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The European Policy Response to Convergence with Special Consideration of Competition Policy and Market Power Control

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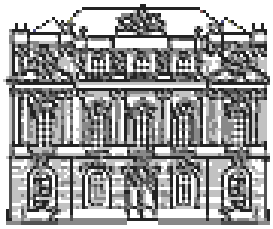

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The European Policy Response to Convergence with Special Consideration of Competition Policy and Market Power Control

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- FIRST DRAFT -

1. Introduction

This paper addresses the controversial subject of convergence in the communications sector and analyzes the regulatory implications of this phenomenon, in particular the leading role and steps taken by the European Commission with regard to media and telecommunications policies. Special attention will be given to the implications of convergence for European competition policy and market power control, as these policy aspects are at the very center of the debate while Europe moves towards the "information society". In liberalized and converged markets competition policy is a very important, but also a very contentious area of concern. It is a *prime example* of the clash between the telematics and the media side, of the clash between economic rationales and cultural concerns.[1]

We start with a brief description of the changed societal communications system of the information society, called *mediamatics* (media & telematics), followed by an outline of the policy challenges it involves and a rough delineation of a suitable mediamatics policy. This will be followed by a description and analysis of the European Commission's initiatives in response to the convergence phenomenon. We will then turn to the analysis of competition policy and market power issues, highlighting some major characteristics of the European competition policy framework, analyzing the challenges posed by convergence and offering some conclusions regarding the reform of these policy fields.

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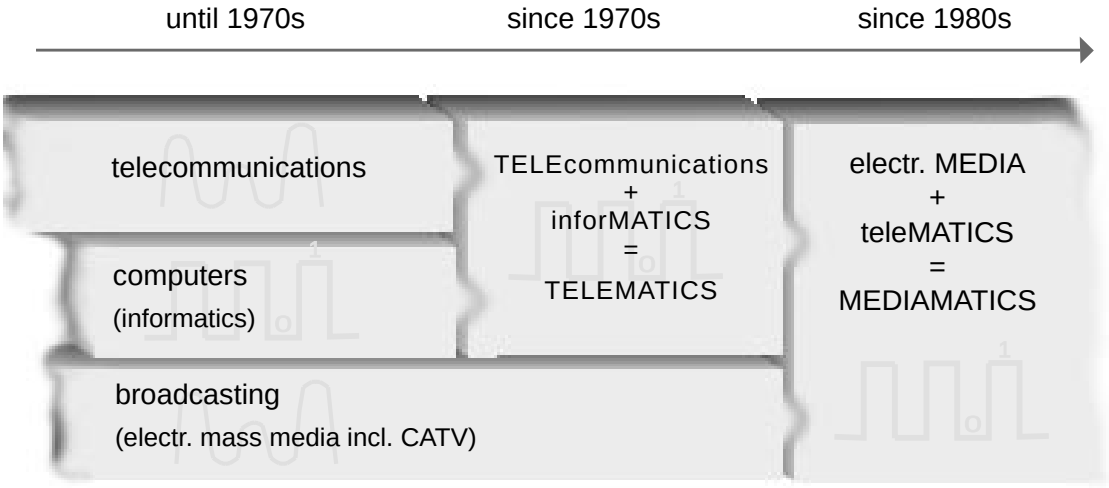
[1] The present study is part of the research project "Mediamatics and Digital Economy", funded by the Austrian Ministry of Sciences and Transport.

2. 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 figure 1):[2]

(1) the convergence of *tele*communications with computers (infor*matics*) toward *telematics*[3], and
(2) the convergence of electronic mass *media* (broadcasting) with tele*matics* toward *mediamatics*.

Figure 1. Convergence stages in electronic communications



Source: Latzer 1997, 61.

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.

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[2] For a detailed analysis of the convergence phenomenon and the changed communications system see Latzer 1997a,b.
[3] See Nora/Minc 1978.

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 contents, 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 (so called "hybrid" services, e.g. audiotex[4]). 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 state of affairs gives rise to an unnecessary contentiousness, 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).[5] Arguments in favor of integration, such as the better usage of synergies between telecommunications and broadcasting regulation, or the reduction of transaction costs etc, by far outweigh the counter-arguments, such as those warning of the danger of increased

[4] For an analysis of regulatory problems regarding audiotex see Latzer/Thomas 1994.
[5] For a detailed outline of an integrated regulatory model see Latzer 1997a, chapter 6.

concentrations of power and the overburdening of organizations.[6] 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, regarding 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.

3. European Mediamatics Policies

Future policy, though, will not be the result of functional arguments alone. Rather, future policy will be formed through their combination with *power political considerations*. Let us now take a closer look at the European activities in response to the challenge of convergence. [7]

European telecommunications and media policy is characterized by a growing importance of the European Union (EU), more precisely of the European Commission. During the past decade, the Commission has established itself as the single most prominent corporate actor in the European communications reform process. It has to be borne in mind, that EU policy is not only decisive for the fifteen member states but also for the other European countries, the EFTA and the (mostly Eastern European) EU candidate countries.

As in all of its member states, EU communications policy is traditionally separated into telecommunications and audiovisual policies, with separate responsibilities (DG XIII for

[6] For a discussion of pros and cons of an integrated approach to mediamatics regulation see Latzer 1997a, b.
[7] The following analysis is, in essence, based on Latzer 1998.

Telecommunications, Information Market and Exploitation of Research; DG X for Information, Communication, Culture, Audiovisual), with different foci and different regulatory models being applied. In the European Parliament, telecommunications matters are essentially dealt with by the economic committee and media issues by the culture committee.

EU *telecommunications policy* started comparatively late, triggered by developments in the United States, and by early liberalization efforts in the United Kingdom. In the second half of the 1980s the European Union first manifested its intention to restructure the telecommunications market, a market that is now, at the end of the 1990s, considered to be the single most important contributor of economic growth in Europe. The EU, in the Green Paper on the development of the Common Market for Telecommunications Services and Equipment (COM (87) 290) outlined a plan to restructure the telecommunications systems. This was the start of the official liberalization process. It was followed by a series of detailed directives and miscellaneous guidelines which were required be incorporated into national law by the member states. The Commission has since increasingly augmented its authority in the field of telecommunications policy, and its harmonized step-by-step liberalization strategy has transformed the telecommunications sector from the exclusive domain of PTTs (Postal, Telegraph and Telephone companies) into an open and competitive environment. As of 1998, full market liberalization has been accomplished in Europe and all major TOs (Telecommunications Operators) have been at least partially privatized. Since then, the Commission has continued its telecommunication policy with a changed emphasis, the *promotion of effective competition*, dealing, for example, with issues of interconnectivity and interoperability, and attention to public policy issues, including strategies for universal services and consumer protection.

The European Commission's *audiovisual policy*, however, has not been as vigorous and unanimous as its telecommunications policy. Concerted action in this politically highly sensitive sector has proved to be far more difficult and troublesome.[8] Liberalization in the audiovisual sector took place at the same time as that in telecommunications, but with much less influence and coordination on the part of the EU. Its policy has traditionally focused on the promotion of the European audiovisual industry, on public interest issues and on the free circulation of services based on the principle of subsidiarity. The major EU instrument in the audiovisual sector is the 1989 Television without Frontiers Directive (89/552/EEC), amended in 1997 (97/36/EC) which coordinates national audiovisual policies regarding advertising, sponsorship, teleshopping, the promotion of the distribution and production of European programs, the protection of minors and the right of reply. A European Agenda regarding technical rules has been articulated by means of two directives aimed

[8] An example of the difficulties is the formulation of a policy on market power control (media ownership and pluralism) which will be explained in the following section of this paper.

at coping with the changes within the broadcasting industries: Directive 95/47/EC lays down *inter alia* the framework for conditional access with respect to digital TV and Directive 98/84/EC offers guidelines for the protection of services comprising conditional access systems[9]. In addition, some harmonizing measures regarding copyright have been introduced by means of, for example, Directive 93/83/EEC on the coordination of rules concerning copyright applicable to satellite broadcasting and cable retransmission, and are of continuing concern as indicated by a recent proposal for a Directive regarding the harmonization of copyright in the Information Society (COM (97) 628 final).

In another segment of the European communications market, the *publishing sector*, the basic aims being pursued are similar to those in the audiovisual sector. However, in contrast to telecommunications and broadcasting, this subsector is largely governed by self-regulatory bodies.

In 1997, after ten years of concentrating its attention on liberalization in the telecommunications sector, the EU Commission put the convergence issue on top of its agenda by publishing the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation (COM (97) 623).

The convergence issue is so complex that the policy process outlined in the green paper on convergence is expected to take longer than the processes dealing with other issues. It is currently envisaged that it will require about five years to complete – a lengthy period compared to green papers presented on other issues.[10]

The green paper was jointly proposed by commissioners Martin Bangemann (DG XIII) and Marcelino Oreja (DG X). Within the common strategy on the convergence issue, DG XIII is the *major driving force* for reforms, whereas DG X is rather reserved and more inclined to maintain the status quo. This is because Commission policy for the audiovisual sector might still change drastically, as broadcasting is increasingly being treated as an economic rather than a cultural good. This implies that more and more strategies and policy instruments originally developed for telecommunications will be applied to it too. Altogether, the centralist influence of the EU may increase and its orientation is likely to change. The outcome of current reforms has to be seen in this perspective as well. Decisions based on the choice between the basic policy options listed below are greatly influenced by the anticipated power-political consequences of these strategies.

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[9] This EU directive is intended to ensure the economic viability of conditional access systems by legally protecting service providers against illicit devices that allow access to these services free of charge.

[10] For example on satellite communications (COM (90) 490), mobile and personal communication (COM (94) 145), cable television networks (COM (94) 440 and 682) or encrypted services (COM (96) 76).

The Green Paper on Convergence is formulated cautiously. Issues are analyzed but it consciously avoids reaching conclusions. Many questions singled out for public response and commentary, are addressed to governments and especially to industry. The green paper includes three basic *options* regarding future regulatory developments:

1. Build on current structures: Leaves in place the current vertical regulatory structure, subdivided into telecommunications and audiovisual/broadcasting.
2. Develop a separate regulatory model for new activities, to co-exist with the current separate telecommunications and broadcasting regulation.
3. Progressively introduce a new regulatory model to cover the whole range of existing and new services.

The publication of the green paper was followed by a *consultation process*, which provoked a strong response from the member states, with about 270 answers. The outcome of this first phase of consultation was published in July 1998 in a Working Document of the Commission (SEC (98) 1284). The most significant outcome of the consultation was a big vote in favor of options one and three. Additionally there was substantial support for a horizontal approach to the regulation of the infrastructure. Regarding the audiovisual sector, most concern was directed at issues like the switch-off policy of analog broadcasting, the regulatory distinction between public and private communication, the relationship between regulation and content support, the lack of European content on the Internet, the public service broadcasting mission and the need for measures to boost European production.

A *second round of consultations*, scheduled for November 1998, focused on the following three issues: (1) Access to networks and digital gateways; (2) Creating the framework for investment and innovation[11] and (3) Ensuring a balanced approach to regulation, among which the question on how to pursue public interest objectives without hampering the development of new services and markets.

In November 1998, a High-Level Conference, hosted by the European Commission and the Austrian government brought together representatives from the telematics and audiovisual sectors from 26 countries to discuss the results of the round of consultation on the green paper and approach ways of harmonizing regulation. In parallel to the results of the consultation process there was a general agreement on the reality of technological convergence, whereas the implementation of a totally horizontal approach to regulation was highly controversial. While the implementation of a

[11] Tackling issues like support options for European content production.

horizontal approach to the regulation of infrastructures was considered a necessity, a more vertical approach to services was deemed to be equally indispensable.[12]

The position of the audiovisual sector on convergence issues is also reflected in *The Digital Age: The European Audiovisual Policy*, a report published in 1998 by a high-level group chaired by Commissioner Oreja from DG X. Its recommendations focused on ways of preserving public interest, on the promotion of digital TV and continued support for European production. In this report, it is asserted that the existence of a dual TV system as a distinctive feature of the European broadcasting landscape and issues of funding of public broadcasting should be determined solely by the individual member states. According to this report, a clear definition of the nature of the public service remit will therefore be required as well as sector-specific regulation for the audiovisual sector based on the distinction between public and private communication. Whether there is one regulator for technological aspects and another for content aspects, or a unified regulator administering both sets of rules, is also for national governments to decide.

Results of the second round of consultation on the Green Paper on Convergence were published in March 1999. The key message was that a more *horizontal approach* to regulation is necessary, one that includes treating all kinds of infrastructure homogeneously, irrespective of the types of services carried. Further, it was emphasized that there is a need to ensure that content regulation is in accordance with public policy objectives while also ensuring that it addresses the specific needs of the audiovisual sector, in particular through a *vertical approach* where necessary, building on current structures. Effective application of competition rules and increased reliance on those rules were deemed to be important. It was further considered important to respect member states' competence by defining the public service remit in accordance to Protocol 9[13] of the Amsterdam Treaty (COM (99) 108 final).

The Green Paper on Convergence and the convergence debate as such are considered to be a major input for the present 1999 Review of the EU telecommunications policy. The review is to assess the effectiveness of the directives that have led to telecommunications liberalization, and also the extent to which the individual member states have complied with the EU request to put these directives into national law and actually apply them (for example regarding interconnection or universal service).

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[12] For a conference report see Latzer/Just 1998.

[13] Protocol 9 of the Amsterdam Treaty is formulated as follows: "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."

The review is expected to result either in new legislation, for example, in a telecommunications act for Europe, or a telecommunications/media act as suggested by Commissioner Bangemann, or in a number of directives. The review is ambitious in scope as it covers questions like the harmonization of regulation of fixed and mobile communications; questions of establishing an appropriate framework for the converging telematics and media sectors; the issue of whether general competition law will replace sector-specific rules as well as the discussion of the need for a single European Regulator.
Whichever mandate is issued, legislation will not come into force before 2003, because the enactment process within the EU usually takes a long time. The unexpected resignation of the European Commission in 1999 may also change the content and timetable of the reform process, as the current reform was strongly determined and personally influenced by Commissioner Bangemann (DG XIII).

The *global nature of developments* is acknowledged both in the initiative for Electronic Commerce (COM (97) 157) and in the Green Paper on Convergence, where the question of the need for further action at the international level in the light of convergence is explicitly stated (chapter IV.5).[14] In a speech in Venice in September 1997, when he argued the need for *An International Charter for Global Communications*, Commissioner Bangemann has already provided a preliminary answer regarding the need for further international action. He stated that policy-makers must admit that they can no longer act independently of each other. In particular, Bangemann underlined the need for an international framework going beyond the EU to expand the Internet, to establish a virtual space for business, a virtual legal space and a virtual space for learning. Furthermore, he opposed the position that no regulation other than self-regulation is needed regarding the Internet. Instead he proposed that a new model of regulation be established that takes into account convergence, globalization, and the nature of the Internet.[15]

At the beginning of 1998, in a joint initiative of the Commissioners Bangemann (DG XIII) and Leon Brittain (DG I, External Relations), the Commission launched an international debate by publishing a Communication on The Need for Strengthening International Coordination (COM 98, 50) on how to improve coordination of world-wide policies affecting the fast developing global online economy in general and electronic commerce in particular. DG X was not one of its initiators, because its interest in further centralized market influence is very limited. It has to be borne in mind that the WTO (World Trade Organization) agreements do not apply to broadcasting either.

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[14] So far, there have been differing degrees of cooperation between the major players at international level, such as the OECD, ITU, WTO and WIPO, focusing on convergence and globalization problems as well.
[15] See <http://www.ispo.cec.be/infosoc/promo/speech/venice.html>.

In the Communication on International Coordination, the idea of an *International Charter*, understood as a legally non-binding multilateral understanding, is further developed. In order to minimize power-political struggles, the Commission stresses that no international supervisory authority would be required under such a solution. The issues to be tackled in such a charter range from interoperable technical (e.g. domain name systems) to legal questions (e.g. tax, jurisdiction, copyright, labor law, consumer protection, trademarks, content). According to the Commission, such an international charter, which would also coordinate public and private sector interests, could be adopted by the end of 1999.

At the EU level, Bangemann further argued in his Venice speech that a *European Communications Act* and a *Single European Regulatory Authority for Communications* might one day prove necessary.[16] This discussion is not totally new. Some years ago, a supranational regulatory authority was proposed in the context of the development toward a *Common Information Area* (CIA).[17] However, the initiative was dropped after a while and has now returned as part of the intensified convergence and globalization debate. Nevertheless, a Common European Communications Act and a single regulator for mediamatics are very sensitive issues in Europe, not so much because of the question of whether this would be the best institutional framework for the development of the information society, but more because of the implied shift of power between member states and the EU, and between telecommunications and media institutions.

Some countries have already moved in the direction of a horizontal approach to communications regulation or are discussing it at the national level. Italy, for example, instituted an integrated regulatory authority in 1998 in response to the convergence trend. In Switzerland the regulation of telecommunications and media is also organizationally integrated. In the UK, where regulation is split between OFTEL (Office of Telecommunications) and the ITC (Independent Television Commission) the establishment of an integrated regulatory authority OFCOM (Office of Communications) is being discussed. Germany, on the other hand, prolongs – due to unbridgeable power-political conflicts of interest - the separation of powers at federal (telecommunications) and state (media) level. Alongside telecommunications and broadcasting, the categories of teleservices (under federal responsibility) and media services (the responsibility of the states) have been introduced for new services. Though, the necessary integration is followed through extended coordination efforts rather than through organizational mergers.

[16]See <http://www.ispo.cec.be/infosoc/promo/speech/venice.html>.
[17]See Turner 1995.

4. Market Power and Competition Policies in the Mediamatics Era

As argued above, the 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 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.[18] Having outlined and analyzed the debate that has developed around the European reform (section III), a discussion which concentrates on the change from a vertical to a horizontal (integrated) communications regulation, we will now take a closer look at an important and contentious aspect of communications policy: at market power control and competition policies. How can the reform model be applied in this area? 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.[19]

Competition policy has received *increased attention* in Europe especially by virtue of the liberalization process set in motion a decade ago. Two central issues have come to light, questioning whether in a liberalized environment competition regulation will be sufficient per se, and if there still is the need for sector-specific competition regulations. 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 competition framework of the EU as indicated by the prevention of particular mergers/takeovers. Since the *European Merger Regulation* (Council Regulation (EEC) No 4064/89) became effective in 1990 only ten untertakings out of 947 final cases have been prohibited. Remarkably, five of these – an indicator for the sensitivity of this sector – were in the media/communications sector.[20]

In response to the growth of convergence and globalization combined with the thrust of liberalization, a growing number of calls for a uniform, general competition policy, applicable to all sectors, are being heard. 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 and by the results of the two-stage public consultation process that followed its adoption. The question will also receive special attention in the 1999 Review of Telecommunications Legislation. One of the

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[18] For a detailed argumentation see Latzer 1997a, b.

[19] 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 1999.

[20] MSG Media Service (1994), Nordic Satellite Distribution (1995), RTL/Veronica/Endemol ('HMG') (1996), Deutsche Telekom/Beta Research (1998); Bertelsmann/Kirch/Premiere (1998).

key messages emerging from the public consultation on the Green Paper on Convergence is the acknowledgement of the need for an effective application of the competition rules as well as an increased reliance on those rules, accompanied by a gradual *phasing out of sector-specific rules* as the market becomes more competitive (COM (97) 623).

4.1. The EU Competition Policy Framework

Competition policy is the 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 Parliament. Within the Commission, Directorate General IV 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 primary provisions governing competition throughout the European Union are Articles 81-86 of the Treaty. Among these, Articles 81 and 82,[21] governing cartels and abuse of dominant positions within the Common Market respectively, are considered the most important.[22]

A fundamental change in the European Union competition law was made with the enforcement of the *Merger Control Regulation*[23] (Council Regulation (EEC) No 4064/89)[24], which principally ends competing jurisdictional responsibilities. Accordingly, it is no longer possible for two or more authorities to have jurisdiction over one merger case.[25] It entered into force in September 1990 and has also recently been amended[26] to cover mergers with lower turnover than was previously the case.[27] The main objective of this regulation is the effective monitoring of all concentrations from

[21] All agreements between undertakings, decisions by associations of undertakings and concerted practices that might affect trade between the Member States are considered prohibited transactions. These might consist in fixing trading conditions, sharing of markets and sources of supply or the control of markets, technical development, or investment (Art. 81). Abuse of a dominant position may consist, for example, in imposing unfair trading conditions, or in the application of different conditions to equivalent transactions etc. (Art. 82).

[22] 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.

[23] For information on the development of merger cases in the telecommunications/media sector subject to this regulation see Appendix I.

[24] This regulation was reluctantly and conditionally approved by the Council after a lengthy period in which the Commission sought a legal base for the advance control of mergers. The Commission's attempt to create a merger regime using Articles 81 und 82, for example, lead to conflicts and uncertainties which the Council felt could be eased only by finally passing the legislation it had previously refused to consider. The existing merger control regulation was established as a compromise between the Commission and those member states which already had their own national merger controls. (Allen 1996)

[25] Nonetheless, according to Art 9 and Art 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. (See also footnote 29.)

[26] Effective since March 1, 1998, Council Regulation No 1310/97 amending Regulation (EEC) No 4064/89.

[27] According to Art. 1 (2) a merger has a Community dimension if

a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5bn, and

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.

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 DG I (External Relations), DG III (Industry), DG X (Information, Communication, Culture, Audiovisual), DG XIII (Telecommunications, Information Market and Exploitation of Research) and DG XV (Internal Market and Financial Services).

The fact that the Commission may act in the competition policy area as "policeman, prosecutor, judge, jury and prison warden" (Allen 1996, 157) lent increased support to proposals for 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 for 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 above-mentioned articles and the *Merger Control Regulation* are fully applicable to both sectors (telecommunications and broadcasting). It is important to note that there are *no* media-

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b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250m (Art. 1 (2) a; b Council Regulation No 4064/89).

But since March 1, 1998 undertakings that are below this threshold also fall under the Merger Control Regulation if they meet the following criteria:

a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2.5bn;
b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100m;
c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of at least two of the undertakings concerned is more than ECU 25m; and
d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100m (Art. 1 (3) a-d; Council Regulation No 1310/97 amending Regulation (EEC) No 4064/89).

The Regulation (EEC) No 4064/89 is not applicable in those cases when each of the untertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. This clause is to guarantee that mergers that mostly affect competition in one Member State remain only within the area of responsibility of that national regulatory authority.

specific or telecommunications-specific competition laws in the EU, whereas *cartel acts* in some member states do contain special provisions for the media sector. Furthermore, there are no special provisions for telecommunications in national cartel laws.[28]

While the Merger Control Regulation contains only exceptional turnover calculations for credit institutions and insurance companies, some national laws contain special multiplier-factors for turnover calculation of media companies.[29] 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 advertisement time, to be multiplied by twenty. Similarly the Austrian Cartel Act (*Kartellgesetz*) requires turnover of media companies[30] and media services[31] to be multiplied by 200 and that of ancillary media companies[32] by twenty.

A vague concept: the plurality of the media

Nonetheless the EU *Merger Control Regulation* 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 can demand that a notified transaction is also referred to the responsible national authorities instead of only to the European authorities.[33] There are flaws related to this principle. Firstly, given that it is not possible to measure the plurality of the media objectively, any assessment can only be assumed to be quite arbitrary. Secondly, the individual member state's laws must themselves contain legal provisions for the enforcement of this concept (COM (92) 480 final).[34] Accordingly, the *plurality of the media* concept has only been put forward once as a reason for referral to a member state.[35]

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[28]There are, however, special provisions governing competition in sector-specific telecommunications laws. Sector-specific telecommunications laws have been adopted in single member states as a result of telecommunications liberalization.

[29] While the media sector is generally not among the enterprises with the biggest turnover in an economy, its acknowledged public-opinion-forming power and its democratic function are far greater than its turnover face value might suggest. 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 merger control regulation are still covered.

[30] A media company is any entity that is responsible for content production and distribution.

[31] A media service is any entity that provides *inter alia* articles and pictures for media companies.

[32] An ancillary media company is a publishing house if it is not a media company, a printing office, and offices ancillary to printing, or also a company that procures advertising.

[33] According to Art 9 Merger Control Regulation a Member State can similarily require a referral on economic/competitiongrounds. As of 8 April 1999 there have been 18 partial/or full referrals to member states.

[34] Austria, for example, included in its cartel law the concept of plurality of the media (Medienvielfalt) in 1993.

[35] Newspaper Publishing (IV/M.423)

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). 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. [36]

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 *Regionalradiogesetz* (law governing private local and regional radio) and the *Kabel- und Satelliten-Rundfunkgesetz* (governing the operation of radio and TV via cable and satellite, but planned to be amended so as to cover also the operation of terrestrial private TV).

There is a variety and 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).

[36] 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 continous basis with issues in the respective sector and are therefore most capable for assessing market dominance.

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 *market-share* model and on the other hand the *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[37] of its broadcasting treaty between the states (*Rundfunkstaatsvertrag*), 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 doesn't achieve a national audience share of more than thirty per cent. 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 DG XV (Internal Market and Financial Services) 1996 and 1997 directive proposals[38] – but so far without success. The Commission indicated 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 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, 381). The argument for defending the 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. It seems that the use of audience share alone, if enforced, is going to be the wrong instrument, even if applied for achieving the right ends. 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, zit. in Siegert 1997, 44). Dörr criticizes the audience share model in Germany as being formulated as a mere "*surmise regulation*" inasmuch as the company in question has the opportunity to refute the

[37] Enacted on January 1, 1997.

[38] DG XV intended the directives to introduce as measure of concentration the audience share model, with the aim of limiting monomedia ownership for radio and television broadcasters to a thirty per cent upper limit in their own transmission areas, and ownership of total media, i.e. ownership of television, radio and/or newspaper to ten per cent of the market (Doyle 1998, 13).

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, 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, 58f).

4.2. 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 additional, 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 (broadcasting and telecommunications) are interlinked with a sector that has traditionally only been regulated by means of general competition policies (information technology).

In the light of convergence, many facts indicate that a move away from sector-specific regulation and a new way of assessing market power is required. In this context a central question emerges: what would an *integrated competition policy framework for the mediamatics markets* look like and to what extent would it leave room for sector-specific regulation? The rationale reserving a *special treatment* for the media sector lies, for example, in the fact that the objectives of market power control in the media sector regard two fields which are often at odds: on the one hand there is a desire to ensure economic competition, on the other hand there is the aim of guaranteeing media pluralism, both are deemed to be in the public interest. Furthermore, in the transition process to effective competition, asymmetric regulation of incumbent companies, for example former telecommunications monopolists, is considered necessary.

The existing framework of market power control and competition policy of the EU faces a long list of *challenges* which have to be analyzed in order to enable a reasonable formulation of an adequate *policy model* for the *mediamatics markets*:

A. 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 on the 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, asymmetric regulation between different sectors is problematic as 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 (also 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.[39]
- *International/supranational level*: Globalization means that competition cases increasingly have a significant international component. Hence, problems regarding the supranational (within the EU) and international division of labor between regulatory authorities and the harmonization of competition rules arise.

- *National level*: Problems of responsibility occur on the 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 OFTEL (Office of Telecommunications), the telecommunications regulator, and not the ITC (Independent Television Commission), the commercial TV regulator, has been awarded the authority for safeguarding third-party access to CAS (Conditional Access System), although conditional access is part of the digital TV infrastructure and hence a television service (also Cowie; Marsden 1999, 62). As a "make good" the ITC received the authority to oversee the EPG (Electronic Program Guides) 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).

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

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[39] On the contrary, the 1996 US Telecommunications Act of, for example, eliminated the ban on cable-telephone cross-ownership. Since then , a telephone company has been able to provide video programming as a pure common carrier or as a traditional cable operator (Meyerson 1997).

– *Media conglomerates complicate the assessment of market power*

Cross-sectoral merger activity is a basic constituent of the convergence process.[40] The levels of corporate integration are differentiated by gauging the affected markets, whereas one usually distinguishes between *horizontal concentration* (companies operate on 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* (firms operate in different markets and are generally not 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.[41]

It seems that 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 the most popular measure for corporate power, the aggregate concentration ratio,[42] 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, 454f)

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[40] Among recent cross-sectoral mergers within the EU are the following: @Home Benelux B.V. (1998); AT&T/TCI (1998); Particitel International/Cableuropa (1998); Albacom/BT/ENI/Mediaset (1997); Telia/Telenor/Schibsted (1998); Deutsche Telekom/Springer/ Holtzbrink/Infoseek (1998); Cegetel/Canal+/AOL/ Bertelsmann (1998). Not all of the decisions are available to the public yet. Details about the planned undertakings are therefore not always available.

[41] Ungerer argues in this context that we have to be alert to the fact that these integrations in a situation where competition in these markets is still unsufficient may lead to the creation of new super-monopolies (Ungerer 1998).

[42] "Aggregate concentration ratios measure the percentage of sales, assets, and value added that are controlled by the largest 50, 100, 200, or 500 firms." (Grant 1997, 455)

- *Convergence leads to new problems regarding the definition of relevant markets.*

The definition of relevant markets[43] is the *non plus ultra* of antitrust analysis. It includes the determination of the product and geographic market in which a company operates. Two problems are evident in a converging environment:

(1) Companies increasingly offer one-stop-shopping[44].

The definition of *cluster markets* might be one way of dealing with the one-stop-shopping quandary. Under this rationale, products that consumers tend to purchase concurrently from a single producer could be grouped together, even though these products are not in direct competition with one another (Nesvold 1997).

(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.

The main 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 broadcast, 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. 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.

- *Growing "coopetition" (cooperation & competition) renders the assessment of market power more difficult*

In addition, cases of *coopetition* are increasing, meaning that firms cooperate on the one side and compete on the other. This is especially the case when they are active in fields where significant

[43] 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).

[44] One-stop-shopping refers to packages of services/products which are offered by one company.

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 TIPHON (Telecommunications and Internet Protocol Harmonization over Networks). Major players in telecommunications and information technology, among these Deutsche Telekom, France Telecom, Post & Telekom Austria, Siemens, Ericsson, Nokia, Telia, Microsoft, and Alcatel have joined this project and are cooperating in developing common solutions for IP telephony.[45] Altogether, coopetition cases make the assessment of market structures regarding their effect on competition more difficult, as joint ventures which concentrate market power in the short run might have positive effects on competition in the long run.

– *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 also 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.[46] With the proliferation of services, such a system gets 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.

C. New bottleneck-facilities call for new policies

[45] Similarly a prominent group of companies including, for example, Ascend, Cisco, Clarent, Lucent Technologies, and VocalTec have joined forces to create an organization, called iNOW (interoperability NOW) to work on interoperability for IP telephony platforms. Ascend, Cisco and Lucent Technologies are also involved in the ETSI project TIPHON.

[46] 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.

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 (Electronic Program Guide), and APIs (Application Programming Interface), 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. [47] A problem for market control questions is, for example, the fact that there are different proprietary (i.e. closed) encryption systems in Europe.[48] 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 services 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 (European Telecommunications Standards Institute) 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 directive also only states in a *vague* manner that member states shall take appropriate measures to ensure that operators of conditional access services offer technical services to all broadcasters on *a fair, reasonable and non-discriminatory basis*.

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[47] These gate-keeping practices can include (1) the technical infrastructure (decoder base/set-top box; CAS; SMS – Subscriber Management System); (2) the technical and administrative services derived from this (provision of decoders, marketing of smart cards; handling of access control etc.); (3) the control over the network through which the services reach the consumer; (4) the control of premium content and of other rights, acquired through output deals, for example,(5) the prices/costs of equipment, for usage and for the program; (6) control through browsers (navigation systems), for example, EPGs (Electronic Program Guides), (7) APIs (Application Programming Interface), but also general (8) ownership issues.

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.[49] 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.[50] 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.

5. 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 policy approach* that overcomes the traditional dichotomy between the governance of telecommunications and media.

In this context we have explained how, with the Green Paper on Convergence and subsequent activities, the European Union has put the problem of convergence at the top of its policy agenda. In accordance with our integrated mediamatics model, the paradigmatic *change from vertical to horizontal communications regulation* in Europe is in the center of debate. After two intensive rounds of consultations on the green paper, with contributions from all member states, the application of a horizontal approach is generally considered necessary for the regulation of infrastructure, while adherence to a more vertical, i.e. sector specific approach for services is still widely desired. A consensus regarding the possible implementation of a "European Communications Act" and the establishment of a "Single European Regulatory Authority for Communications" is not within sight. In general it can be observed that the telematics side is pushing for an integrated approach, while the broadcasting side is rather reluctant regarding overall reforms, fearing increased supranational, economics-based regulation by the EU. The reform debate clearly indicates that the two sides are pursuing different aims and objectives. On the one side there

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[48] For example Videocrypt (used by BSkyB); Syster (used by Canal+); Irdeto (used by Telepiù) among others.

[49] Among these provisions, for example, a requirement can be found regarding the non-discrimination between free-to-air and pay television.

[50] See for example Consultative Document on Digital Television and Interactive Services: Ensuring Access on Fair, Reasonable and Non-Discriminatory Terms (March 1998). http://www.oftel.gov.uk/broadcast/dig398.htm and Digital Television and interactive services (May 1999). http:// www.oftel.gov.uk/broadcast/dtv0599.htm

is an increased drive toward economic principles, the other emphasizes cultural aspects. However, it is also becoming clear that future policy is not only decided by functional arguments but also to a significant extent by power-political considerations, as every reform option, involves major power losses and power gains, especially as far as changes in the structure of political responsibilities are concerned.

After having discussed the general lines of reform of EU communications policy, we took a close look at a very important and contentious area of concern within the liberalized and convergent communications sector, *competition policy*. 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 and telecommunications on the national 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.

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:

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).

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.

Reduction of sector-specific regulation

The system of sector-specific regulations becomes even more problematic and unenforceable as categorization problems increase. The reduction of sector-specific regulations is a central part of the above-mentioned harmonization process. It is especially complicated by the different approaches (economic and cultural) being pursued in the telematics and the media field.

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. For the latter 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.

Summing up, the convergence phenomenon has put the European communications policy into a state of flux. After a decade of concentrated attention on liberalization of telecommunications, the convergence issue has moved to the center of debate, calling into question even some recently issued regulations and policies. The 1999 review, which is already under way, takes into account both the adequate consideration of convergence and the possible new role and reform of EU competition policies. It can be expected that it will set important signals for the course of future EU mediamatics policies. The reason why the challenges of convergence are even more complex than the liberalization process was, is that stronger supranational policies for the media side are now required as well, if a harmonized EU policy is to be achieved for convergent markets. This has been so far consciously avoided owing to the cultural and political sensitivity of this area, and it undoubtedly throws up a lot of explosive power-political issues.

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Appendix I[51]
Council Regulation 4064/89: Development of Telecommunications/Media Mergers

The Merger Task Force of DG IV groups the merger cases according to 50 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 1998[52], while the other areas have often been subject to great variations (see figure 1 for a comparison of the four largest areas from 1991-1998).

The number of merger cases in the *Post and telecommunications* area doubled from 1997 to 1998, in absolute terms from 12 cases to 24. Accounting for 10.2% 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[53], this growth may be due to telecommunications liberalization within the European Union. It can be expected that this sector will also be among the fastest growing sectors in 1999. With 9.5% (11 merger cases) at the end of June 1999 it is the largest area, followed by *Manufacture of motor vehicles, trailers and semi trailers* with 6.9% (8 merger cases).

In terms of the total number of final decisions by the EU Commission of merger cases (860) from 1991 to 1998 the *Post and telecommunications* sector ranks 4th behind *Manufacture of chemicals and chemical products* (1), *Financial intermediation, except insurance and pension funding* (2) and *Insurance and pension funding, except compulsory and social security* (3).

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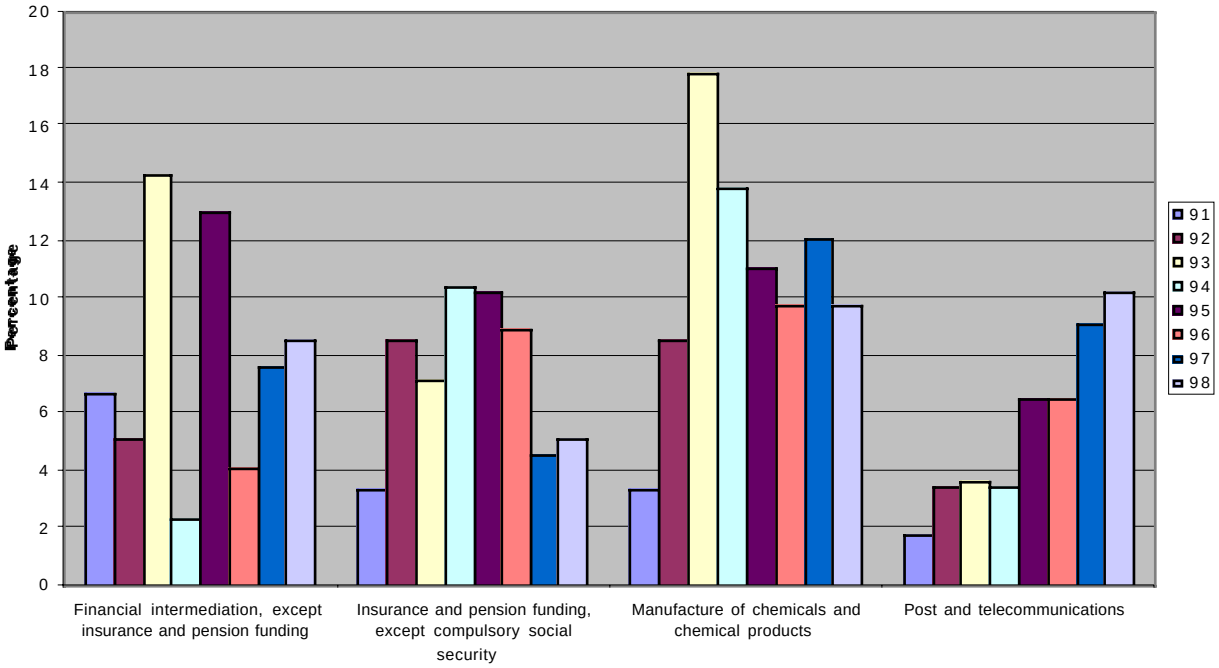
[51] The following results are based on the numbers of cases listed in the European Commission's *Merger Decisions by product* list (860 total final decisions 1991-1998), which can be found on the Internet. The numbers of cases listed there do not correspond with the numbers of cases in the *Statistics European Merger Control* (883 total final decisions 1991-1998), also published by the Commission on the Internet. The authors relied on the *Merger Decisions by product* list in order to provide comparative information on sectors.

[52] The Merger Control Regulation entered into force in September 1990. To provide comparative data only the years 1991-1998 were used for analysis.

[53] It is possible that the general increase in merger cases subject to Council Regulation 4064/89 from 1997 (132 cases) to 1998 (253 cases) 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 available decisions fall under the regulation because of the original turnover), it might be for other sectors.

Figure 2: Comparison of Merger Cases by Sectors: 1991-1998



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