

OPEN ACCESS FROM THE EU PERSPECTIVE

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Convergence is no longer only talk about the future, but has finally become reality. In the US, the UK and Japan, *triple play*, i.e. the offering of TV, telephony and Internet access over cable has already become routine. In Germany, where the upgrade of the cable network is lagging behind, *Deutsche Telekom* has just introduced its new DSL-service with a speed of 1.5 Mbit/s¹. This speed is approximately 27 times faster than the Internet access through a standard telephone line at 56 Kbit/s and nearly 8 times faster than the current US-definition of broadband services, which requires only a bandwidth of 200 Kbit/s². The new DSL-connection offered by *Deutsche Telekom* will thus allow, for the first time, the transmission of standard quality TV-signals via the Internet – something that the *Bundeskartellamt*, in its *Liberty* decision at the end of February³, regarded as not being feasible in the near future. Finally, satellite communication providers are about to offer integrated “two-way” broadband services. For example, *ASTRA-SES* has announced plans to offer a new broadband service with an integrated return channel in Spain⁴.

In this converged communications environment in which the same communications services can be delivered over a variety of platforms, the issue of open access to these platforms, in particular with regard to broadband services, is of critical importance. At the same time, vertical integration of content providers and delivery systems raises the issue of open access to content. Accordingly, *Herbert Ungerer*, Head of Division Media and Music Publishing in DG Information, Communication and Multimedia, has made clear that “*access to content for the new platforms will be a focus of attention for both regulation and competition law enforcement in the European Union during the next months – and years – as will be the inverse problem of access to these platforms for content providers*”.

¹ See F.A.Z of April 25, 2002; Die Welt of March 13, 2002. For more information on the state of Internet access via satellite see F.A.Z of November 18, 2002.

² The FCC, in its first report under Section 706 of the 1996 Act (*Inquiry Concerning the Development of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd. at 2398 (1999), available at <<http://www.fcc.gov>>, has defined “broadband” as “the 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. This rate is approximately four times faster than the Internet access received through a standard phone line at 56 kbps.” *Id.* at 2406. The FCC chose 200 kbps because ‘it is enough to provide the most popular forms of broadband – to change web pages as fast as one can flip through the pages of a book and to transmit full motion video.’ *Id.* See also Deborah A. Lathen, *Broadband Today: A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau*, October 1999, at 17, available at <<http://www.fcc.gov>>.

³ *Liberty/KDG*, BKartA Decision of February 22, 2002 (B7-168/01).

⁴ Press release of December 13, 2001, available at www.ses-astra.com.

Against this background, this article will discuss the current key open access issues under European law covering both sector-specific regulation as well as general competition law. As to sector-specific regulation under the new EU regulatory framework for electronic communications, these are, first, the right to open access of Internet Service Providers; second, the right to open access and to open standards of TV Service Providers; and third, the issue of unbundled access to the local loop. Since only the transmission of content but not the content itself is regulated by the new framework, the upcoming revision of the Television without Frontiers Directive⁵ and its possible impact on the regulation of open access will be briefly discussed as well. In the second part, the article deals with the latest developments in general competition law with regard to open access, discussing some of the current open access cases under Article 82 of the EC-Treaty as well as the major merger control decisions the Commission has rendered using merger control as a tool to impose open access remedies.

1. OPEN ACCESS UNDER SECTOR-SPECIFIC REGULATION

1.1 The New Regulatory Framework for Electronic Communications

On February 14, 2002 the Council adopted the new EU Regulatory Framework for Electronic Communications⁶. The package entered into force at the end of April 2002 and will have to be implemented by the Member States by 24 July 2003. The new regulatory framework reduces the number of legal texts from 28 to 8, intending to increase simplicity and clarity. Given the broad coverage the new framework has received, this article is not going to give another overview of the new provisions. In the context of open access, however, it is important to bear in mind the new framework's main objectives.

(a) Objectives

The new regulatory framework has the following three main objectives.

First, the new framework aims to adapt the existing regulatory conditions to the technological development in a converged communications environment. Due to convergence, the existing network-specific regulations need to be amended to ensure that market participants do not face uncertainty and an excessive, irreconcilable maze of regulation.

⁵ Council Directive 89/552/EEC of October 3, 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, O.J. L331/51, 16.11.1989, as amended by Directive 97/36/EC of June 30, 1997, O.J. L202/60, 30.07.1997.

⁶ The package encompasses the following measures most of which have been adopted on February 14, 2002. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. L108/33, 24.4.2002; Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), O.J. L108/7 of 24.4.2002; Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive), O.J. L108/21, of 24.4.2002; Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), O.J. L108/51 of 24.4.2002; Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), O.J. L201/37 of 31.07.2002; Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Liberalisation Directive), O.J. L249/21 of 17.09.2002; Decision No. 676/2002/EC on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision), O.J. L108/1, 24.4.2002; Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, O.J. C165/6 of 11.7.2002.

Second, the new framework aims to make competition rules the prime instrument for regulating the electronic communications market. However, until the market becomes genuinely competitive, some sector specific *ex ante* rules continue to be appropriate. Subject to regular revisions by the EU Commission, *ex ante* rules will apply only as long as they are more effective than competition law remedies.⁷

Third, harmonisation of legislation procedures must ensure the development of the market in a consistent manner at EU level. The new transparency mechanism will allow the Commission to monitor and produce guidance for the national regulatory authorities' regulatory intervention.

(b) The Principle of Technological Neutrality

Fundamental to the regulation of open access under the new framework, is the principle of technological neutrality. It underlies the definitions of electronic communications networks and services and is supposed to ensure that sector-specific regulation applies to any network or service permitting the transmission of signals - including satellite networks, fixed (circuit and packet-switched including internet) and mobile terrestrial networks, and broadcasting networks regardless of the type of information conveyed.

However, the new regulatory framework does not cover the content of services delivered over electronic communications networks and services. Content includes audiovisual content, financial services and certain information society services. Audiovisual content continues to only fall under the Television without Frontiers Directive 89/552/CEE (as amended in 1997)⁸. Information society services fall under the e-commerce Directive 2000/31/EC⁹.

⁷ Since the national regulatory authorities ("NRAs") are supposed to apply the concept of significant market power ("SMP") – the key concept to determine those undertakings on whom regulators can impose sector-specific obligations in order to guarantee effective competition. - it is crucial to have guidelines to ensure that the concept is applied consistently in the Community market. This requirement is addressed by Article 14 of the Framework Directive which mandates the Commission to issue a Recommendation, that "*shall identify those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations as set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law*" Article 6 of the Framework Directive provides for a consultation procedure with all interested parties as regards any NRA's draft measure affecting the relevant market, notably those concerning the designation of SMP operators. In addition, a new transparency mechanism requires NRAs to notify draft regulatory measures relating to the definition of the relevant markets to the Commission and to other NRAs that may make comments within one month. The Commission then has the power to require an NRA to amend or withdraw those measures defining a relevant market for the assessment and designation of undertakings with SMP differently from those defined in the Commission recommendation adopted pursuant to Article 14. . Although not legally binding, NRAs will thus have to take account of the Commission's recommendation which is currently the subject of the consultation process. In June 2002, the Commission has published a first draft recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC on a common regulatory framework for electronic communication networks and services.

⁸ Council Directive 89/552/EEC of October 3, 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, O.J L331/51, 16.11.1989, as amended by Directive 97/36/EC of June 30, 1997, O.J. L202/60, 30.07.1997.

⁹ Directive 2000/31/EC of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J. L178/01, 17.07.2000.

(c) Key Open Access Issues

(i) Open Access of Internet Service Providers

The distinction between the regulation of transmission and the regulation of content creates significant problems in the context of open access. This is of particular importance for the issue of whether ISPs may claim open access to the networks covered by the new framework.

In the US, where the upgrade of the cable networks is more advanced and broadband Internet is far more developed than in Europe, one issue has become a focus of debate in the last three years – the issue whether cable companies should be required to give unaffiliated ISPs open access to their broadband platforms. It is a crucial issue because in the US 70% of all broadband Internet connections are through cable modems and the two biggest cable operators are offering broadband services through their affiliated ISPs. Even though one of the two major cable networks¹⁰ has meanwhile been opened to other ISPs by the FTC and FCC's *AOL/Time Warner* decisions¹¹, the discussion is still ongoing with regard to the adoption of a coherent national broadband regulation by the FCC¹². Problems arise in this context from the statutory classification of broadband services under the Communications Act¹³.

¹⁰ On November 13, 2002, the FCC cleared Comcast Corp.'s acquisition of AT&T Broadband. AT&T Comcast, with 21.5 million subscribers, will be more than twice the size of the second-largest US cable company, Time Warner Cable. It will also be the biggest provider of high-speed Internet service in the US. The Justice Department's antitrust division also announced that it will not object to the deal, originally valued at \$72 billion but worth 34 percent less because of Comcast's fallen stock price. The only major condition attached to the FCC approval is that AT&T Comcast put the 21 percent stake it will hold in Time Warner Cable into a trust.

¹¹ See *In the matter of America Online, Inc. and Time Warner Inc., Agreement Containing Consent Orders*, File No. 001 0105, Docket No. C-3989, December 14, 2000 subject to Conditions, Commission Approves Merger Between America Online, Inc. and Time Warner Inc., Public Notice FCC, January 11, 2001, available at www.fcc.gov.

¹² See Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (March 14, 2002); *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Dockets Nos. 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (February 14, 2002); *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forebearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (December 20, 2001); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (December 20, 2001), all available at <www.fcc.gov>.

¹³ In its Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (March 14, 2002), the FCC has, meanwhile, classified cable modem services, i.e. broadband services delivered via cable, as information services and not as telecommunications services. As a consequence, cable broadband services are not subject to stringent Title II regulation with far reaching open access obligations. Furthermore, local cable franchise authorities have no competence to regulate these services. See for further information on this discussion *Rosenthal*, Open Access of Internet Service Providers to the Cable Operators' Facilities in the United States, International Journal of Communications Law and Policy, Issue 6, Winter 2000/2001,

In Europe, the discussion of broadband services has just started and is, so far, limited to the issue of unbundling the local loop. The importance of cable as platform for the offering of broadband services has so far been ignored, mainly due to (1) substantially differing cable penetration rates in the different Member States; and (2) the slow upgrade of cable in countries with higher penetration rates. However, the issues currently under discussion in the US will arise in Europe in the near future as well. The Commission hopes to have solved the classification problems encountered in the US by means of the technological neutrality principle underlying the new regulatory framework. Under the current legal conditions, the Commission can only exercise limited *ex ante* control in merger cases. Under the new framework, cable operators may face *ex ante* regulation if they are found to be dominant in the relevant markets.

However, even under the new framework the reach of an ISP's potential right to open access is limited due to the distinction between the regulation of transmission and content. The right to open access exists only for the purposes of providing communications services (Article 12 (1) in conjunction with Article 2 (a) of the new Access and Interconnection Directive).

Recital No. 10 of the new Framework Directive provides:

“The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.”

On the basis of these provisions, the following classification problems remain:

The provision of access to the Internet is an electronic communications service;

- but is the provision of web-based content by the ISP to be regarded as an electronic communications service as well? Recital No. 10 indicates that this is not the case. But can this be right? The ISP only offers the access service, but not the content itself.

- What about the provision of ISP-based content, i.e. content which is received from the ISP directly (e.g. *T-Online's* video offering) and not from the web? Is this an electronic communications service? No, the ISP, in this case, clearly offers content.

-Finally, is the provision of real time broadcasting / streaming video to be considered as an electronic communications service? Again, a distinction may be drawn between web-based (ISP offers access) and ISP-based content (ISP offers content).

What are the consequences of this for an ISP's claim to open access?

- Are ISPs who are offering content (whether web-based or not) barred from open access?
- Are only ISPs who are offering ISP-based content barred from open access?
- Is it, for open access purposes, only relevant that ISPs are providing a communications service through the offering of Internet access - regardless of any content offering?

Based on the new framework, there is no clear-cut answer to these questions. The most pragmatic approach seems to be the third one. Under this approach, it would only be relevant for open access purposes that ISPs are providing an electronic communications service through the offering of Internet access. The content, whether web- or ISP-based, accessible once the user has been connected, would not prevent the national regulatory authorities from granting open access.

This interpretation, however, is far reaching in view of Recital No. 10. Furthermore, it may be argued that the offering of ISP-based content does not involve the offering of Internet access and thus does not imply any electronic communications service. As to the first solution, seemingly mandated by Recital No. 10, it is at least questionable whether - even though by definition the Internet access service (as electronic communications service), provided by an ISP includes a content component - the mere existence of such a content component, without more (e.g. the separate offering of ISP-based content) indicates that there is a separate offering of content to the subscriber. The result of such interpretation would be that ISPs have no right to open access under the new framework, a result which can hardly be mandated by the new framework.

(ii) Open Access of TV Service Providers

(A) Open Access Regarding TV-Programming Services

Claims to open access will not only be made by ISPs but also by TV service providers, i.e. TV programmers. *Erkki Liikanen*, member of the Commission responsible for the new framework, has recently stated that

*“[t]hanks to convergence, broadcasters will benefit from a wider choice of networks and terminals. [...] For broadcasters, the technology-neutral approach of the Communications regulatory package opens new opportunities to benefit from this widening choice of networks, platforms and technologies.”*¹⁴

However, this is only true to the extent to which broadcasters are actually entitled to claim open access to the different platforms. Here, once again, the distinction between regulation of transmission and

¹⁴ See presentation “*The New Communications Directive and their benefits for the Audiovisual Sector*” from Commissioner Erkki Liikanen at the European Voice Conference “*Television Without Frontiers*” of March 21, 2002, available at www.europa.eu.int.

regulation of content comes into play. Recital No. 2 of the new Access and Interconnection Directive provides that

“[s]ervices providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services.”

Therefore, TV service providers have no right to claim open access with regard to TV-programming (services). However, TV service providers may benefit from national “must carry” rules. Article 31 of the new Universal Services Directive recognises the Member States’ right to impose, on the basis of clearly defined general interest objectives, proportionate and transparent “must carry” obligations on network providers.

(B) Open Access in the Context of Digital Television

In *Telia/Telenor*¹⁵, the Commission indicated that there were a number of aspects which indicated that a certain degree of substitutability already existed between cable, digital terrestrial transmission (DTH) and Television Satellite Mast Antenna (SMATV). It furthermore did not contest third parties’ submissions that with the introduction of digital services, cable and DTH offerings could become less homogeneous, thereby increasing the incentive for customers to switch. However, the Commission did not take the position that there were separate markets for the different TV distribution infrastructures but ultimately left the market definition open¹⁶.

As to pay-TV, the Commission followed its past practice of not subdividing pay-TV services into analogue and digital transmission services, stating that digital services were an emerging market which would gradually replace analogue services¹⁷. In the context of digital television, however, the Commission drew a distinction between free-TV, pay-TV and interactive DTV (“iDTV”). In the Commission’s view, pay-TV and iDTV constitute two separate, but complimentary markets. Pay-TV is perceived as being “entertainment based”; iDTV is perceived as being “transactional” or as a source of information for the consumer. The Commission sees iDTV as an emerging market (e.g. in *BIB/Open* and in *BSkyB/Kirch Pay TV*¹⁸). It is, thus, mainly concerned

¹⁵ *Telia/Telenor*, Case IV/M.1439, Commission Decision of October 13, 1999, O.J. 2001 L040/1.

¹⁶ See, however, *MSG*, Case IV/M.469, Commission Decision of November 9, 1994, O.J. 1994 L364/1 and *Nordic Satellite Distribution*, Case IV/M.490, Commission Decision of July 19, 1995, O.J. 1995 C53/20, where the Commission found that cable was a market to be distinguished from satellite and terrestrial transmission. This approach has recently also been taken by the *Bundeskartellamt* in its *Liberty* decision of February 22, 2002 (B7-168/01), available at www.bundeskartellamt.de.

¹⁷ See also *TPS*, Case IV/M.36.237, Commission Decision of March 3, 1999, O.J. 1999 L90/6; *BSkyB/Kirch Pay-TV*, Case IV/JV.37, Commission Decision of March 21, 2000, O.J. 2000 C110/45.

¹⁸ *BiB (Open)*, Commission Decision of September 15, 1999, O.J. 1999 L312/1; *BSkyB/Kirch Pay TV*, Case IV/JV.37, Commission Decision of March 21, 2000, O.J. 2000 C110/45.

about whether a pay-TV operator could foreclose access to iDTV by requiring iDTV competitors to use its digital platforms.

Under the TV Standards Directive 95/47/EC¹⁹, providers of conditional access systems for digital television already have to offer access to their platforms on fair, reasonable and non-discriminatory terms. Article 6 of the new Access and Interconnection Directive confirms this obligation. A regular review of the regime is to be carried out by the national regulatory authorities for their respective national markets. As a result of this review, the existing obligations may be extended to new gateways, such as electronic programme guides (“EPGs”) and application programme interfaces (“APIs”).

(C) Open Standards

Open access needs to be distinguished from open standards. Open access only grants network capacity to the requesting provider. This capacity, however, is useless in a digital environment, if the requesting provider is not also granted access to the end-customer. Set-top-boxes serve as gate to the customer. Providers of the technical platform are thus gatekeepers with whom third parties have to deal when trying to reach the viewer.

The interoperability of applications on set-top-boxes can be achieved via common APIs. APIs serve as a binding link (middleware) between hardware and the (internal and external) software of the platform. However, a common API does not prevent a platform operator from using proprietary conditional access systems. The interoperability of competing technical platforms can be realized via common interfaces (“CIs”) in conditional access systems. Without a common API, interoperability between hardware and external software, and, without a CI, the interoperability of competing platforms, can be achieved only through licensing agreements between the gatekeeper and the requesting party.

In *BSkyB/Kirch Pay TV*²⁰, the Commission forced *Kirch* to implement the Multi Home Platform (“MHP”) interface, an API developed by the DVB Project and standardised by the European Telecommunications Standards Institute (“ETSI”) in the *d-box*. However, the Commission fell short of mandating a CI as well. Instead, the authority tried to achieve interoperability of the technical platforms through a commitment by *Kirch* to enter into simulcrypt agreements with other conditional access providers. The undertakings provided for a dispute resolution system to ensure that these agreements were entered into on fair and non-discriminatory terms. However, the latter condition failed since licensing proved to be too burdensome. First of all such a licensing regime creates additional costs for the competing pay-TV

¹⁹ Directive 95/47/EC of 24 October 1995 on the use of standards for the transmission of television signals, O.J. L281/51, 23.11.1995.

²⁰ *BSkyB/Kirch Pay TV*, Case IV/JV.37, Commission Decision of March 21, 2000, O.J. 2000 C110/45.

provider who needs to pay license fees in order to receive access to the CA-system. But even more importantly, such licensing regime forced competing pay-TV providers into a dependency vis-à-vis *BetaResearch* - which in return is controlled by their competitor *Kirch* who is a pay-TV operator himself and as such has every incentive to impose unfavourable conditions when negotiating the licensing agreements. Only a neutral and independent licensor could guarantee that licensing conditions are fair and non-discriminatory. No simulcrypt agreement was ever concluded.

In its statement of objections regarding *Deutsche Telekom/Beta Research*, the *Bundeskartellamt*, in January 2001, cited the Commission's *BSkyB/Kirch Pay TV* decision to justify its insistence on a CI. Licensing agreements had proven to be insufficient to guarantee the interoperability of competing technical platforms. Licensing agreements would only suffice, if the gatekeeper were independent and not linked to a content provider itself. In the case of *Kirch's BetaResearch* there was, in the authority's view, reason to believe that the company would use its gatekeeper position to hinder competition in the pay-TV market by discriminating against *Kirch's* competitors. The parties were not willing to agree to a CI and withdrew their notification.

The issue of open standards also played a major role in the *Liberty*²¹ decision rendered by the *Bundeskartellamt*. The authority condemned *Liberty's* goal of achieving the exclusive end-customer relationship through proprietary set-top-boxes as unduly restraining competition. *Liberty* argued against adopting open standards in its set-top-boxes because it would undermine network integrity. Statutory open access provisions would guarantee a competitive environment even in the absence of open standards. The *Bundeskartellamt* did not agree. Without open standards, the right to open access could not be realized by content providers either. Content providers would need to enter into simulcrypt agreements with *Liberty* in order to have access to its encryption system. The high cost of entering into these agreements could prevent content providers from claiming open access. By controlling the API, *Liberty* could furthermore - by means of a certification system - control all application software to be used on its set-top-boxes thereby discouraging third parties from developing new innovative services.

While the *Liberty* case was pending, *Fritz Pleitgen*, head of first German television *ARD*, claimed that under the new EU framework Multi Home Platform ("MHP") was mandated as a common API and would bring competition to the digital television platform. This is, however, not quite correct. While open access is regulated in great detail under European law, open standards for the transmission of TV-signals are still not mandated. The new Framework Directive requires Member States merely to encourage the use of a single open interoperable API by digital TV platform operators and equipment

²¹ *Liberty / KDG*, BKartA Decision of February 22, 2002 (B7-168/01), available at www.bundeskartellamt.de.

manufactures. However, within one year from the Directive's entry into force, the Commission may introduce further measures, including mandatory standards. Commissioner *Erkki Liikanen* has already indicated that he is determined to mandate MHP, a standard developed by the DVB Project and standardised by the European Telecommunications Standards Institute ("ETSI"), if interoperability is not achieved through industry-led initiatives.

Meanwhile, the Commission may, on a case by case basis, elect to impose open standards via merger control. Because of the experience in *BSkyB/Kirch Pay TV*²², the parties to a future pay-TV transaction will most likely face an uphill battle, unless they are prepared to accept not only open APIs but also a CI. This is certainly true for the *Bundeskartellamt* in Germany, but in all likelihood it is also true for a notification with the Commission.

(iii) Unbundled Access to the Local Loop

Access to the last mile is still considered to be the least competitive segment of the liberalised telecommunications market. Unbundled access to the local loop is, therefore, at the top of the Commission's regulatory agenda at the moment, in particular with regard to broadband services.

(A) Local Loop Regulation No. 2887/2000

Regulation No. 2887/2000 on unbundled access to the local loop, already adopted in December 2000, provides for the unbundling of the local loop, either in the form of full unbundling or of shared access²³. The Regulation's provisions will be incorporated in the new Access and Interconnection Directive, providing an annexed list of items to be included in the offer for sufficiently unbundled access under conditions that are transparent, fair and non-discriminatory and on the basis of cost orientation, identical to that contained in the Regulation. Article 2 (a) of the new Access and Interconnection Directive makes it clear that any definition of access should also encompass local loop unbundling and facilities and services necessary to provide services over the local loop.

Already in its Seventh Implementation Report of 2001²⁴, the Commission found the results of the Local Loop Regulation to be unsatisfactory. An external study published in September 2001, reflecting and summarizing the views of new entrants, confirmed these conclusions and identified mainly tariff and cost related as well as behavioural problems as reason for the slow progress in unbundling the local loop. The Commission tackled these issues on two different

²² *BSkyB/Kirch Pay TV*, Case IV/JV.37, Commission Decision of March 21, 2000, O.J. 2000 C110/45.

²³ Regulation No. 2887/2000 on unbundled access to the local loop of 18 December 2000, O.J. L336/4 of 30.12.2000.

²⁴ Communication from the Commission, Seventh Report on the Implementation of the Telecommunications Regulatory Package, COM (2001) 706. Meanwhile, on 3 December 2002, the Eighth Implementation Report has been published, COM (2002) 695.

tracks. First, it used sector-specific regulation by launching infringement proceedings against a number of Member States for failure to implement the Local Loop Regulation. Secondly, it applied general competition rules by taking action against several incumbents whose behaviour could, in the view of the Commission, be equated with an abuse of a dominant position.

(B) Infringement Proceedings

In December 2001, the Commission introduced infringement proceedings against Germany, Greece and Portugal to allow competitors to “share” the respective incumbent’s local loop, in particular with regard to the provision of DSL-services. The Commission is concerned that incumbents continue to promote their own DSL-services over their local access networks thereby preventing competitors from offering broadband as well. A recent study has shown that in only two Member States (Denmark and the UK) new entrants had a comparable number of high-speed Internet access lines competing with the offering of the incumbent. In seven Member States (Belgium, Germany, France, Luxembourg, the Netherlands, Portugal and Sweden) the incumbent currently holds virtually all DSL-connections. The Commission has already closed the cases against Greece and Portugal after both states took the appropriate remedies. The Commission is currently considering closing the case against Germany as well. In Germany, until recently, neither wholesale DSL nor shared access was offered. However, on 15 March 2002, the German regulatory authority approved the prices *Deutsche Telekom* may charge for shared access.

In March 2002, the Commission opened a second infringement proceeding against Germany, France, Ireland, the Netherlands and Portugal. The five Member States have allegedly not taken adequate steps to ensure that the incumbent’s reference offer for unbundled access to the local loop is complete and sufficiently unbundled, particularly in relation to local sub-loops. With respect to Germany, the Commission is currently considering closing this case as well. On 13 March 2002, the German regulatory authority published a reference unbundling offer.

1.2 Revision of TV without Frontiers Directive

(a) Relationship to the new regulatory framework for electronic communications

As already set out, EU regulation in communications continues to differentiate between the regulation of transmission and the regulation of content. The regulation of transmission is covered by the new framework. The regulation of audiovisual content falls mainly within the (cultural) competence of the Member States. On EU-level audiovisual content is only regulated by the Television without Frontiers Directive. This Directive is currently under review. The goal of the revision must be to address issues left open by the new regulatory framework due to the distinction between transmission and content regulation. However, audiovisual content has proven to be a very difficult area for EU legislation due to a conflict of competence

between the EU and Member States. Therefore, it is not realistic to expect the revision of the TV without Frontiers Directive to solve all remaining issues.

(b) Current scope

The current scope of the Television without Frontiers Directive includes rules on advertising, sponsoring, quota, and protection of minors. Furthermore, a provision introduced in 1997 in the wake of pay-TV allows national measures to exploit TV-rights for events of particular importance to the public. This means that some listed events may not be offered in an encrypted way. The Directive does not contain any media concentration rules. Due to the conflict of competence, the 1992 Green Paper on media ownership and the 1994 proposal of a media merger control Directive remained inconclusive. Thus, a European answer to the current changes regarding media ownership in the US seems highly unlikely.

(c) Status of reform

The Commission is about to start a public consultation proceeding based on an implementation report which was published on 6 January 2003²⁵. This report includes a detailed work programme covering all the main areas of the Directive and discussing studies commissioned by the Commission early 2002:

- *Study on the application of the rules of the Directive "Television without Frontiers" (advertising etc.) in the Member states;*
- *Study on the rating practice used for audiovisual works in the European Union; and*
- *Study on the economic and financial aspects of the film industry.*

Based on the results of the public consultation, the Commission intends to submit a proposal for a revised TV without Frontiers Directive by the end of 2003. It seems at the moment that the Commission is reluctant to undertake a fundamental reform of the Directive.²⁶ The European Parliament, however, wants to have the following major issues covered by an amended Television Without Frontiers Directive:

- Webcasting on the Internet;
- Streaming video;
- Decoders (MHP);
- EPGs and APIs;
- Intellectual property (esp. digital private copying and caching).

²⁵ Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 89/552/EEC "Television without Frontiers", COM(2002) 778 final.

²⁶ On the status of the review process see also Financial Times of November 18, 2002.

(d) Content Regulation in the Digital Age

The Television without Frontiers Directive contains several controversial provisions, in particular, Articles 4 and 5 that aim to promote the distribution and production of European television programmes (“quotas”).

Article 4 states that Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time. Article 5 states that Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, or at least 10% of their programming budget, for European works created by producers who are independent of broadcasters.

These European content requirements have given rise to substantial controversy both within and outside the European Union. One of the most controversial issues being discussed as part of the review process is the enforceability of quota provisions in a digital environment. Digital television opens up the possibility of a vast increase in the number of channels available. It will, therefore, become increasingly difficult for regulators to review each broadcaster’s performance especially if the new channels are not distributed evenly throughout the EC. In addition, the review system set up under the Directive may come under pressure because in a converging communications environment, the boundaries between different types of services (for example telecommunications and broadcasting) are becoming blurred, making it more difficult to identify the appropriate scheme of regulation.²⁷

It has been suggested that the quota provisions’ aim of protecting and stimulating European culture may be better served by a system that imposes certain content requirements on a limited number of broadcasters which, in return, are entitled to receive compensation for providing programming that reflects and represents a diverse range of cultural, social and political concerns in the European Union. In fact, if there is a need for such protective regulation at all, a “European public service obligation” may be the better means in order to achieve the declared goal of cultural diversity. In its work programme, the Commission has earmarked the European content provisions for review, but mainly with a view to fleshing them out²⁸. The Commission’s current view is that “this part of the Television without Frontiers Directive is operating effectively”²⁹.

2. OPEN ACCESS UNDER GENERAL COMPETITION LAW

Even if after the revision of the Television Without Frontiers Directive gaps should remain, competition law enforcement is a powerful tool in the hand of the Commission. The significance of general competition law will further increase since the new EU Regulatory

²⁷ For information on DTV in the United States see *Rosenthal*, Der aktuelle Rechtsrahmen für digitales Fernsehen in den USA, RTKom 3/2000, p. 182. See also *Rosenthal*, Neue Antworten auf Fragen der Konvergenz, TMR 3/2002, p. 181.

²⁸ See Press Release IP/03/6 of 7 January 2003.

²⁹ *Ibid.*

Framework for Electronic Communications aims to make competition rules the prime instrument for regulating the electronic communications markets.³⁰

2.1 Open Access under Article 82 of the EC-Treaty

Acting under Article 82 of the EC-Treaty, the Commission is competent to review the conditions under which operators are granting access to their networks. For example, in May 2002, the Commission sent *Deutsche Telekom* a statement of objections claiming that the German incumbent has abused its dominant position through unfair pricing regarding the provision of access to its local loop³¹. The Commission has also opened proceedings in France against *Wanadoo's* ADSL tariffs and in the Netherlands against *KPN's* mobile termination rates.

(a) The *Deutsche Telekom* Case

The Commission, launching its investigation after having received complaints from *Arcor* and regional and local carriers in Germany, is concerned about *Deutsche Telekom's* practice of charging new entrants higher fees for wholesale access to the local loop than what *Deutsche Telekom's* subscribers pay for retail access.

In Germany, where local loop unbundling has been mandated by the *Telekommunikationsgesetz* since 1998, tariffs for access to the local loop are, however, subject to German price regulation. This is true for both levels at which *Deutsche Telekom* offers access to its local loop. First, *Deutsche Telekom's* retail subscriptions to end customers are subject to a price cap procedure. Second, *Deutsche Telekom's* prices for wholesale local loop access for competitors is subject to so-called single price regulation, i.e. each price *Deutsche Telekom* wants to charge its competitors for rental of its local loop needs to be approved by the German regulator *Regulierungsbehörde für Telekommunikation und Post* ("RegTP").

Deutsche Telekom rejected the charges and told the Commission to address any queries to RegTP in an infringement proceeding against Germany. It could not be blamed for the shortcomings of German price regulation, which lay with the German regulator alone³². However, what *Deutsche Telekom* did not mention is that RegTP has so far never been able to establish the price in relation to the efficient provision of the local loop access service as mandated under German price regulation. Because *Deutsche Telekom* never provided sufficient factual cost information, RegTP, instead, had to use ancillary means such as benchmarking or analytical cost models. This behaviour makes it now questionable whether *Deutsche Telekom* is right to point to the German regulator as being responsible for German prices for access to the local loop.

³⁰ In Germany, *Arne Börnsen*, former Vice-President of RegTP, has recently suggested to let the sector-specific regulation of telecommunications expire by 2010. This expiration date should be inserted in the German Telecommunications Act which, in 2003, needs to be overhauled in order to implement the requirements of the new EU Regulatory Framework for Electronic Communications. F.A.Z. of 6 January 2003, p. 11.

³¹ See Press Release IP/02/348 of 1 March 2002.

³² See Press Coverage of 8 May 2002, available at www.eubusiness.com.

(b) The *Wanadoo* Case

In connection with its ongoing sectoral investigation into the local loop and DSL services, the Commission, in December 2001, also opened proceedings *ex officio* into high-speed internet access services (*Pack X-Tense* and *Wanadoo ADSL*) marketed by *Wanadoo*³³. The Commission alleges that the retail prices charged by *Wanadoo* for these two services are below cost.

The Commission, in this case, may find a violation of Article 82 of the EC-Treaty for so-called predatory pricing, often defined as pricing below average or marginal cost. There is, however, debate as to the exact requirements for establishing such violation since predatory pricing is not easily distinguished from normal price competition. This is particularly true in emerging markets such as the high-speed Internet access market. The European Court of Justice has held that in order to establish predatory pricing it is necessary to show that the company is selling (i) at below average total cost and (ii) with the intention of eliminating a competitor³⁴.

The Commission found that *Wanadoo's* high market share on the high-speed Internet access market for residential customers³⁵ had two consequences, namely marginalizing other Internet access suppliers and allowing *France Telecom* (its ultimate parent company) to extend widely over the range of ADSL services by including its *ADSL Netissimo* service with *Wanadoo's* ADSL Pack. The Commission is concerned that as a result, alternative telecommunications operators who, by taking advantage of local loop unbundling, might wish to offer ADSL services comparable to those of *France Telecom* would find themselves up against an incumbent in a firmly entrenched position, limiting their own potential for growth.

As a result of reductions in *France Telecom's* charges for intermediate services, the rate of cover of the costs of *Pack X-Tense* and *Wanadoo ADSL* improved in August 2001, and presumably again in October 2002. It would appear that the Commission's goal of putting an end to the alleged predatory pricing has thus been achieved. However, the Commission may still find an infringement for the past.

(c) The *KPN* Case

Following a complaint by *MCI WorldCom* ("*WorldCom*"), the Commission, in March 2002, sent a statement of objections to Dutch incumbent telecommunications operator *Koninklijke KPN NV* ("*KPN*") alleging that *KPN*, through its subsidiaries *KPN Mobile* (mobile traffic) and *KPN Telecom* (fixed traffic), was abusing its dominant position regarding the termination of telephone calls on the *KPN* mobile network through discriminatory or otherwise unfair behaviour³⁶.

³³ See Press Release IP/01/1899 of 21 December 2001.

³⁴ See ECJ, case C-62/86 (*AKZO v. Commission*) [1991] ECR I-3359. In contrast, the US Supreme Court has developed a two-pronged test under Section 2 of the Sherman Act: (i) plaintiff must prove below-cost pricing by defendant; and (ii) defendant must have a dangerous probability of recouping the money it lost on below-cost pricing. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578 (1993).

³⁵ *Wanadoo* was found by the Commission to be way ahead of its rivals on the high-speed Internet access market for residential customers. At end-November 2001, *Wanadoo* had a near-60% share of the French market (including Internet access by cable modem), and over 90% of ADSL Internet access.

³⁶ See Press Release IP/02/483 of 27 March 2002.

WorldCom, a US-based fixed telecommunications network operator, had complained to the Commission about the high cost of terminating fixed calls on *KPN's* mobile network³⁷. The problem of expensive fixed termination costs in the Dutch market was compounded by the fact that only *KPN* had direct interconnection with the mobile networks in the Netherlands. A direct interconnection agreement offer had been made extended to *KPN's* competitors at the end of 2000 but was rejected due to unacceptable terms. However, the absence of direct interconnection significantly reduces the scope of services that *WorldCom* and other operators can offer to their customers.

The Commission, in its statement of objections, reached the preliminary conclusion that *KPN Mobile's* public mobile telecommunications network constitutes a separate product/service market and that³⁸, in this market, *KPN Mobile* held a dominant position for the termination of calls on its network. The Commission alleged that *KPN* was abusing its dominant position in the market for the termination of calls on its network based on (i) *KPN Mobile's* discrimination in offering direct termination terms favouring *KPN Telecom*; (ii) unfair pricing practices amounting to a margin squeeze between *KPN Mobile's* wholesale terminating services offered to other network operators and the retail prices of *KPN Mobile/Telecom* for certain mobile/fixed services offered to business customers in The Netherlands; and (iii) refusal by *KPN Mobile* to provide direct interconnection for call termination on its network.

2.2 Open Access under European Merger Control

Over the last years, the Commission has increasingly often imposed remedies of a regulatory nature, such as open access to networks and content, local loop unbundling or even legal separation, as conditions for clearance of mergers which seems to go beyond the resolution of the competition concerns raised by the particular transaction under review and, therefore, raises competence concerns.

Such a regulatory approach to competition has mainly been used in cases involving vertical integration. In general, the Commission's major concerns regarding vertical mergers bringing together content and delivery systems under single ownership are (i) to ensure third party access to infrastructure and content (for example in *Vizzavi*³⁹ and *Vivendi/Canal+/Seagram*⁴⁰); (ii) to avoid the strengthening or the creation of a gatekeeper position (for example in *Vizzavi*, *AOL/Time Warner*⁴¹ and *BSkyB/Kirch PayTV*⁴²); (iii) to

³⁷ It was reported on 27 March 2002 that in the near future the European Commission is to introduce new rules, which will enable national regulatory authorities (NRAs) to force mobile phone operators to reduce the price of their calls. It is believed the new rules are being introduced to combat the excessive price being charged to fixed line operators for calls terminating on a mobile operator's network (*Financial Times*, 27/03/02).

³⁸ This position is highly contested in the industry but has been confirmed in the Commission's current draft recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC on a common regulatory framework for electronic communication networks and services.

³⁹ *Vodafone/Vivendi/Canal+*, Case COMP/JV.48, Commission Decision of July 07, 2000 (not published). See Commission Press Release IP/00/821 of July 24, 2000.

⁴⁰ *Vivendi/Canal+/Seagram*, Case IV/M.2050, Commission Decision of October 13, 2000, O.J. C311/3.

⁴¹ *AOL/Time Warner*, Case IV/M.1845, Commission Decision of October 11, 2000, O.J. 2001 L268/28.

⁴² *BSkyB/Kirch Pay TV*, Case COMP/JV.37, Commission Decision of March 21, 2000, O.J. 2000 C110/45.

avoid the leverage of market power, especially into new emerging markets (for example in *BSkyB/Kirch PayTV*; *AOL/Time Warner*; and *Vivendi/Canal+/Seagram*⁴³); and (iv) to avoid the exploitation of network effects to the disadvantage of competitors and consumers (for example in *Vizzavi* and *AOL/Time Warner*).

(a) Open access to networks

(i) Wireline networks

In *Telia/Telenor*⁴⁴, the transaction concerned the acquisition of joint control by the Swedish and Norwegian governments of a new company created to hold the shares of Telia AB and Telenor AS. Both incumbents are active across the full range of telephony and related services as well as in retail distribution of TV services and related markets in their respective countries. The Commission imposed, inter alia, a condition that the parties had to grant competitors unbundled access to their respective local access networks. For this purpose, the Swedish and Norwegian governments committed to implement a set of measures to introduce local loop unbundling in both countries⁴⁵. As a result of disagreements between the parties, the transaction was abandoned subsequent to the Commission's decision.

In *Telia/Sonera*⁴⁶, the parties to the transaction committed to grant non-discriminatory access to their fixed and mobile network services as well as to their international wholesale roaming services in Sweden and Finland. In this case, unlike in *Telia/Telenor*, the open access obligations as behavioural remedy were only considered to be sufficient by the Commission because they were "backed" by a structural remedy leading to the legal separation of the merged entity's activities. *Telia* committed to divest its cable network in Sweden and to create separate legal entities for its fixed and mobile network and services in both Sweden and Finland. The Commission, in its decision, considered cable to be the most credible substitute for the local loop infrastructure of the incumbents. The acquirer of *Telia's* cable network could thus - upon the upgrade of the cable network - offer triple play services, i.e. the provision of high speed Internet access, TV and telephony, in competition with the merged entity's services over the traditional telephone line.

(ii) Wireless networks

The Commission imposed open access obligations on wireless networks for the first time in its *Vodafone/Mannesmann* decision of April 2000⁴⁷. In this case,

⁴³ *Vivendi/Canal+/ Seagram*, Case IV/M.2050, Commission Decision of October 13, 2000, O.J. C311/3.

⁴⁴ *Telia/Telenor*, Case IV/M.1439, Commission Decision of October 13, 1999, O.J. 2001 L040/1.

⁴⁵ It is interesting to note that in this case the Commission found shortcomings of the regulatory regimes in Sweden and Norway, such as no mandatory local loop unbundling and *ex post* instead of *ex ante* price regulation regarding interconnection charges. As to the relationship between sector specific regulation and general competition rules, the Commission underlined, however, that even if the regulatory systems were effective, regulation could not be expected to address the structural competition problems raised by the merger, i.e. to prevent the creation and/or strengthening of a dominant position.

⁴⁶ *Telia/Sonera*, Case COMP/M.2803, Commission Decision of July 10, 2002, O.J. 2002 C201/19.

⁴⁷ *Vodafone/AirTouch*, Case IV/M.1430, Commission Decision of May 21, 1999, O.J. 1999 C295/2.

the Commission found a market for seamless pan-European mobile telephony services, on which the merged entity would have been in a unique position to build an integrated network of advanced telecommunication services across the common market. This would, in the view of the Commission, have enabled the merged entity to overcome the technical and commercial barriers to providing advanced seamless services on a large scale, while it would have been highly unlikely that third parties could have replicated (contractually or by merger) a similar network in the short or medium term. Other mobile operators simply could not have offered similar services because of the segmentation of the existing networks and the difficulties in integrating them into a seamless integrated network. Competitors would thus, if they were allowed access to the merged entity's network at all, have to face significant costs and performance/quality disadvantages given their dependency on the new entity in order to offer equivalent pan-European services. Third parties would also have needed access to the merged entity's network to be able to locate their own customers and to provide their advanced services to their subscribers when they were in the merged entity's network. The merged entity would, therefore, have had the ability either to refuse access to its network or to allow access on terms which would have made it impossible for its competitors to compete. The Commission concluded, therefore, that the concentration would have led to the creation of a dominant position on this particular market.

To remedy the Commission's concern related to third parties' access, *Vodafone* submitted a set of undertakings, such as a prohibition on exclusive roaming agreements, third party open access to roaming agreements, third party open access to wholesale arrangements, open standards and the provision of SIM-cards to override preferred roaming arrangements. The undertakings were tailored to allow *Vodafone's* competitors to provide pan-European advanced seamless services to their customers - by using *Vodafone's* integrated network. This regulatory remedy - valid for a period of three years - was not only crucial for achieving clearance of the *Mannesmann* takeover but also for *Vodafone's* subsequent acquisitions of European mobile operators which were cleared by the Commission under reference to the *Mannesmann* undertakings⁴⁸.

(iii) Cable networks

Open access to cable networks has not yet been mandated by the Commission. In *AOL/Time Warner*⁴⁹, open access was not imposed by the Commission, but rather by the US authorities. As already discussed, in Europe, opening DSL, rather than cable, is the focus of regulatory attention. However, cable will become much more important once the old network has been upgraded to a multifunctional broadband platform. Given that the new regulatory framework and the future TV without Frontiers Directive may well leave significant gaps in the regulation of open access for ISPs and TV-programmers, it is not

⁴⁸ See Commission Decisions *Vodafone Group Plc/Eircell*, Case IV/M.2305 Commission Decision of March 2, 2001, O.J. 2001 C128/3; *Vodafone/Airtel*, Case IV/M.2469, Commission Decision of June 26, 2001, O.J. 2001 C207/9.

⁴⁹ *AOL/Time Warner*, Case IV/M.1845, Commission Decision of October 11, 2000, O.J. 2001 L268/28.

excluded that the Commission will follow the example of the US authorities and impose open access obligations on a case-by-case basis⁵⁰.

(b) Open access to content

The Commission emphasizes the “new critical role of access to content for the development of the converging telecom – Internet – media markets”. Access to content is regarded as a new bottleneck.

(i) *Vivendi/Canal+/Seagram*

In *Vivendi/Canal+/Seagram*⁵¹, the Commission was concerned about the anticompetitive effects of the acquisition of *Seagram* by *Vivendi* with respect to (i) an emerging pan-European market for portals providing WAP-based Internet access and (ii) the emerging market for online music (resulting from the addition of Universal’s music content to *Vivendi*’s multi-access portal (*Vizzavi*)). *Vivendi* first offered an undertaking not to discriminate for a period of two years in favour of *Vizzavi* in the supply of music on the Internet. This undertaking was rejected by the Commission as purely behavioural and too short in duration. Instead, the Commission required more elaborate third party access to *Universal*’s music content on a non-discriminatory basis for five years. In addition, to address concerns in the Pay-TV market, the parties committed to have *Universal* license no more than 50% of its films to *Canal+* and to divest its stake in *BSkyB*.

(ii) *AOL/Time Warner*

Further important decisions on (vertical) integration of content and delivery systems include *AOL/Time Warner*⁵². In *AOL/Time Warner*, the Commission’s concern was that the merged group could leverage AOL’s Internet distribution strength in the US and the combined group’s music library to impose proprietary technology for downloading and streaming music on the Internet. In order to remedy this situation, the Commission required the dismantling of the *Bertelsmann/AOL* joint venture as a condition for clearance. While the Commission was concerned about the vertical integration leading the merged entity to set excessive access prices to unaffiliated content providers, it did not raise concerns about the Internet broadband access market and open access of unaffiliated Internet service providers to the new entities’ distribution facilities, since neither AOL nor Time Warner owned transmission infrastructure in Europe.

⁵⁰ Please note, however, that the *FCC* has meanwhile initiated proceedings to establish a coherent broadband policy (see above footnote 11). In its Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, available at <www.fcc.gov>, the *FCC* has classified cable modem services, i.e. broadband services delivered via cable, as information services (and not as telecommunications services), thereby ending a controversial discussion on the regulatory classification of these services. For information on this discussion see *Rosenthal*, Open Access of Internet Service Providers to the Cable Operators’ Facilities in the United States, International Journal of Communications Law and Policy, Issue 6, Winter 2000/2001, available at www.ijclp.org.

⁵¹ *Vivendi/Canal+/Seagram*, Case IV/M.2050, Commission Decision of October 13, 2000, O.J. 2000 C311/3.

⁵² *AOL/Time Warner*, Case IV/M.1845, Commission Decision of October 11, 2000, O.J. 2001 L268/28.

(iii) *Vizzavi*

In *Vizzavi*⁵³, the Commission was concerned about the anticompetitive effects following from the creation of the *Vizzavi* multi-access Internet portal joint venture between *Vodafone*, *Vivendi* and *Canal+* with respect to (i) developing national markets for TV-based Internet portals and (ii) developing national and pan-European markets for mobile phone-based Internet portals. In order to address this problem the Commission required third party access to the parties' pay-TV and mobile facilities on a non-discriminatory basis so that consumers could choose their content provider independently of their access provider. The undertakings would ensure that the current competitive model of Internet services pursuant to which consumers can choose their content provider regardless of their access provider is carried over into the emerging markets of Internet provision via mobile phones and televisions. The agreed undertakings allow consumers to access third party portals, to change the default portal themselves, or to authorise a third party portal operator to change the default setting for them.

⁵³ *Vodafone/Vivendi/Canal+*, Case COMP/JV.48, Commission Decision of July 07, 2000.

3. CONCLUSION

The European Union hopes to solve new issues of open access to converged networks by means of the recently adopted Regulatory Framework for Electronic Communications. However, since the new framework only covers communications networks and services but not content, difficult regulatory issues will inevitably remain.

It is unlikely that the pending revision of the Television without Frontiers Directive will “fill the gaps” arising from this regulatory distinction. The existing conflict of competence between the EU and the Member States in the field of audiovisual content will make any coherent European approach very hard to achieve.

However, even if gaps remain, competition law enforcement is a powerful tool that can be used by the Commission to impose open access obligations, in particular as regulatory remedies in merger cases. The Commission has made use of this tool in the past and is determined to do so in the future when competition rules become even more important due to the gradual phase-out of sector-specific regulation mandated by the new EU Regulatory Framework for Electronic Communications.

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