory measure does not imply as such that the geographic definition corresponds to the EU area. Such is particularly the case for instance in the broadcasting sector, where several directives provide for a European regulatory framework, whereas markets are often still considered as national.

997. As far as national sector-focused legislation is concerned, the geographic definition of the sector is often not addressed. Regulatory instruments apply to the activities – and to the undertakings – which are located in the national territory where such regulation is adopted. Moreover, the existence of such regulations then induces competition authorities to consider the existence of a special regime for national undertakings or activities, which differentiate them from other undertakings or activities operating in different Member States.

6.2.3. The relative absence of geographic market definition in EU competition law

998. More interestingly, competition law itself tends to overlook the geographic dimension of the markets. This relative lack of significance is already present in the 1997 Commission Notice, where most emphasis is given to the product market rather than to the geographic one. This position is then largely endorsed in the further competition law based materials. Indeed, most demand and supply criteria relate to product substitutability.

999. Furthermore, the criteria that are upheld for geographic market definition may be ill adapted for the appraisal of services markets. As far as demand is concerned, the geographic boundaries of the market are essentially established according to a switch in orders of the customers (and evidence of such switch), the trade flows and patterns of shipments and the existence of transportation costs. Such factors correspond mostly to industrial products and may not be adapted to examine the scope of immaterial services. Demand criteria also include consumer preferences and customer purchase pattern. These latter factors actually seem to be the ones that are mostly referred to in media cases, together with the existence of language and cultural differences. Supply criteria seem to be more secondary and consist of examining the possibility for undertakings to sell their products in a particular area.

979 One should, however, point out the exception of the ECMR and corresponding form CO, where the dimension of the markets is duly taken into consideration.
Furthermore, one could wonder whether the importance given to national specificities is not overlooked in geographic market definitions. In this respect, it appears that the existence of national markets stems from a constant practice of the courts, but may not be subject to a case-by-case investigation by the competition authorities, based on the precise situation of the case at hand. The only exception to that situation seems to concern cases where the patterns of the geographic market are extremely specific\textsuperscript{980}, or where the undertakings at stake by definition only operate in a restricted and limited geographic area (cable operators in particular, which can only operate on the territory that corresponds to their local coverage).

Moreover, some national authorities seem to be rather confused regarding the distinction to be made between the geographic scope of the market and the national application of the legislation at stake\textsuperscript{981}. In this respect, it seems that quite a lot of authorities consider that, whenever their national antitrust legislation is applicable, the geographical scope of the market is necessarily national. There is thus a tendency in a significant number of cases to elude the geographic issues. Once again, the only exception to that principle seems to be concentration cases, where competition authorities genuinely investigate the territorial scope of the market.

Finally, this standard approach to market definition (limiting the markets to the national boundaries) may also tend to underestimate the existence of infra-national markets. The existence of such markets may be particularly true when the existence of networks is at stake. This factor is duly taken into account in the telecommunications sector, where national competition and regulatory authorities do refer to infra-national markets, but, unfortunately, less in the media environment.

### 6.3. The search of a coherent, unique market definition test in the media sector

Overall, it is difficult to identify throughout the case law the existence of a specific reference test to be used in the media sector to define relevant markets. As mentioned earlier, that absence is particularly blatant concerning the geographic market. However, even on the product/service market, there is a certain lack of consistency in the criteria applied and upheld. This does not mean that the market definitions finally upheld are inconsistent. Quite on the contrary, practice throughout the EU tends to show similarities or identities in such definitions. However, legal certainty and anticipation concerns should probably dictate the creation of a consistent and \textit{ex ante} market definition test.

\textsuperscript{980} See for instance Commission decision n° COMP/M.2300, \textit{YLE/TDF/Digita/Noos}, of 26/06/2001, regarding the specificity of the Finnish territory.

\textsuperscript{981} See in particular infra, for Italy and Germany.
6.3.1. The variety of criteria used in market definition

1004. Market definition focuses essentially on demand. This feature is common to all competition law materials, both at the EU and national level. However, that common feature may only be apparent since case law tends to show the use of various other factors.

1005. First, the very notion of demand is not expressed very clearly. The 1997 Commission Notice refers to the point of view of consumers, whose perspective is duly taken into account to examine the substitutability between products. However, the notion of consumers is sometimes mixed with the one of “end-consumers”. On the other hand, practical implementation of case law tends to show that a number of cases do not deal with end-consumers. Furthermore, the very notion of demand varies according to the value chain.

This point is particularly reflected for instance in Germany, in the cable sector, where the determination of the demand/supply is dictated according to the attractiveness of the programmes to be broadcast: appealing programmes are paid for, in which case the demander is the broadcast or cable operator; on the other hand, producers of less attractive programmes are in a demand situation vis-à-vis broadcasters and cable operators, since they seek or need them for a distribution of these programmes and will therefore pay to obtain it.

To take another example, in France for instance, the demand/supply situation in the cable sector is not clear: for the time being, cable operators pay channels to broadcast their programmes, for a fee which is based on the number of viewers. One could also imagine that the financial relation could go the other way around, and that programme suppliers would pay cable operators to have their channels broadcast.

1006. In addition to that uncertainty, competition law based materials (and in particular the 1997 Commission Notice) indicate that supply is also taken into account, though it is supposed to be relied upon to a lesser extent.

However, practice shows that in quite a number of cases, supply is duly taken into account, or even the only criterion taken into account, in order to determine the boundaries of the markets. This is particularly true, for instance, in the books and publishing sector, where the Commission exclusively focused its market analysis on supply criteria.

1007. Finally, in some cases, some other quite different criteria are relied upon, which do not seem to directly correspond to a demand or supply based analysis but which are nevertheless considered as key factors to identify market boundaries. A few of these criteria are mentioned below.

1008. Factual-based criteria are taken into account, as shown for instance in the market definition for retail pay-TV services as opposed to free-to-air TV, in which the Commission ultimately relied on characteristics of the transmission paths and their funding-structure as the distinctive parameters for
upholding a separate market definition. Demand-side or supply-side substitutability was disregarded.

1009. In this respect, it is interesting to note that national courts, such as the U.K. one for example, motivated the need to supersede the application of cross-price elasticities of demand on the basis of the trade-relationship between the supplier of pay-TV services (BskyB) and its subscribers.\textsuperscript{982} There, the likely response of customers to a hypothetical small, non-transitory change in relative prices of BskyB’s products was not applied, as BskyB was, at the time of the case, the only (monopolist) supplier of the goods in question. The ‘competitive level’ required under U.K. competition law for comparing the price elasticities of each product turned out to be \textit{a priori} ‘distorted’.\textsuperscript{983} Therefore, the OFT Director\textsuperscript{984} relied on the characteristics of products which, in this case, involved the question of whether consumers view terrestrial TV or other forms of audio-visual entertainment as close substitutes for subscription to cable and satellite TV (pay-TV).

The notion of \textit{complementarity} between two products may also lead to include them in one and the same market. Indeed, it is difficult to appraise the level of substitution needed for two products in order to belong to the same market. In some past cases, the Commission appears to have required a rather extensive substitutability between two products to uphold that they were in the same market.\textsuperscript{985} Of course, it is not necessary for two products to be completely interchangeable in all of their applications or for all customers to belong to the same market. All that is required is that there be a sufficient proportion of customers who would switch a sufficiently large share of their purchases from one product to the other in response to an increase in price.

1010. Finally, the authority may also rely exclusively on the sector regulation. A good example is the UEFA case\textsuperscript{986}, in which the Commission identified an upstream market for the acquisition of free-TV and pay-TV broadcasting rights by examining the UEFA’s broadcasting regulations. However, in that case, the Commission considered that these regulations were applicable to all types of broadcasting (on both free-TV and pay-TV); as the case did not raise competition issues, it was not necessary to exactly define the relevant product markets.

\textsuperscript{982} OFT Director General’s Review of BSKYB’S position in the wholesale Pay-TV market, December 1996.

\textsuperscript{983} In other words the price of the ‘hypothetical monopolist’ was already set at a supra-competitive level.

\textsuperscript{984} The OFT Director’s approach was consistently followed in subsequent case law.

\textsuperscript{985} For example, in Mannesmann/Vallourec the Commission argues that seamless and welded tubes are in different product markets because “in certain applications seamless tubes cannot be replaced by welded tubes ... [this] leads to the conclusion that seamless tubes are a different relevant product market from welded tubes.”

\textsuperscript{986} Case n°: 37.576, 19 April 2001.
Therefore, one may wonder which criteria would be used in the future in the broadcasting sector for example where technological innovation allows the supplier of, for example, Pay-TV services to offer a bundle of services, such as film entertainment, interactive TV, sports events and telecommunications services.

1011. Overall, two characteristics therefore seem to appear: first, the overall number of criteria to characterise demand and supply and, second, the uncertainty as to which criterion is finally going to be upheld as the decisive one to decide on the boundaries of the relevant product market.

6.3.2. Does the solution lie in a more economic approach?

1012. In view of these uncertainties, one may wonder whether the solution to market definition would not be to rely more heavily on a more economic approach. In this respect, the Commission seems to thoroughly use the economic approach to define markets, and more particularly to rely on the SSNIP test. It is interesting to point out in this respect that the first test mentioned in the 1997 Commission Notice for product market definition is the hypothetical monopolist one. In the same way, as far as geographic markets are concerned, the evidence used relies on the existence of cross-price elasticities between two geographic regions.

However, the use by the national authorities of such test varies enormously. In a nutshell and to caricature, the U.K. authorities tend to rely on it, the French Competition Council regards (and applies) it extremely cautiously, the German authorities seem not to make much use of it and the Italian position varies according to the cases at stake.

In any event, the use of such test may seem questionable for two reasons.

1013. First, market definition is essentially, from our point of view, a legally based approach, intended for legal purposes. Law is not an exact science and the inclusion of economic evidence may not alter that conclusion. On the other hand, the current trend is for a prominent economic approach, and the SSNIP test thus tends to be more intensively used than before. The use of such economically based criteria may indeed enable the competition authorities to ascertain with more legal certainty the existence of markets.

However, from our point of view, the accurateness of such tests should not be overestimated. It appears indeed that market definition is and remains an issue which involves both qualitative and quantitative evidence. The heavy reliance on economically based concepts tends, from our point of view, to erase that qualitative approach.
1014. Second and more importantly, the very use of the SSNIP test is rather delicate. It requires the gathering of precise data, over a substantial period of time, which may raise considerable practical difficulties. Moreover, it may well be that the starting price, which was used as a basis for the application of the test, was already above the competitive level. In such a hypothesis, any increase by 5-10% of the already supra competitive price will naturally lead consumers to discover new alternatives; however, such a search may actually just be a consequence of the fact that the price is well above (and not merely by 5-10%) its competitive level. Including all such alternatives in the market definition would thus tend to unduly extend the market boundaries.

This was particularly mentioned by the French Competition Council, which tends to make a rather cautious application of it. Indeed, the a priori identification of the likely reactions of consumers, in abstracto, to a small and permanent increase (or decrease in some cases) of prices is particularly difficult to anticipate. This difficulty is further accentuated in growing services industries, such as the media ones, which tend to evolve and grow quite rapidly. Therefore, the widespread use of that test may correspond to the search of an economic justification to the upholding of the legal concept of market definition.

1015. Finally, this test is currently probably the main – if not the only one – used to appraise substitution. On the other hand, it may be considered that this test is somehow detached from the actual perception of consumers and from the perceptions of the actors in the industry. In this respect, one could wonder whether the use of a hypothetical and theoretical test should not be corroborated by relying on quantitative evidence, gathered through polls or other means of actual investigation of the consumers’ behaviour. These opinion polls or surveys do exist in most sectors of the media industry (see in this respect the audience share surveys, the advertising survey on media penetration, perception of consumers, etc.).

1016. On the other hand, economic approach is heavily present in competition law (and should probably remain so) as far as market power is concerned. Indeed, market power is often expressed in terms of market shares and based on the possibility for an undertaking to behave independently of its competitors, customers, and ultimately, of the consumers. In this type of approach, the SSNIP test may prove more useful as it would tend to anticipate, ex ante, i.e., necessarily in abstracto, whether a given undertaking could possibly increase its prices without suffering from a consumption shift to other products.
Part 6 – Conclusions. Market definition in the media sector: a comparative analysis

6.3.3. The need for a market test specific to the media sector? Comparison with the telecommunications approach

1017. The questioning of the use of the SSNIP test necessarily entails the further issue of determining what would be an appropriate test, particularly in the media sector. In this respect, our opinion would be that the first step is that of the actual adoption of a “standard” test, in order to provide for sufficient guidance both for the undertakings in the sector and the national competition law authorities, in order to ensure a consistent application of EU competition law.

1018. The second step would then entail the concrete definition of such test. In this respect, it is necessary to draw a value chain which is specific to the media sectors, in order to examine exactly the patterns of relationships and, consequently, the supply and demand connections that exist between the parties. This idea is certainly not new, as a value chain is a basic element definition for every market definition exercise.

1019. Such reasoning may highlight in a greater fashion the problem of financing, which we did not find in the case law analysis we conducted. Indeed, in theory, the meeting of demand and supply leads to the formation of a price, which is considered, from a competition point of view, as the optimal value which should be given to that particular good or service.

However, in media sectors, some services are rendered literally for free. This may be the case for instance regarding purely public broadcasting (such as the one provided by the BBC), which is not funded by advertising but purely by public funds. This may also be the case for free services on the Internet, such as open source software, which literally may be downloaded without any charge to the consumer nor without any advertising funds. In this type of situation, the question is therefore to determine whether the absence of price entails the absence of commercial activity; should the undertakings at stake nevertheless be considered as carrying out an economic activity, which competition rules – and therefore market definition – may apply?

1020. Finally, a global thinking may be needed in the media sector in its entirety, which does not emerge particularly clearly from a case law reading. Indeed, one may have the impression that case law results in a vast collection of market definitions, some of which are left open, which may lack strong sector coherence. On the contrary, media sectors do tend to present the same overall patterns and a corresponding analogous similarity in their value chain. The difficulty in identifying the connections between all market definitions upheld and amongst the various media sectors may be further accentuated by

987 See in this respect article 50 of the EU Treaty relating to the freedom to provide services, which defines services as activities “normally provided for remuneration” and including, inter alia, “activities of an industrial character” and “activities of a commercial character”, as well as “activities from the professions”.
the internal cross-references within case law, to previous cases rendered by the Commission and which give a general impression of a self-nourishing system. Few references are made either to sector-focused legislation or to “exterior” references.

The test to be adopted may also leave a greater room to the opinions of the actors in the industry into greater consideration. Such opinions are obviously duly taken into account, particularly by the means of the questionnaires sent by the Commission when appraising concentrations. However, such opinions mostly tend to relate to the position of the parties, rather than to the definition of the market.
Another useful tool for the problem of market definition in the media environment may be the Commission’s presentation of a list of possible markets, which could evolve over time but which would nevertheless provide some guidelines to the actors in the industries as well as to the NCA’s and
NRA’s. This may provide a framework to enhance cooperation between the Commission and the NCA’s and between the NCA’s themselves.

1022. Indeed, the telecommunications area is also – like the media sector – under constant evolution, which leads to the emergence of new competitive forces and concentrations. In that sector as well, national regulatory and competition authorities play a key role and are invested with large powers.

However, in the telecommunications sector, the Commission issued Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, in which it mentioned a list of markets. That list is not exhaustive and is subject to review and modifications.

In our opinion, an analogous methodology could be envisaged in the media sector, particularly in the light of the coming – and sometimes difficult to predict – evolution of the media markets.

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Brussels, December 2002
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### INTRODUCTION

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#### 1. ANALYSIS OF THE MARKET DEFINITION UPHeld AT EU LEVEL

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**Market definition in the media sector: a comparative analysis**

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