EU competition policy and market power control in the mediamatics era

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Abstract

This paper addresses the controversial subject of convergence in the communications sector and analyzes its regulatory implications for European competition policy with special emphasis on market power control. We start with a brief description of the changed societal communications system of the information society, called mediamatics (media and telematics). We will then turn to the analysis of competition policy and market power issues, applying an integrated mediamatics approach. First, we highlight some major characteristics of the European competition policy framework. Subsequently, our analysis concentrates on the challenges posed by convergence and we offer some conclusions regarding the reform of these policy fields. © 2000 Elsevier Science Ltd. All rights reserved.

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1. Convergence and the rise of mediamatics

From a historical-analytical perspective, the electronic communications sector emerged subdivided into telecommunications and broadcasting (mass media), involving different major players and regulatory models. Since the 1980s, it has been possible to observe two convergence stages which have led to the blurring of traditional boundaries and to far-reaching changes in the traditional setting of the communications sector (see Fig. 1):¹

(1) the convergence of telecommunications with computers (informatics) toward telematics (Nora & Minc, 1978), and

¹ For a detailed analysis of the convergence phenomenon and the changed communications system see Latzer (1997a, b).
(2) the convergence of electronic mass media (broadcasting) with telematics toward mediamatics.

Digital technology, first established in the computer sector, can be considered as the major link between the diverse subsectors of communications. The first convergence stage toward telematics was marked by the liberalization trend in Europe. The European Commission has acquired increasing relevance and influence in the course of this transformation. In 1987, it published its Green Paper on the Development of the Common Market for Telecommunications Services and Equipment (COM (87) 290), followed by various directives promoting the harmonization of activities within Europe. This process eventually resulted in the full liberalization of the European telecommunications market, formally completed in 1998.

In this paper we focus on the second stage of convergence toward mediamatics. Indicators of the convergence trend can be observed at the technical, functional and corporate levels: digitalization of telecommunications and the media sector provides a common technological basis allowing cross-sectoral combinations, mixes and substitutions of content, distribution channels and equipment. At the functional level, the traditional separation – telecommunication services for commercial communications, broadcasting for entertainment – disappears with the emergence of services that combine attributes of both patterns (the so-called “hybrid” services, e.g. audiotex). At the corporate level, the traditionally separated industry structure is facing a challenge from increasing dual manufacture, cross-ownership and cross-provision of services, leading to corporate convergence of the telecommunications, broadcasting and information technology industries. The Internet and digital TV are excellent examples of a converged communications sector.

The major policy problems and challenges thrown up by the convergence trend result from the following: the industry has already entered the mediamatics era while the policy makers still remain anchored in the traditional separation between telecommunications and media (audiovisual). Hence,
the current developments are no longer compatible either with the traditional categorizations and analytical frameworks or with the separated institutions and regulatory models characteristic of current policies. We can no longer assume that the criteria used to categorize the new services are objective, since they were defined to respond to a reality that no longer exists. This leads to arbitrary decision-making produced by an excessive reliance on inappropriate categorizations, and this in turn renders policy vulnerable to interest-driven tactics. Such a state of affairs gives rise to unnecessary conflict, as inapplicable categorizations are combined with divergent regulations, producing contradictory preconditions for market development. The consequences of all the above are a growing legal uncertainty, reduction of the margins of predictability in company planning, and hence increasing investment risks which hamper the smooth development of mediamatics markets. Altogether, this situation is leading to growing policy problems—especially with regard to regulatory policies.

As a general approach towards the search for possible solutions to the current convergence problems, it seems all too obvious that it is necessary to propose an institutional integration of telecommunications and media regulations—both at the organizational level (regulator) and at the level of norms (laws). Arguments in favor of integration, such as the better usage of synergies between telecommunications and broadcasting regulation, or the reduction of transaction costs, etc., far outweigh the counter-arguments, such as those warning of the danger of increased concentrations of power and the overburdening of organizations. It should be stressed that this approach to the understanding and management of convergence problems still leaves a wide variety of specific reforms regarding the organizational structure of regulatory commissions and communication laws open to debate. Integration strategies range from coordination to fusion. Nevertheless, a common denominator may be found inasmuch as the traditional telecommunications-broadcasting dichotomy, based on technical/infrastructure distinctions and on a category separation between mass and individual communication, is being replaced by functional distinctions. One option for an institutional change in the regulatory approach might be to separate economic/social regulation from content regulation for the whole mediamatics sector irrespective of the old distinction between broadcasting and telecommunications. This solution would allow many different variations in the organizational structure of regulatory bodies. An appropriate detailed reform has to be elaborated at national level, taking into account the difference among the various starting positions regarding: the separation of responsibilities for media and telecommunications policy between the federal, state and community level; the legal system in general; the performance of existing regulatory institutions, etc. In any event, the new regulatory model will have to overcome the problems of pressing the new services into a framework which no longer reflects market reality.

2. Market power and competition policies in the mediamatics era

This convergence trend calls for a reform aimed at establishing a future-oriented policy model for the mediamatics sector, one that is on the one hand, integrated so as to overcome the traditional...

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4 For a detailed outline of an integrated regulatory model see Latzer (1997a, Chapter 6).
5 For a discussion of pros and cons of an integrated approach to mediamatics regulation see Latzer (1997a, b).
telecommunications-broadcasting (media)-dichotomy, and, on the other hand, dynamic so as to cope with the fast-changing technological and economic conditions in upcoming markets.\textsuperscript{6} We will now take a closer look at an important and contentious aspect of communications policy – the control of market power, an integral part of competition policy. The aim is to identify the challenges posed by convergence and to analyze possible elements of reform toward a future-oriented mediamatics policy in this area.\textsuperscript{7}

Competition policy has received increased attention in Europe especially by virtue of the liberalization process set in motion a decade ago. The central issue in a liberalized telecommunications environment is whether competition regulation will be sufficient per se, or if there still is the need for sector-specific regulation, e.g. asymmetric regulations for dominant operators. In this analysis, we will not focus on the asymmetric regulation caused by convergence, but rather concentrate on the new challenges it poses to the existing system of general and sector-specific competition policy for the convergent mediamatics sector.

In response to the growth of convergence and globalization combined with the thrust of liberalization, a growing number of calls are being heard for a uniform, general competition policy, applicable to all sectors. Both the importance and necessity of a reform of competition policy are becoming increasingly apparent. This was also manifested by the Green Paper on Convergence (COM (97) 623) and by the results of the two-stage public consultation process that followed its adoption. The question also received special attention in the 1999 Review of Communications Legislation (COM (99) 539). One of the key messages emerging from the 1999 Review is the acknowledgement of the need for greater reliance on the general competition rules of the Treaty and a phasing out of sectoral rules as competition becomes effective. The 1999 Review mainly draws conclusions both from the liberalization and convergence debates, and hence makes the key proposal of a single/integrated regulatory framework for communications infrastructure and associated services.

In the media sector in particular, many doubts have been raised regarding the termination of sector-specific rules and the sole application of competition law. Nonetheless, it appears that media cases do receive a high degree of attention within the general EU competition framework, as indicated by the prevention of particular mergers/takeovers.\textsuperscript{8} Since the European Merger Regulation (Council Regulation (EEC) No. 4064/89) became effective in 1990, from a total of more than 1100 final cases only 11 takeovers have been prohibited. Remarkably, five of these were in the media/communications sector – an indicator of the sensitivity of this sector.\textsuperscript{9}

2.1. The EU competition policy framework

Competition policy is one of the few policy fields in which the European Commission has direct decision-making power and is not subject to approval by the Council of Ministers or the European

\textsuperscript{6} For a detailed argumentation see Latzer (1997a, b).
\textsuperscript{7} For the analysis of another policy field in the light of convergence, the universal services policy, and the outline of an integrated mediamatics policy model for this area see Latzer (2000).
\textsuperscript{8} For information on the development of merger cases in the telecommunications/sector subject to this regulation see the appendix.
Parliament. Within the Commission, the Competition Directorate-General is responsible for competition policy, its role being to establish and implement a coherent competition policy for the European Union ensuring that competition in the Common Market is fostered and not distorted.

The fact that the Commission may act in the competition policy area as “policeman, prosecutor, judge, jury and prison warden” (Allen, 1996, p. 157) has lent increased support to proposals for institutional reform toward an independent competition agency, a European Cartel Office (ECO). The rationale underlying this idea is to protect competition policy by removing it from the direct control of the Commission and therefore make it less vulnerable to political compromise and to opposition from within member states. The lack of transparency and the failure of subsidiarity have also been major causes of concern leading to the idea of establishing an ECO (Wolf, 1999). The German authorities, mainly the Bundeskartellamt (Federal Cartel Office) and the Federal Economics Ministry, have been pushing for this institutional reform with the aim of reproducing the German system of competition policy at the European level (Wilks & McGowan, 1995).

The primary provisions governing competition throughout the European Union are Articles 81–86 of the Treaty. Among these, Articles 81 and 82, governing cartels and abuse of dominant positions within the Common Market, respectively, are considered the most important. The primary provisions governing competition throughout the European Union are Articles 81–86 of the Treaty. Among these, Articles 81 and 82, governing cartels and abuse of dominant positions within the Common Market, respectively, are considered the most important.10

A fundamental change in European Union competition law was made with the enforcement of the Merger Control Regulation, which principally ends competing jurisdictional responsibilities. Accordingly, it is no longer possible for two or more authorities to have jurisdiction over a merger case with a community dimension.11 This entered into force in September 1990 and was amended in 199812 to cover mergers with lower turnover than was previously the case. The main objective of this regulation is the effective monitoring of all concentrations from the point of view of their effects on the structure of competition within the European Union. It is aimed at facilitating the preservation and development of effective competition in the single European market. Before this regulation came into effect, transnational mergers were subject to national competition laws, sometimes with more than one national law being applicable and responsibility being spread over various different authorities.13

The above-mentioned articles 81 and 82 and the Merger Control Regulation are fully applicable to both sectors (telecommunications and broadcasting). They contain no media-specific or telecommunications-specific competition rules, whereas cartel acts in some member states do contain special provisions for the media sector.14 For example, some national competition laws include

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10 The competition rules apply both to private companies and governments of the member states. Article 86, for example, relates to public undertakings and Art. 87–89 to state aid.
11 Whether a merger has a community dimension depends on the turnover of all companies concerned (Art. 1). Nonetheless, according to Arts 9 and 21 (3) of the Merger Control Regulation, a member state can require a referral/partial referral on economic/competition grounds or to safeguard certain national interests.
13 Further, one has to bear in mind that within the Commission a wide range of other Directorates-General are concerned with media ownership questions, pursuing different aims and objectives in their respective actions regarding the media ownership issue, among which are External Relations Directorate-General, Education and Culture Directorate-General, Information Society Directorate-General and Internal Market Directorate-General.
14 While the media is not generally the biggest sector in an economy in terms of turnover, its acknowledged public-opinion-forming power and its democratic function are far greater than its turnover might suggest at face value. It is therefore assumed that the media sector should be given special treatment due to its democratic function within a society. Some national cartel laws try to deal with the above-mentioned criteria by multiplying the turnover so that media mergers that would otherwise not be subject to merger control regulation are still covered.
special multiplier-factors for turnover calculation of media companies. Further, there are no special provisions for telecommunications in national cartel laws. Nonetheless, the telecommunications sector is characterized by uniform and manifold sector-specific competition rules (EU directives and national laws) resulting from concerted action by the European Commission to promote the liberalization of telecommunication markets. The special provisions governing competition in national sector-specific telecommunications laws are thus the result of the transposition of EU directives into national law.

2.1.1. A vague concept: the plurality of the media

The EU Merger Control Regulation nevertheless seeks to give the media sector special status inasmuch as it leaves room for the principle of subsidiarity by introducing the concept of the plurality of the media (Art 21 (3)). This concept is considered to be an appropriate measure to protect legitimate national interests. According to this, a member state may also have authority over a notified transaction. If a member state asserts the concept of media plurality, it can only prohibit the takeover on the grounds of a threat to media plurality, not on economic grounds. The responsibility for the latter rests with the Commission. There are flaws related to this principle. Firstly, given that it is not possible to measure the media plurality objectively, any assessment can only be assumed to be somewhat arbitrary. Secondly, the individual member state's laws must themselves contain legal provisions for the enforcement of this concept (COM (92) 480 final). Accordingly, the media plurality concept has so far only once been the subject of a case.

2.1.2. Variety of divergent regulatory models and responsible regulatory authorities

Another problematic characteristic of the European competition policy framework is the variety of different regulatory models and the fact that the responsibility for competition and market power cases is split between various institutions. The fostering of competition is generally considered an important governmental task, whereby market power control is used as an instrument against restraint of competition. This control is expected to work ex ante as merger control and ex post as control of abusive practices. The aims of market power control in the telecommunications and media sector are achieved through general competition law, for example cartel/antitrust laws and/or through sector-specific, i.e. telecommunications/media specific, regulation. As a result of the telecommunications liberalization in the EU, most member states have implemented special telecommunications laws, and installed more or less independent telecommunications regulators. Some of these laws include detailed rules for defining market dominance (for example the Austrian law), others rely on their general antitrust law to determine this issue (for example Germany).

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15 For example, the German Gesetz gegen Wettbewerbsbeschränkungen (restraint of competition act) requires the turnover of publishing, production and distribution of newspapers, magazines and related items, and also that of broadcasting programs and broadcasting advertising time, to be multiplied by 20. Similarly, the Austrian Cartel Act (Kartellgesetz) requires turnover of media companies and media services to be multiplied by 200 and that of ancillary media companies by 20.

16 However, according to Art. 9, Merger Control Regulation, a Member State can similarly require a referral on economic/competition grounds.

17 Newspaper Publishing (IV/M.423).
A consequence of sector-specific regulators being responsible for the application of sector-specific competition provisions is the further fragmentation of political/regulatory responsibilities, intensifying the struggle between the regulators for control in their respective areas and undermining a coherent policy in this field.\textsuperscript{18}

In the media sector several laws often apply for competition and ownership issues as well. In Austria, for example, since 1993 the cartel law has contained media-specific provisions regarding mergers as well as control of abusive practices. Questions of media ownership, on the other hand, are dealt with in the \textit{Regionalradiogesetz} (law governing private local and regional radio) and the \textit{Kabel- und Satelliten-Rundfunkgesetz} (governing the operation of radio and TV via cable and satellite, but planned to be amended so as to cover the operation of terrestrial private TV as well).

There are many differences between the European Union member states in the respective measures and models used for assessing media concentration. The critique has often been advanced that varying national legislation on media ownership undermines the development of the internal market. This is inter alia argued in the Green Paper on Pluralism and Media Concentration in the Internal Market (COM (92) 480 final). Similarly, the 1994 Bangemann Report considered the various existing rules to be “a patchwork of inconsistency which tend to distort and fragment the market” (Bangemann et al., 1994).

2.1.3. Audience-share model and/or market-share model

Whereas telecommunications companies are assessed by economic principles alone, two models are principally applied to the media sector for market power assessment: on the one hand, the \textit{market-share} model and on the other hand, the \textit{audience-share} model. They are applied either independently or in combination. There is a debate at the national and supranational level about the choice of models. Since the amendment of its broadcasting treaty between the states (\textit{Rundfunkstaatsvertrag}) in 1997, Germany, for example, has used the audience-share model as a measure to counter-media concentration, with a private broadcasting operator being allowed to operate as many channels as it wishes as long as it does not exceed a national audience share of more than 30\%. In the UK, the 1996 Broadcasting Act introduced audience share as a key element and additionally contains certain cross-ownership rules with various restrictions on the simultaneous ownership of TV and radio licenses, and TV licenses and newspapers.

As argued above, there are no special provisions regarding the competition of media industries in the EU. Initiatives to harmonize media ownership regulations throughout the EU, however, have led to the advancement of recommendations for media ownership restrictions based on the audience share model – in the 1996 and 1997 directive proposals of the Internal Market Directorate-General (former DG XV) – but so far without success (Doyle, 1998). In a follow up green paper to the Green Paper on Pluralism and Media Concentration in the Internal Market (COM (92) 480 final) in October 1994, the Commission indicated that “The choice of audience share rather than market share as a policy instrument is significant because it differentiates media ownership legislation from competition law”. (Harcourt, 1998, p. 381). The argument for defending the

\textsuperscript{18}The major argument for the responsibility of sector-specific regulatory institutions for sector-specific competition provisions are expected synergy effects which reduce transaction costs as these regulators are dealing on a continuous basis with issues in the respective sector and are therefore most capable of assessing market dominance.
implementation of the audience share model is quite peculiar, i.e. the aim of differentiating media ownership legislation from regular competition law. The audience-share model seeks to emphasize the special status of the media sector. To apply a model, though, by the sole rationale of its distinctiveness to other means, for example to competition law, does not address the problem substantially. The extent to which the audience-share model is indeed adequate to measure and control media concentration, or better than competition policy, is open to dispute. Kübler, for example, argues that this model is indifferent to many types of media integration (Kübler, 1995 quoted in Siegert, 1997, 44). Dörr criticizes the audience share model in Germany as being formulated as a mere “presumption regulation” (Vermutungsregelung) and as such cedes the burden of proof to the companies; the company in question has the opportunity to refute the presumption of market/opinion domination. Further, the extent to which the empirical data to measure audience share is reliable has to be questioned (Dörr, 1998, p. 54). Kiefer considers the implementation of the audience-share model in Germany to be an act of symbolic politics. In addition, she argues that concentration control can only work on the presumption that pluralism is enabled through multiple ownership. There is a lack of knowledge and instruments for any other alternatives (Kiefer, 1995, p. 58f).

2.2. Pressure for reform

The current debate clearly indicates that the “old” system is already in need of reform, requiring, for example, a harmonization of rules and responsibilities. We will now argue that these problems are intensifying with the phenomenon of convergence and, additionally, new problems are arising. Altogether, the convergence of telecommunications, information technology and broadcasting is bringing about a wide range of market power questions that are not yet comprehensible in all their facets. Problems emerge inter alia from the fact that two sectors that themselves have historically been sector-specifically regulated in different ways and with different rationales (telecommunications, according to an economic rationale and broadcasting, according to a cultural rationale) are interlinked with a sector that has traditionally only been regulated by means of general competition policies (information technology).

The existing framework of EU competition policy faces a long list of challenges which have to be analyzed in order to facilitate a reasonable formulation of an adequate policy model for the convergent mediamatics markets:

2.2.1. Different models and divided political responsibilities

Although convergence blurs the distinctiveness of media and telematics services/companies, various sector-specific regulations are still applied. This is especially problematic since there are not only different regulatory models for different industry segments at EU level, but also different models within segments in individual member states. The problem is further aggravated by the fact that the responsibilities are divided between various authorities. In a convergent environment, discriminatory (not technologically neutral) regulation between different sectors is problematic as

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19 It is often argued that competition law alone is not the proper means to achieve the goal of media plurality and plurality of opinions and that media therefore have to be regulated with a special regime that takes account of this goal.
Whether a telecommunications operator may compete with a cable TV operator is up to national provisions. Among recent cross-sectoral mergers within the EU are the following: @Home Benelux B.V. (1998); AT and T/TCI (1998); Particiel International/Cableuropa (1998); Albacom/BT/ENI/Mediaset (1997); Telia/Telenor/Schibsted (1998); Deutsche Telekom/Springer/Holtzbrink/Infoseek (1998); Cegetel/Canal+/AOL/Bertelsmann (1998).

Well. In Europe, for example, the Cable Directive (95/51/EC) ensures that all cable TV networks are free to provide all liberalized telecommunications services, but there is no corresponding provision allowing telecommunications operators to offer cable TV over their public telecommunications networks (98/C 71/04). This provision is to the disadvantage of telecommunications operators. The joint ownership of telecommunications and cable TV networks by a single operator, though, is permitted in all member states.

International/supranational level: Globalization means that competition cases increasingly have a significant international component. Hence, problems arise regarding the supranational (within the EU) and international division of labor between regulatory authorities and the harmonization of competition rules.

National level: Problems of responsibility occur at national level not only because services and industries can no longer be categorized by the old criteria because of convergence, but also because of the separation of regulatory powers at the national level. An example of this state of affairs can be seen in the UK, where Office of Telecommunications (OFTEL), the telecommunications regulator, and not the Independent Television Commission (ITC), the commercial TV regulator, has been awarded the authority for safeguarding third-party access to conditional access system (CAS), although conditional access is part of the digital TV infrastructure and hence a television service (also Cowie & Marsden, 1999, p. 62). As a “make good” the ITC received the authority to oversee the Electronic Program Guides (EPG) regulation. The decision in the UK exemplifies how this kind of approach changes the outcome, inasmuch as the regulatory authorities pursue different general objectives, here competition (OFTEL), there cultural aspects (ITC).

2.2.2. Complicated assessment and regulation of market power in convergent markets

2.2.2.1. Media conglomerates complicate the assessment of market power. Cross-sectoral merger activity is a basic constituent of the convergence process. The levels of corporate integration are differentiated by gauging the affected markets, whereas one usually distinguishes between horizontal concentration (companies operating at the same stage of the value chain), vertical concentration (integration of different stages of the value chain, for example content production and distribution) and conglomerate/diagonal concentration (companies operating in different markets and generally not as direct competitors, suppliers, or distributors). Horizontal mergers generally receive more intense scrutiny than any other merger category, because the risk of restriction of competition appears highest here, since these corporations are operating on the same relevant market (inter alia Nesvold, 1997).

In the context of convergence, the increasing number of media conglomerates and the difficult assessment of the consequences of conglomerate power is most problematic. It was already difficult enough to assess media concentration issues for separate industries, but now the convergence phenomenon is posing additional problems with the increased emergence of media conglomerates, i.e. cross-ownership between telecommunications, media and computer industries. It seems that

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\[^{21}\text{Among recent cross-sectoral mergers within the EU are the following: @Home Benelux B.V. (1998); AT and T/TCI (1998); Particiel International/Cableuropa (1998); Albacom/BT/ENI/Mediaset (1997); Telia/Telenor/Schibsted (1998); Deutsche Telekom/Springer/Holtzbrink/Infoseek (1998); Cegetel/Canal+/AOL/Bertelsmann (1998).}\]
classical oligopolistic and traditional industrial organization theories are no longer sufficient to explain these developments since the industries involved in corporate convergence are not only active in one sector but in many, and not only in national but also in international spheres. The existence and consequences of corporate market power are much discussed today, yet the traditional criteria used to gauge corporate market power often prove inadequate to assess the situation. The industry concentration ratio, for example – a standard used to measure industry share controlled by the largest firms – is applied to industrial sectors separately. It is not suited for measuring the reach and impact of today’s conglomerates, since they participate concurrently in different types of industries and thus do not automatically reveal their de facto concentration ratios. Further, both the industry concentration ratio, and one of the most popular measures for corporate power, the aggregate concentration ratio, do not account for foreign competition, i.e. they measure only the domestic share of industrial activity and ignore changes in foreign market share (Grant, 1997, p. 454f).

2.2.2. Convergence leads to new problems regarding the definition of relevant markets. The definition of relevant markets\(^{22}\) is the non-plus ultra of antitrust analysis, although it is an area of high controversy. It includes the determination of the product and geographic market in which a company operates. A few problems are evident in a converging, liberalized environment:

1. The definition of relevant markets in the telecommunications sector is a completely new task. Market structures change with the liberalization of telecommunications markets and the proliferation of services resulting from convergence. Consequently, the assessment of relevant markets is also affected. Telecommunications companies have traditionally been organized as state monopolies and were hardly involved in competition cases requiring market definitions. There is therefore very little experience in this area so far.

2. The definition of the relevant market for digital TV (in its form as pay TV) is contentious. This question addresses digital TV relative to its characteristic as pay TV. The main issue is whether digital TV can be considered a part of the relevant market of general TV. In the merger cases of Bertelsmann/Kirch/Premiere and Deutsche Telekom/Beta Research, in 1998 in accordance with the MSG decision of 1994, the European Commission decided that pay TV constitutes a separate relevant market and consequently has to be distinguished from commercial, advertising financed and/or from public-subscription financed TV. We show that there are arguments both in favor of two separate markets and in favor of a single market. The respective decisions have different effects on the market. An argument for the European Commission decision was the trade relationship. The Commission argued that while in the case of advertising financed television there is a trade relationship only between the program supplier and the advertising industry, in the case of pay TV there is only a trade relationship between the program supplier and the viewer as subscriber (94/922/EC). This trade relationship, though, cannot be defined so clearly. Some argue for example that there also is a trade relationship between a program supplier and the viewer in advertising financed TV, because the reception by the viewer is of economic value to the supplier inasmuch as the supplier sells audiences to the advertising industry. For the concept of the market it is not

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\(^{22}\) The relevant market is the area of effective competition and is defined by all products that are substitutable for each other from the point of view of the consumer (Heinrich, 1994).
important that the viewer pays his reception with time and not with money (Schmidt, 1997). Another problem arising in connection with digital pay TV is its affiliation status, i.e. the question of whether pay TV is a broadcasting or telecommunications service. Directive 97/36/EG, for example, includes encrypted services among the definition of TV broadcasting, but only if they are not individually receivable. Once a broadcast is received on demand at an individual moment it is no longer considered to be TV. Further, pay TV requires a conditional access system that allows only authorized consumers to receive certain fee-financed programs. The authority over CAS is arbitrary, as the above-mentioned UK example shows. Further, the high costs and risks involved in entering this market make it almost impossible for new market players to emerge and compete with dominant players. Determining the relevant product market also requires consideration of whether certain products are bought and sold as a group (Nesvold, 1997). Accordingly, the cluster market doctrine requires that products that are not considered as direct substitutes for one another are grouped into a single product market if they are purchased concurrently from a single producer. From the current market structure, the high costs of entering that market and price discrimination strategies and the like, one may conclude that pay and free-to-air TV will be purchased as a group from one single company. To avoid many problems, it would be obvious and also in accordance with the convergence trend to consider digital pay TV as a form of product heterogenization and thus part of the relevant TV market. This too, because the model of the relevant market works by means of the concept of product substitutability. Often, however, there is insufficient information on the extent of product substitutability, and one therefore has to rely upon plausibility considerations.

(3) The Internet poses additional problems for market definitions. The global character of the Internet makes it difficult to determine the place of production. Merger control and the control of abusive practices depend upon the calculation of market share and therefore also upon the definition of the relevant market. The definition of the relevant market for companies that are potentially in worldwide competition will be extremely difficult.

2.2.2.3. Growing “coopetition” (cooperation and competition) renders the assessment of market power more difficult. In addition, cases of coopetition are increasing, meaning that firms cooperate on the one hand and compete on the other. This is especially the case when they are active in fields where significant network effects occur, when the critical mass is hard to achieve in a competitive environment. When competitors want to build networks, create common platforms, and establish certain standards they increasingly cooperate in order to share sunk costs like high R&D expenditures, and to spread the risk of misinvestment. Then, shortly afterwards, they will start competing again on the basis of these platforms or applying these standards. The European Telecommunications Standards Institute (ETSI) has, for example, established the project Telecommunications and Internet Protocol Harmonization over Networks (TIPHON). Major players in telecommunications and information technology, including Deutsche Telekom, France Telecom, Telekom Austria, Siemens, Ericsson, Nokia, Telia, Microsoft, and Alcatel, have joined this project and are cooperating in developing common solutions for IP telephony. Altogether, coopetition cases make the assessment of market structures more difficult with regard to their effect on competition, as cooperations which concentrate market power in the short run might have positive effects on competition in the long run.
2.2.2.4. Changing character of monopolies. With liberalization, convergence and globalization, the number of product innovations is increasing and the life cycles of innovations are becoming shorter. This is leading to less stable market structures. In consequence, the nature of monopolies that are not protected by statutory regulation is also changing – their life span is becoming shorter. They are more vulnerable to innovations, the markets become more contestable. As a result of this development, market structures, and in particular monopoly situations, are becoming more difficult to assess with regard to their effect on competition. Furthermore, another problem arises in that current market-power control measures cannot be extended to all the new services. This is especially true for the current system restricting ownership to certain percentages in the media sector.\footnote{The system is as follows: anyone active in this sector is only allowed to hold a percentage of any company in the sector up to a fixed limit.} With the proliferation of services, such a system becomes too complex and can no longer be effectively enforced. An increased emphasis on the analysis of market conduct and market performance for assessing market power questions might be an alternative to relying on market-structure analysis alone.

2.2.3. New bottleneck facilities call for new policies

The diffusion of Internet and digital TV is increasing the problems of bottleneck facilities in the communications system, such as conditional access systems (CAS) and navigation systems/browsers like EPGs, and Application Programming Interface (APIs), and calls for new competition policies in these areas. An important goal of market power control is to ensure that competitors have non-discriminatory access to all platforms. Furthermore, lock-in effects for customers or high switching costs between systems should be minimized. The design of EPGs, for example, the way programs are listed and how different logos and brand names are placed can all be seen as discriminatory practices in the navigation systems. In this context especially, the different types of potential gate-keeping practices that could be employed by some corporations have to be analyzed in the light of their capacity to hinder access to digital platforms at a fair price by entities external to their area of influence. A problem for market control questions is, for example, the fact that there are different proprietary (i.e. closed) encryption systems in Europe. This characteristic could become a precondition for far-reaching control by just one company, but also provides the basis for discrimination between competitors and customers alike. One objective is therefore to develop open interfaces, which can guarantee universal access to services through one single set-top box.

The EU policy framework contains two directives regarded as being significant for the development of digital TV. One is concerned with the promotion of advanced television, including support for digital TV (Directive 95/47/EC), the other relates to the legal protection of services based on, or consisting of, conditional access (Directive 98/84/EC). The latter is to give service providers legal protection against illicit devices which allow access to their services free of charge. An important step has also been taken by the work of the Digital Video Broadcasting (DVB) project. The DVB, a body comprising more than 200 organizations and 30 countries around the world, established in 1993, has drawn up extensive specifications regarding digital TV, which have since been converted into ETSI standards (COM (97) 623). However, whereas they reached a consensus on digital transmission standards, they failed in developing a standard for digital conditional access, indicating just how controversial an area CAS is (Humphreys & Lang, 1998). Consequently, the 1995 EU
Among these provisions, for example, a requirement can be found regarding the non-discrimination between free-to-air and pay television. 

As an example of national policy initiatives, the ITC (UK) has published a detailed Code of Conduct on EPGs which requires EPG providers to ensure the provision of these services on a fair, reasonable and non-discriminatory basis. With regard to EPG regulation, OFTEL and ITC have now initiated a joint committee to oversee regulation. (Cowie & Marsden, 1999) Further, OFTEL is publishing extensively on issues of digital TV. In parallel to telecommunications regulation, where ex ante rules play a crucial role, OFTEL favors an ex ante approach to regulating bottleneck facilities, i.e. try to forestall concentration in the market by implementing rules in areas where there is the likelihood of dominant position being established.

3. Conclusions

In this paper we have argued that the phenomenon of convergence combined with liberalization and globalization is leading to the formation of a changed societal communications system, called mediamatics, which renders the traditional communications regulation system obsolete. To meet the challenges inherent in this development we have proposed a reform toward an integrated (horizontal) policy approach that overcomes the traditional dichotomy between the governance of telecommunications and media.

Consequently, we have analyzed the problems that competition policy – a very important and contentious area of concern within the liberalized and convergent communications sector – faces in the mediamatics era. It is a prime example of the clash between the telematics and the media side, of the clash between economic rationales and cultural concerns. Competition policy also involves the discussion of a conceptual change from media as a cultural to media as an economic good.

The analysis reveals that EU competition policy is characterized by intense fragmentation, by a vague concept of the plurality of the media, by sector-specific regulations for media at the national level and for telecommunications at both the national and supranational level, by an EU policy that mostly follows economic rationales and by national policies that, in contrast, also include a consideration of cultural aspects. The effect of convergence is twofold: on the one hand, it is aggravating existing problems, and on the other hand, additional problems are appearing. These include the assessment of conglomerate power and coopetition cases, the insecurities in defining relevant markets and the need for adequate policies for new bottleneck facilities with regard to the Internet and digital TV (see Table 1).

The challenges of convergence that have been identified for the current EU competition policy framework are giving rise to growing pressure for reform. Subsequently, we will list some elements and directions of a possible reform which will need further intensive scrutiny in order to make possible a formulation of an adequate mediamatics policy for this crucial policy area.

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24 Among these provisions, for example, a requirement can be found regarding the non-discrimination between free-to-air and pay television.
25 See, for example, OFTEL (1998, 1999).
Table 1
The challenges of convergence for competition policy

<table>
<thead>
<tr>
<th>Different models and divided political responsibilities for telecommunications and media</th>
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<tr>
<td>At international/supranational level and</td>
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<tr>
<td>At national level</td>
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*The assessment and regulation of market power in convergent markets is difficult*

- Media conglomerates complicate the assessment of market power
- Convergence leads to new problems regarding the definition of relevant markets:
  1. The definition of relevant markets in the telecommunications sector is a completely new task
  2. The definition of the relevant market for digital TV (in its form as pay TV) is contentious
  3. The Internet poses additional problems for market definitions
- Growing coopetition (cooperation and competition) renders the assessment of market power more difficult
- The changing character of monopolies makes market structures more unstable and thus harder to assess

*New bottleneck-facilities (e.g. CAS, EPG) call for new policies*

3.1. Harmonization and integration of regulations, responsibilities and institutions

Growing problems of categorization in telematics and media are increasing the legal uncertainties and opening the field to growing arbitrariness. Harmonization within and between sectors, and integration could not only decrease legal insecurities and raise planning security, but would also contribute to considerable reductions in transaction costs (e.g. administration costs).

3.2. Dynamic and flexible model

In order to cope with the accelerated changes in the communications environment, a more dynamic and flexible policy model which might include periodic reviews and which builds on wide parameters might prove successful.

3.3. Reduction but not termination of sector-specific regulation

The system of sector-specific regulations for media and telecommunications becomes even more problematic and unenforceable as categorization problems increase. A necessary transition will have to lead towards a mediamatics regulation that integrates media and telecommunications regulation and consequently reduces sector-specific regulation because of harmonization measures between the two sectors. This harmonization process is especially complicated by the different approaches (economic and cultural) being pursued in the telematics and the media field. Further, with regard to the discussion on the termination of sector-specific competition rules for the media and telecommunications sector, sector-specific rules will still have to play an important role for a long time to come. Although some of the asymmetric sector-specific provisions for telecommunication for example resemble provisions in general competition law, they often extend beyond these.
3.4. Innovative assessment approaches: emphasis on market performance in addition to market structure

The assessment of market power in a convergent market requires innovative approaches. The speed of technological change, the complexity and diversity of goods and services, short product life cycles and the increase in conglomerate mergers and cases of coopetition are making it increasingly difficult to assess the market structure. An alternative approach would be to monitor the market conduct of firms as well, and especially their market performance. The analysis of market performance is difficult inasmuch as it cannot be reduced to descriptive realities and also involves two dimensions: an economic and a sociopolitical dimension. The latter refers to issues like guaranteeing media pluralism, and diversity of ideas, objectivity or access to distribution channels. For market performance analysis it is essential to find criteria to gauge economic performance, i.e. an understanding/ a definition of the desired market outcome is indispensable, e.g. consumer choice or lower prices.

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Appendix A. Development of telecommunications mergers in the EU

The Merger Task Force of the Competition Directorate-General groups the merger cases according to 51 product areas, which are further subdivided by means of NACE codes (Nomenclature générale des activités économiques dans les Communautés Européennes). The categorization of cases is not always completely clear, especially for the media and telecommunications areas. Accordingly, one may find media/telecommunications mergers listed in the area of post and telecommunications, or other business activities, or among the recreational, cultural and sporting activities, or education sectors, among others. The MSG Media Service decision of 1994 is listed in post and telecommunications, while the Bertelsmann/Kirch/Premiere case of 1998 (a renewed attempt of establishing/sharing a digital TV platform by the companies involved in the MSG Media Service case) can be found among recreational, cultural and sporting activities.

A look at the merger regulation cases subject to Council Regulation 4064/89 indicates that of all product areas only the post and telecommunications sector has been growing steadily from 1991 to 1999, while the other areas have often been subject to great variations (see Fig. 2 for a comparison of the four largest areas from 1991 to 1999).

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26 The following results are based on the numbers of cases listed in the European Commission’s Merger Decisions by product list as of February 3, 2000 (1144 total final decisions 1991–1999). The numbers of cases listed there do not correspond with the numbers of cases in the Statistics European Merger Control (1160 total final decisions 1991–1999), also published by the Commission. The authors relied on the Merger Decisions by product list in order to provide comparative information on sectors.

27 The Merger Control Regulation entered into force in September 1990. To provide comparative data only the years 1991–1999 were used for analysis.
The number of merger cases in the post and telecommunications area more than doubled from 1997 to 1998, in absolute terms from 12 cases to 25. Accounting for 10.3% of merger cases in 1998, for the first time since 1991 this became the sector with most merger cases. Besides a general increase in merger cases, this growth may be due to telecommunications liberalization within the European Union. This sector was also the largest area in 1999, with 11% (30 merger cases), followed by manufacture of chemicals and chemical products with 7% (17 merger cases).

In terms of the total number of EU Commission final decisions on merger cases from 1991 to 1999 the post and telecommunications sector ranks 2nd behind manufacture of chemicals and chemical products (1), followed by financial intermediation, except insurance and pension funding (3) and insurance and pension funding, except compulsory and social security (4).

References


28 It is possible that the general increase in merger cases subject to Council Regulation 4064/89 from 1997 to 1998 is due to the fact that the regulation has recently been amended so as to cover mergers with lower turnovers than was previously the case. Although this is not true of the post and telecommunications sector (all but one of the available decisions fall under the regulation because of the original turnover), it might be for other sectors.


