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Regulating 'Access to Digital Content' in EU: Particular Problems and Appropriate Measures

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I. Introduction

Convergence takes place in everyday life, having an influence as a reality rather than a myth along with the rapid pace of technological changes. At the centre of the convergence lies the digital transformation which is based on granular and intelligent technologies facilitating the electronic communications both at network and service level. The so-called transformation is augmented with enhancements concerning digital compression and standardisation. In the end, a 'multimedia' sector appears to emerge owing to increasingly computerised and multi-functional platforms that are increasingly becoming subject-matter of the same legacy: digital convergence.

Transition to all IP-based networks that are now carrying voice and video (cable with Internet capability) is leading the convergence in the network space.[1] However, the digital convergence has a slow pace for it depends on development of closed networks. These (closed) networks do not take data everywhere, or at least not at the same speed, nor are they available to everyone, as much of the network architecture is privately owned and managed.[2] This fact, on the one hand is being challenged through 'cross-over links' between Internet and digital TV allowing users to interact with web content related to what they are watching on TV and the ability to switch between TV and web,[3] on the other hand is still heavily influencing the regulatory measures which seem to continue to reside in the foreseeable future.

Albeit separately regulated, transmission facilities and content are inseparable in the sense that when the former is hampered by dominant players denying or aggravating access to 'bottleneck' technologies, access to the latter would have been threatened seriously. Not only anti-competitive behaviours but also structural constraints, i.e.

[1] Margherita Pagani, Multimedia and Interactive Digital TV: Managing Opportunities Created by Digital Convergence, Idea Group Inc., 2003, http://site.ebrary.com/lib/universityofessex/Doc?id=10022507&ppg=50, p. 40.
[2] Christopher T. Marsden, Introduction: Information and communications technologies, globalisation and regulation in Christopher T. Marsden (eds.) Regulating the Global Information Society, *Routledge*, 2000, p. 6.
[3] See Rica Calleja, Convergence: Gone Digital, Going Interactive – Markets and Regulation in the Audiovisual Sector, *Entertainment Law Review*, Vol. 10, Issue 3, 1999, p. 66.

concentrated and/or vertically-integrated markets would affect distribution and delivery of digital content in a vigorous manner. As such, digital convergence does not mean dismissal of access-related problems, even it might cause an exacerbation of the prevailing problems in absence of a sound access regime that ensures an open and competitive marketplace that would bring about consumer welfare, whilst securing accessibility of end-users to digital content as widest as possible.

In fact, access to digital content, is for the time being and does seem for the foreseeable future, to be one of the hot topics under the influences of convergence. This is because whereas digitalisation of platforms promotes content delivery at various levels, the fact that producers of digital content are limited does not change in wake of convergence. Delivery of (access-controlled) content to consumers is another stage, which, even in a convergent environment, represents one of the emerging areas of access foreclosure. That is to say, proliferation of transmission facilities would erode the problem of transmitting data, but could hardly ensure the same for content production as well as delivery of content to consumers.

From this point of view, access-related problems appear at the beginning of the value chain that is composed of various steps enabling reaching to the consumers, i.e. from production to delivery stage. The emerged problems at the production level take a form of monopolisation of content, and thus have a societal character that extends to lack of cultural diversity and media pluralism. While coming to the consumer level, access-related problems differ in nature, yet revealing common aspects with those that are seen at the production level. Among them, some relate to access to encryption systems, navigators, decoders and to a less extent digital right managements (hereinafter "DRMs"),[4] while others are indirect problems arising out of vertically-integrated players keeping in their hands the digital gateways through which dissemination of a wide range of informational (e.g. moral, cultural) values is risked.

[4] [D]RM can be defined as "a bundle of software, services and technologies that confine use of digital content to authorised consumers, and manages consequences of that use throughout the entire life cycle of the digital content" (Carlisle George and Navin Chandak, Issues and Challenges in Securing Interoperability of DRM Systems in the Digital Music Market, *International Review of Law Computers & Technology*, Vol. 20, No. 3, 2006, p. 272.

The above-mentioned problems, namely those related to conditional access[5] (hereinafter "CA") and those relating to lack of pluralism figure as the main concerns policy makers and law enforcers have in their agenda. Likewise, this dissertation draws attention to the said concerns by firstly examining implications of convergence towards regulatory landscape, consumer behaviours and competitive relationships, then goes through convergence-driven problems that affect access to digital content, and ultimately discusses possible solutions from European Community (hereinafter "EC") framework to achieve public policy results as well as a competitive digital content market.

In line with the above framework; definition and scope of 'access' which takes new forms along with digital convergence are dealt with under first chapter. Throughout the first chapter, 'convergence' 'interoperability' and 'standardisation' are also examined so as to enlighten the key areas in solving access-related problems. The so-called problems constitute the subject-matter of the second chapter, which comprises five sub-sections, namely; 'denial of access', 'discrimination', 'bundling', 'pricing issues' and 'information policy matters'. After discussing those problems, the dissertation turns its face to the possible legal solutions based upon EC legal framework including case-law of the Community Courts in the third (last) chapter.

II. New Challenges of Digital Era: Converging Markets and New Forms of Access Relationships

II.A. Digital Convergence

Having the meaning of 'coming and meeting together' literally, 'convergence' means more than this for information and communications technologies (hereinafter "ICTs"). In a narrow sense, convergence means digitalisation of signal delivery

[5] [C]onditional access means any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation (Alexander Scheuer and Michael Knopp, Digital Television Glossary, (Supplement to Susanne Nikoltchev (eds.) Regulating Access to Digital Television), *IRIS Special*, European Audiovisual Observatory, Strasbourg, 2004, p. 9). See also *infra*, p. 20).

systems which ensures all kinds of data, i.e. texts, video, radio broadcasts to be delivered through binary codes (bits) in a compressed and speedy manner. By and large, the concept of digital convergence is used to refer to three possible axes of alignment: convergence of devices, convergence of networks and convergence of content.[6] While convergence, in its former meaning, does not necessarily entail eroding of the boundaries between separate industries as well as sector-specific rules, the latter approach means cross-boundaries of three neighbouring sectors, namely telecommunications, broadcasting and information technologies being blurred both legally and functionally. Following an analogy similar to the latter, Commission's Convergence Green Paper states that, "the term 'convergence' eludes precise definition, but it is most commonly expressed as:

- the ability of different network platforms to carry essentially similar kinds of services, or
- the coming together of consumer devices such as the telephone, television and personal computer"[7]

Convergence between telecommunications and new (digital) media is the most paradigmatic change in rapid evolution of converging markets. Traditionally, media markets are used to be dominated by state-funded broadcasters who were granted many prerogatives, i.e. regarding allocation of spectrum frequencies, state subsidies, and were providing analogue television services solely. Where, in analogue pay-TV industry, there was typically only a single service provider on each platform, there was little potential for competition.[8] As well, non-liberalised telecommunications sectors in EU represented monopolistic market structures where only voice telephony and related services were being supplied. Thus, crossing other business areas which potentially bring out innovations was quite rare during pre-convergence era.

[6] Pagani, *supra* note 1, p. 33.
[7] Green Paper on the Convergence of the Telecommunications, Media, and Information Technology Sectors, and the Implications for Regulation Towards an Information Society, COM(97) 623 (3 December 1997), p. 1, http://europa.eu.int/ISPO/convergencegp/97623en.doc
[8] Campbell Cowie and Christopher T. Marsden, C., Convergence: navigating bottlenecks in digital pay-tv, Vol. 1, No. 1, 1999, *Info*, p. 54.

Along with massive use of digital applications, the situation of separate business models within media and telecommunications industries has evolved into a medium where one class of competitors hailing from one sector (e.g. cable operators) would have to face new competitors coming from another sector (e.g. Internet service providers). In a convergent landscape, where telecom suppliers are tending to expand their fields of activity towards hybrid products such as cable telephone, mobile TV, wireless application protocol, media operators would on the other hand supply voice (e.g. VoIP) and data (e.g. access to the web).

In the new converged digital environment, the aim of the supplier, broadcaster or service provider is simply to deliver the content in a convenient user-friendly manner, leaving many of the consumption choices to the end-user: navigation and search modes and multiple ways of accessing content in 'pull' business models, where the consumers chooses what he or she wishes to view, as opposed to the traditional 'push' mode of traditional electronic media, where the broadcaster or service provider determines the schedule.[9] As such, digital convergence is turning ubiquitous TV sets, PC screens, mobile handsets and consumer electronic devices into end-user terminals for interactive media applications and download services.[10] In fact, one of the most apparent features of convergence is the abandonment of strictly defined consumer choices which are -albeit in a slow pace- undergoing a deep change during this process, i.e. from traditional TV sets, PCs, telephones to mp3-players, personal digital assistants, 3G-compatible mobile handsets.

All the abovementioned developments pave the way for convergence of legal measures with a far-reaching result that regulatory principles would apply to all the converging platforms, networks and services. While Commission's Green Paper on Convergence[11] reveals a prospect of convergence between regulatory measures at the

[9] Screen Digest Ltd, CMS Hasche Sigle, Goldmedia Gmbh, Rightscom Ltd, Interactive content and convergence: Implications for the information society - A Study for the European Commission (DG Information Society and Media), October 2006, p. 25, http://ec.europa.eu/information_society/eeurope-/i2010/docs/studies/interactive_content_ec2006_final_report.pdf
[10] *Ibid*, p. 26.
[11] See *supra* note 7.

level of transmission, it does not deal with content-side regulatory convergence.[12] The latter is unpredictable in near future since a deep change in consumer behaviours and business relations that would supersede traditional modes of content delivery is required for such a prospect. As such, whereas the former has formally taken place with the introduction of 2002 Regulatory Framework,[13] the latter is expected to be realised to a limited extent with the enactment of AMSD Proposal.[14]

In sum, to what extent 'digital convergence' will change consumer/business relationships as well as regulatory measures remains to be seen. With digital convergence really happening now, it, nevertheless, becomes clear that the obstacles hampering the development of digital content distribution are themselves 'convergent', where many of them are affecting all content sectors (music, movies, games, etc) as well as platforms (online, mobile), some others are specific to certain sectors/platforms.[15] As such, most prevailing problems are touched upon below; however the main focus is directed to the key areas, i.e. access to CA systems and its components, which are most affected by convergence process.

II.B. Scope of 'Access' and Related Key Concepts

II.B.1. General Overview

Although technological and convergence developments are contributing to the demise of spectrum scarcity as a rationale for broadcast regulation, these developments are contemporaneously giving rise to a new basis for regulation, and that is access.[16] Indeed, adequate level of access being ensured is of critical importance on part of

[12] See also Wolf Sauter, Regulation for Convergence: Arguments for a Constitutional Approach? in Christopher T. Marsden and Stefaan G. Verhulst (eds.), Convergence in European Digital TV Regulation, *Blackstone Press Limited*, 1999, p. 77-80.
[13] See *infra* p. 12.
[14] See *infra* p. 55-56.
[15] Screen Digest Ltd, CMS Hasche Sigle, Goldmedia Gmbh, Rightscom Ltd, (A Report on 'Interactive content and convergence'), *supra* note 9, p. 13.
[16] Jeremy Landau, The Regulation of Broadcasting Following the Advent of Digital Convergence, *Computer and Telecommunications Law Review*, Vol. 4, Issue. 3, 1998, p. 64.

new entrants who do not often possess key technologies and/or infrastructure that represent large economies of scale and scope.

Access-control measures and exclusive rights over content aggravate competitive constraints against new media operators having to compete with dominant firms. Migration from analogue to digital circuitry offers many distribution facilities and removes the restraints of spectrum scarcity does not change the inherent imbalances between market players as well as vertically-integrated market structures with easiness. Thus; despite the fact that innovative and competitive services are augmented with digitalisation, the need to securing access to proprietary technical platform services is still valid even in a convergent environment.

On the other hand, following the emergence of new business models, multimedia appliances and service packages which are by-products of convergent, abundant transmission facilities, premium content (e.g. major Hollywood films and sporting programmes) gained a crucial role in provision of multimedia services.[17] As a matter of fact, entrepreneurs that wish to enter new media markets could do nothing without reaching to premium content even if he or she has already occupied a strong position at the network level. In view of these facts, Commission officials have emphasized the indicative role of 'access to premium content' in provision of newly emerged media services.[18]

Although the restricted access to premium content leads to media concentration, restricts output and offers less choice for consumers, the Commission accepts that there are efficiencies to be gained for firms and their customers by some degree of restriction of competition which gives market operators sufficient financial stability to

[17] Commission regarded 'premium content' as "essential input" for operators carrying out their activities in delivery of audio-visual content (Case No.IV/M.2050, *Vivendi/Canal+Seagram*, Commission decision of 13 October 2000, OJ C311/3 (hereinafter "*Vivendi/Canal+ /Seagram* decision").

[18] See Mario Monti, Access to content and the development of competition in the New Media market- the Commission's approach, Brussels, 8 July 2004, http://europa.eu/rapid/pressReleasesAction.do?reference=-SPEECH/04/353&format=PDF&aged=1&language=EN&guiLanguage=en; Herbert Ungerer, Application of Competition Law to Media - Some recent issues, Nera Conference, Brussels, 22 June 2004, http://ec.europa.eu/comm/competition/speeches/text/sp2004_019_en.pdf

be able to develop new and reliable media services.[19] However, at the same time, there are competition concerns which relate, for instance, to leveraging market power from traditional to new media markets or foreclosing these markets by barring access to premium content required by potential entrants.[20]

In view of prevailing problems, access to digital content is inseparable from access to digital gateways in the sense that they constitute one value chain which content suppliers, carriers and equipment manufacturers always have to face. Though concept of 'access', as implied above, refers to access to network facilities, including software programs or navigators in general, it also means access to premium or niche programmes supplied by the right holders. Thus, 'access' has a wide range of meanings both literally and legally.

II.B.2. Definition and Scope of 'Access'

As value-added services such as internet access, electronic mail, voice mail and online databases were progressively liberalised in EU, access to essential network facilities started to become a recurrent theme and a central issue in the telecommunications, media, and information technology markets.[21] However, there was neither a definition nor a common understanding regarding 'access' under the Community measures of 1990s, which were only handling some individual types of access, i.e. interconnection, co-location. Considering the short-term requirements to speed up large-scale deployment of Internet at affordable rates in EU, and to open up development towards high-speed multimedia Internet applications, the Commission chose to pursue a wide-ranging reform, taking the convergence phenomena into account.[22] Given the need to adapt the old regulatory measures to new challenges, a

[19] Nikos Th. Nikolinakos, EU Competition Law on Access to Premium Content: The Emergence of New Media, *Computer and Telecommunications Law Review*, Vol. 11, Issue. 2, 2005, p. 13-14.
[20] *Ibid*, p. 14.
[21] Herbert Ungerer, Competition Workshop on Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union, 13 November 1998, Florence, p. 6.
[22] Herbert Ungerer, Access Issues under EU Regulation and Anti-Trust Law - The Case of the Telecommunications and Internet Markets, July 2000, Research Paper, WCFIA Fellows Program 1999/2000, Harvard University (Weatherhead Center for International Affairs), p. 29.

new consolidated package was entered into force in 2002 bringing together all the related measures, i.e. concerning authorisation, numbering, access, user rights, data privacy, under which all transmission networks and services are regulated under a single framework.

Under the Directive 2002/19/EC (hereinafter "Access Directive"), 'access' is used to encompass all kinds of arrangements relating to access to a type of wholesale network component or service.[23] That is, 'access' is defined as "making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services".[24] Though non-exhausted, many sub-categories of access including 'access to network elements and associated facilities'[25] and 'access to conditional access systems (hereinafter "CAS")[26] for digital television services' are specified under the definition of 'access'.[27] Deliberately, both 'access by end-users' and 'access to content services' are excluded from the concept of 'access' and related measures enshrined under Access Directive.[28] In relation to this fact, policy makers and law enforcers could not force dominant firms to make available their digital content to third parties in accordance with Access Directive. Importantly saying, neither this nor another Community Directive does include any provision directly designed to mandate third-party-access to premium content. However, as will be described below, under the 2002 Regulatory Framework are there alternative

[23] See Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ 24.4.2002, L 108/7, http://www.europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#reg
[24] Access Directive, *supra* note 23, Article 2(a).
[25] Article 2(e) of the Directive 2002/21/EC (hereinafter "Framework Directive") reads as follows: "*Associated facilities* means those facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service. *It includes conditional access systems and electronic programme guides*" (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ 24.4.2002, L 108/33, http://www.europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm#reg).
[26] Under the Framework Directive, 'conditional access system' is defined as "any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation" (Framework Directive, *supra* note 25, Article 2(f)).
[27] Access Directive, *supra* note 23, Article 2(a).
[28] Access Directive, *supra* note 23, Article 1(2) and Recital 2.

mechanisms available to force network owners to open their platform to third parties and/or to carry certain content via their networks.

II.B.2. Interoperability and Standardisation

Though undefined, 'interoperability' is deemed one of the policy objectives to be ensured under the 2002 Regulatory Framework. Interoperability is one of the big challenges of the convergence, arising as a multi-level compatibility problem, specifically at the levels of network, service, content and terminal equipment. For example successful proliferation of mobile content requires co-ordinated development of networks, handsets, operational and usage restriction systems, and content formats.[29] In order to ensure a positive user experience, the handset's physical features as well as the operating system and software tools necessary to run protected or non protected content applications must work all together.[30]

'Interoperability' is conferred upon different meanings for the purpose of different sector-specific rules. Interoperability, in relation to telecommunications, refers to a higher level of functionality of interconnection of networks, namely the level of applications and services.[31] It is essential for the achievement of the principle of 'any-to-any connectivity', which means that any user can communicate with any other user, even if they use different networks or equipment.[32] As such, interoperability is covered under mandatory solutions under Framework and Access Directives.[33]

Under Directive 91/250/EEC (hereinafter "Software Directive") which ensures copyright protection on computer programs at EU level, 'interoperability' is simply defined as "the ability to exchange information and mutually to use the information

[29] European Commission, i2010 Information Space Innovation & Investment in R&D Inclusion, The Challenges of Convergence, Discussion paper, 12.12.2006, p. 22.
[30] *Ibid*.
[31] Pierre Larouche, Competition Law and Regulation in European Telecommunications, Hart Publishing, 2000, p. 380.
[32] Nikos T. Nikolinakos, EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors, *Kluwer Law International*, 2006, p. 385.
[33] See Framework Directive, *supra* note 25, Article 18(3); Access Directive, *supra* note 23, Article 5(1).

which has been exchanged".[34] The exception set out under Article 6 of the Software Directive as a decompilation right[35] guarantees mutual-functionality, namely a certain level of interoperability of computer programs.[36] Therein, the legislator envisages not a full functionality, rather lays down a limited right to be used whenever the software developers would need in order to enable (related parts of) their computer programs to be interoperable with others.

On the other hand, with regard to DRM systems which music right-holders usually create to prevent unauthorised usages and downloads from the web, there is no mandatory interoperability solution within the Community measures.[37] Notwithstanding the fact that creation of a proprietary DRM system by each right-holder is of the potential to lock-in consumers to different software applications and devices, i.e. portable music players such as iPods, European legislators seem to be satisfied simply with encouraging interoperability of different copyright technologies in that context. This fact, when compared with computer and telecommunications industries, demonstrates how interoperability concerns are treated differently under different (sector-specific) rules.

However, convergence turns lack of interoperability into a common problem against development of ICTs. In fact, not only technical compatibility problems but also competitive failures, economic inefficiencies, and hazards to consumer welfare would arise out of insufficient interoperability. As a matter of fact, developers of digital devices, software applications and multimedia services inevitably find themselves in

[34] Directive 91/250/EEC on the legal protection of computer programs, [1991] OJ L122/42, Recital 12.
[35] *Ibid*, Article 6(1). Decompilation allows a software engineer or programmer to access the original source code, or a version as near as possible to the source code, so that he can appreciate the ideas and principles underlying a computer program, how the program functions and the interfaces of the program (Tanya Aplin, Copyright Law in the Digital Society, Hart Publishing, 2005, p. 166).
[36] According to that provision, authorisation from the rightholder of a computer program is not required for *reproduction* or *translation* of the programme in question provided that these acts are "indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs" [Software Directive, *supra* note 34, Article 6(1)].
[37] Under Directive 2001/19/EC, interoperability of different systems created for copyright protection is just encouraged (See Directive 2001/19 of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L167, [2001], Recital 54).

a complex world where they have to find interoperability solutions to compete effectively in the marketplace.

Standardisation, together with alternative tools, i.e. open access regimes, voluntary agreements to disclose proprietary interfaces, would effectively respond to interoperability-related concerns. Generally speaking, industry standards can take three forms, first; market-driven mechanism as has typically been the case in computer industry, second; imposition of standards by governments as was common in old telecommunications regime, third; sponsoring private industry consortia for standardisation alike the case in digital TV industry.[38] Development of standards to allow interoperability of digital interactive television services has thus far been the very subject-matter of discussions across Europe. EU-wide standardisation efforts hitherto concentrated on set-top boxes[39] and in particular application programme interfaces[40] (hereinafter "APIs").

Under the Article 18(1) of Framework Directive, European legislators require Member States (hereinafter "MSs") to encourage digital TV providers and equipment manufacturers to adopt an open API. To ensure interoperability of digital interactive television services, implementation of mandatory standards and specifications is enshrined as the last resort in case market-driven efforts have not satisfied the policy objectives laid down under Article 18 of Framework Directive.[41] Pursuant to the said Directive provision, Commission published two documents setting out its position in

[38] Hernan Galperin, Can the US transition to digital TV be fixed? Some lessons from two European Union cases, *Telecommunications Policy*, Vol. 26, 2002, p. 5.
[39] Set-top box is the device required for reception of digital television services. Its main task is to decompress and decode the data stream so that a normal audio-visual signal can be sent to the television (Alexander Scheuer and Michael Knopp, *supra* note 5, p. 16-17). See also *infra*, p. 19-20.
[40] API is an operating language configured as an interface between the operating system of a set-top box and digital applications that offer end-users a variety of (multimedia) services. In order for a service provider wishing to reach a consumer base bound with a pay-TV subscription, its application(s) must be compatible with API of the set-top box used for the pay-TV offering in question.
[41] To mandate standards, Commission, following a one-year-lasting review after the entry into force of the Framework Directive, should conclude that interoperability and freedom of choice for users have not been adequately achieved in one or more Member States, (Framework Directive, *supra* note 25, Article 18(3)).

regard to interoperability objectives.[42] Both two documents revealed Commission's reluctance to mandate any standard regarding digital set-top boxes, as well as demonstrated that Commission persists on market dynamics to agree on a standard like Multimedia Home Platform (hereinafter "MHP").[43]

Open interfaces and Europe-wide standards would be an effective remedy to ensure interoperability in order to create a competitive environment and achieve consumer welfare. However, because standards are accepted and/or created by standard-making organisations in long timeframes by following strict procedures, standardisation may fail to respond to interoperability concerns in a satisfactory and expeditious manner. The alternative way forward, thus, would be to establish interfaces that provide the minimum set of required protocols and tools to achieve the purpose of interoperability.[44]

In comparably the same manner framed above, Commission adopts rather a comprehensive view that includes not only encouragement of open APIs but also mandatory access solutions providing open industry standards fall insufficient to ensure interoperability in the marketplace. In *Microsoft* case, Commission followed this analogy and required Microsoft to disclose interface information that would allow non-Microsoft work group servers to interoperate with Windows PCs and servers.[45] Commission concluded that Microsoft infringed Article 82 by refusing to supply the so-called interface information to third parties (e.g. server vendors),

[42] See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *on reviewing the interoperability of digital interactive television services pursuant to Communication* COM(2004) 541 of 30 July 2004, COM(2006) 37 final, 02.02.2006, http://ec.europa.eu/information_society/policy/ecomm/doc/info_centre-/communic_reports/interoperability_idtv/comm_pdf_com_2006_0037_f_en_acte.pdf; Commission Staff Working Paper, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on interoperability of digital interactive television services - Extended Impact Assessment COM(2004)541 final, 30.07.2004, http://ec.europa.eu/information_society/policy/ecomm/doc/info_centre/communic_reports/interoperability_idtv/sec_2004_1028.pdf

[43] MHP is the open standard for APIs of set-top boxes developed by a consortium (Digital Video Broadcasting group) delegated by Commission in 1993, whose members consisted of European equipment manufacturers, broadcasters, national regulatory authorities, and software developers.

[44] European Commission, Discussion paper, *supra* note 29, p. 22.

[45] See Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft).

considering that none of other alternative tools was substitutable with interoperability information in order to compete viably in the market.[46] In justifying mandated disclosure, Commission seems to have regarded the proprietary specifications embedded into the Microsoft servers as de facto standards, being unsatisfied with either open software standards or decompilation right that can be used under Software Directive.

In conclusion, to enable consumers to achieve the fullest connectivity to digital applications and benefit from them at the highest level, mandating disclosure of minimum set of interfaces seems to be regarded as an effective measure in the EU for the foreseeable future.

III. Access-related Problems

As convergent and commercialised services increase, both the general availability of and the choice between information sources becomes questions of access and slip away into private control.[47] Put differently, more consumer choices unfettered from technical constraints such as spectrum scarcity would turn the competition and information based problems into distinct matters of access, which would take many forms such as denial of access, anti-competitive bundling, discrimination.

Leading obstacles against development of digital content distribution ironically results from the process of convergence and relate to the monopolisation of customer bases on part of the suppliers of access-controlled services, i.e. pay-TV providers, DRM owners. That is, scarcity of premium content in contrast to transmission facilities comes with scarcity of available customers who often support one

[46] Commission in its comparative analysis referred to three categories of technical tools (the use of open industry standards supported in Windows; the distribution of client-side software on the client PC; and the reverse-engineering of Microsoft's products) which Microsoft alleged could substitute the interoperability information that Sun demanded, and concluded that none of them is a viable solution for companies willing to compete with Microsoft on the market for work group server operating systems (hereinafter "OS") (Commission's *Microsoft* decision, *supra* note 45, paras. 667-691).

[47] Natali Helberger, Controlling Access to Content - Regulating Conditional Access in Digital Broadcasting, *Kluwer Law International*, 2005, p. 53.

proprietary technology, end-user device and service package. Not always related to content scarcity but affecting a robust content market is the limited audience of digital content services, particularly in pay-TV industry.

As a matter of fact, many access-related problems stem from the cut-threat competition to attract the referred limited audience. Monopolization of the consumer base in the form of bundling strategies, technical or contractual lock-ins as well as manipulating consumers' search patterns and increasing their search costs are strategies to improve one's competitive position.[48] The emerging problem of monopolisation of consumer base, when combined with behavioural and structural constraints, would aggravate the competition and information problems. Below are described the so-called access-related problems in detail.

III.A. Denial of Access

As stated above, multimedia and ICT industries witness a supply chain starting from content production ending up with consumer delivery.[49] Such a supply chain means varying levels of service and content providers having to collaborate with each other. For instance, in case of media services which are provided going through the vertical value chains, content providers who have already gained rights to offer various types of content, i.e. music, games, sport programmes would have the so-called content transmitted via either their affiliated content delivery firms or other service providers. The rights purchased by content delivery operators may cover one platform [(e.g., direct-to-home (hereinafter "DTH")], but also several other platforms (e.g., UMTS

[48] *Ibid*, p. 54

[49] Martin Cave describes constituent stages of the so-called supply chain for broadcasting industry as follows:

(1) Content,
(2) Packaging of content into channels,
(3) Bundling of channels into packages (in pay TV),
(4) Delivery,
(5) Conditional access,
(6) Reception,
(7) Revenue collection

(Martin Cave, Regulating digital television in a convergent world, *Telecommunications Policy*, Vol. 21, No. 7, 1997, p. 582).

and Internet).[50] In the latter case, these alternative platforms are unable to deal with the content provider directly; instead, they will have to negotiate with a competitor on the delivery segment, i.e., the company who bought the rights for the different platforms.[51]

At each of the key stages in the supply chain there is typically only one provider within each geographic territory, effectively placing the provider in a gatekeeper position, with third party access to the bottleneck facilities only possible through agreement with the proprietary service provider.[52] Such agreements so many times play a key role in opening digital gateways which are generally held by a limited number of operators who may deny access to their information, infrastructure, etc. For instance, content delivery firms, i.e. satellite TV companies may be reluctant to supply their premium content to new broadcasters, i.e. cable companies, considering their reputation would be diminished once they have allowed transmission of well-reputed content, i.e. national soccer matches via unknown channels.

Assuming that the premium content has been released by the right-holders to new entrants, access problems would not disappear at all, particularly at the level of technical platform. Access barriers would also come from owners of integrated receiver decoders (hereinafter "IRD") called 'set-top boxes' as well as providers of other digital software embedded in IRDs, i.e. electronic programming guides (hereinafter "EPGs").[53] They would potentially refuse to make available their technical platform services in order to deter third parties from transmitting their broadcasts to intended viewers. Set-top boxes, which function in the opposite way to

[50] Damien Geradin, Access to Content by New Media Platforms: A Review of the Competition Law Problems, *European Law Review*, Vol. 30, Issue. 1, 2005, p. 70-71.
[51] *Ibid*.
[52] Cowie and Marsden, *supra* note 8, p. 57.
[53] EPGs, which constitute an important component of CASs, are a kind of electronic menu enabling end-users to navigate through the list of digital applications, i.e. TV channels, and select one of those that best fit their needs according to the given information. They can also be used to order pay-per-view, pay-per-event per time services, to purchase goods and services and, in some cases, for Internet access if the digital receiving equipment has a built-in/attachable modem connected to a telecommunications network (Dermot Nolan, Bottlenecks in pay television: Impact on market development in Europe, *Telecommunications Policy*, Vol. 21, No. 7, 1997, p. 603)

modems, translate digital signals into analogical understandable signals for television sets,[54] and function as a digital gateway for broadcasters. They, with other hardware (e.g. smart card) and software (e.g. encryption system, subscriber management functions) components, constitute CA systems (hereinafter "CAS"),[55] which all together enable authorised end-users to receive and view the content delivered to the user terminals, i.e. TV sets.

Given the increasing importance of CASs, many platform owners develop their proprietary CASs in order to move up the ladders of the so-called value chain. However, proliferation of such systems means a number of distinct -and mostly non-interoperable- technologies having the effect of structural barriers between broadcasters and dispersed consumer bases. In such a fragmented market, a broadcaster who does not have any or a popular set-top box would encounter serious access problems, i.e. denial of access. Such denials, in effect, put entry barriers against new operators wishing to deploy their services in new media industry. However, content suppliers must be able to access all the facilities of the IRD, as a package.[56] Otherwise, foreclosure possibilities continue at the level of technical platform, threatening the diligence of digital content delivery markets.[57]

III.B. Bundling

In parallel with increasing trend of commercialisation, undertakings sometimes offer their services via combinations of content and delivery and/or within bundled service packages.[58] For instance, bundling purchase of one service with purchase of another

[54] Carles Llorens-Maluquer, European Responses to Bottlenecks in Digital Pay-TV: Impacts on Pluralism and Competition Policy, *Cardozo Arts & Entertaintment Law Journal*, Vol. 16, Issue. 557, 1998, p. 559.
[55] See also Natali Herberger, Access to technical bottleneck facilities: the new European approach, Communications & Strategies, Vol. 2, No. 46, 2002, p. 34.
[56] Cowie and Marsden, *supra* note 8, p. 61.
[57] Having been concerned about such possibilities from the very beginning, EU legislators granted a statutory right that enables broadcasters to access to existing CASs on fair, reasonable and non-discriminatory terms (See *infra*, p. 47).
[58] Bundling is also known within its distinct form of 'tying' in competition law terminology. Tying, in general, means making purchase of one product or service conditional upon the purchase of another, and departs from 'bundling' on the ground that the latter no longer requires distinctly formed two products.

is a widely-used strategy particularly in pay-TV industry. In this regard, many pay-TV operators would prefer to make subscription of a pay-TV service package dependent on the purchase of their proprietary set-top boxes irrespective of whether consumers would rather be pleased to buy components of a bundled offer from different providers. Arguments of service compatibility, transaction and cost efficiencies might be asserted as to the benefits of such bundling acts. Notwithstanding the so-called benefits, competitive conditions of both downstream (e.g. CAS) and upstream (e.g. pay-TV) markets would be affected from bundling strategies. This is because overwhelming products (offered in a bundled form) would leave no comparable choice to customers in each of the said markets, and this prospect means exclusion of new entrants in effect.

As in the case of content-delivery bundling, consumers, as a method of marketing digital content, may be forced to subscribe one niche channel (e.g. documentaries) whilst buying a premium channel (e.g. sports). Bundling of channels would come with some efficiencies as well as some hazardous impacts in respect of fragmented markets. Accordingly, anti-competitive concerns must be weighed against the consumer benefits that are attached to bundled offers. A decision of Independent Television Commission (hereinafter "ITC") sheds light to the concerns of how to balance those conflicting effects. In a case where BSKyB has involved in a channel bundling, ITC recognised both valid business reasons for bundled offers and hazards of them towards consumers; and ultimately posed the questions as to whether the wider range of channels would result in increased consumer welfare and whether better risk-bearing options are available for testing the legitimacy of bundling in case of pay-TV.[59] Following a different analogy, Office of Fair Trade (hereinafter "OFT") sought whether there was a natural link between main and tied products as the key point to find existence of an abusive practice.[60]

Tying is one of the non-exhausted abusive practices which are prohibited under Article 82 of the EC Treaty. Notwithstanding these facts, tying is used to entail the same meaning in this study.

[59] Helberger, *supra* note 47, p. 183.

[60] Helberger, *supra* note 47, p. 184.

However, the natural links perceived between different components of bundled service packages do not dismiss the potential for anti-competitive bundling acts. This fact is also affirmed by the European Court of Justice (hereinafter "ECJ") in the landmark case of *Tetra Pak II*,[61] where a dominant manufacturer's tying supply of machines used for processing milk and filling the cartons with that of aseptic cartons for packaging ultra-heat treated milk is condemned in a prescriptive manner:

> "[C]onsequently, even where tied sales of two products are in accordance with commercial usage or there is natural link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 (now Article 82) unless they are objectively justified"[62]

Now it is clear from *Tetra Pak II* that, once it is shown that the products or services tied together are in different markets, a dominant undertaking cannot rely on the words about nature and commercial usage in Article 82(d).[63] By the same token, EC Authorities do not follow any economics-based justification concerning prohibition of tying agreements under Article 82, but simply punishes leveraging of market power from one market to another; and this fact attracts so much criticism from commentators.[64]

Commission's attitude towards tying could also be seen in *Microsoft* case, where Microsoft's tying strategy by making the availability of the Windows client PC OS conditional on the simultaneous acquisition of Windows Media Player is found abusive by itself. Commission's fears surrounded the ubiquity of Windows client PC OSs, and possible harmful effects of the so-called tying both in market for streaming media players and neighbouring markets, i.e. markets for DRM solutions and online music delivery. Not only a market tipping in favour of Microsoft but also a prospect

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[61] Case-C-333/94 P, *Tetra Pak International SA v. Commission* [1996] ECR I-5951, [1997] 4 CMLR 662.
[62] *Ibid*, para. 37.
[63] Alison Jones and Brenda Sufrin, EC Competition Law: Cases and Materials, Oxford University Press, 2nd Ed., 2004, p. 461.
[64] See Antonio Bavasso, Communications in EU Antitrust Law: Market Power and Public Interest, *Kluwer Law International*, 2003, p. 214.

of competition foreclosure in overall digital content industry seems to have made Commission concerned about Microsoft's tying.[65] *Microsoft* would be a comparable case for similar business areas, i.e. content encoding software applications, format licensing, wireless information devices, where individual software applications could hardly reach massive populations without commercial strategies including bundled offers. In view of *Microsoft* decision, any digital content distributor who is running its activities within the boundaries of EU has to be cautious in marketing its combinative products and refrain from lock-in situations.[66]

III.C. Discrimination

Discrimination means placing the same-sorted products or services, i.e. those having the same quality, function, etc. into different levels of treatment by imposing on one customer a higher burden in terms of price or other sale conditions. Discrimination might take different forms. First, it may take place via differentiation of terms and conditions in respect of the same product/service in different geographical locations, i.e. MSs of EU. Second, it could occur by applying different purchase and/or licensing conditions for two separate products despite the similar cost structure, functionality, etc.

At the heart of the former lies the free movement of goods and services, which is the fundamental principle of EC Treaty as laid down under Articles 28 and 49. Such kinds of discriminative treatments are flatly prohibited in EC law except on very limited grounds of public interests.[67] The latter includes both linear discrimination between two products/services of the same sort and more comprehensive acts which

[65] See Commission's *Microsoft* decision, *supra* note 45, para. 842.
[66] Lock-in situations usually takes place by binding consumers to receive the bundled package with a DRM solution to deter them from using other proprietary applications; whereas it is arguable that unreasonably long contract durations are able to lock-in customer choices.
[67] So-called public interests, i.e. concerning public morality, public policy or public security, protection of health are specified under Article 30 of the EC Treaty; yet they pertain to free movement of goods. As far as services concerned, there appears a more implicit and narrower derogation. Article 50, by specifying the character of the services within the meaning of Treaty, puts forth an ambit of exemption to the freedom of services.

arise out of interrelationship between downstream and upstream markets and generally take the form of a dominant firm favouring its subsidiaries. All the discrimination acts in this category are *prima facie* caught under Article 82(c) which prohibits "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".

Across the vertically integrated electronic communications markets in EU, the typical scenario of discrimination by which a dominant firm favours its subsidiary has so far been witnessed widely. In such a situation, a dominant firm does not generally involve itself into a binding relationship which it usually establishes with other (unaffiliated) downstream companies, though it may disguise to have made the same contract with all the third parties. According to Larouche, who considers this line of discrimination cases as a new pattern, suggests putting an account system in place and creating a technical interface (that disintegrates the upstream facility, access to which is denied or offered less favourably by dominant firm, from its downstream arm) in order to ensure that third-party clients are not treated less favourably than the own subsidiary of the firm holding the (essential) facility in question.[68]

Each of the above-described discriminative treatments is disapproved comparably with the same manner under EC competition law. While *United Brands*[69], *Irish Sugar*,[70] and *Tetra Pak*[71] demonstrate Community Courts' very harsh attitude towards price discrimination among MSs,[72] one can easily conclude that strengthening internal market is one of the central aims of EU. Not only this kind of discrimination acts, but also the so-called new pattern that is generally depicted with a dominant firm discriminating between its subsidiary and downstream competitors is condemned by

[68] Larouche, *supra* note 31, p. 221.
[69] Case 27/76, *United Brands Co and United Brands Continental BV* v. *Commission* [1978] ECR 207, [1978] 1 CMLR 429.
[70] Case T-228/97, *Irish Sugar plc* v. *Commission*, [1999] ECR II-2696, [1999] 5 CMLR 1300.
[71] Case T-83/91 *Tetra Pak International SA v. Commission* [1994] ECR II-755.
[72] The common circumstances with the referred cases derive from the fact that in those cases dominant undertakings abused their market powers by applying selective (discriminative) pricing either in purchasing identical packaging machines and cartons (*Tetra Pak*) or in importing bananas (*United Brands*) or sugar (*Irish Sugar*) towards various customers from different Member States.

EU authorities in unequivocal manner. Commissionrm''s *BT/MCI*[73] and *Atlas*[74] merger decisions are worthy noting in this regard,[75] for they prove that Commission's determination to dismiss scenarios of discrimination between a dominant firm's subsidiary and its downstream rivals.

Alike the case-law, Community legislation demonstrate a particular emphasis given to dominant firms' obligation to ensure non-discrimination. As such, Commission frames the duty of dominant firms not to discriminate as "[provision of] access in such a way that the goods and services offered to downstream companies are available on terms no less favourable than those given to other parties, including its own corresponding downstream operations"[76] Under 2002 Regulatory Framework, 'non-discrimination' is regarded as a fundamental principle so as to enable imposition of other obligations such as account separation, publication of reference offer, etc.[77] European legislators' inclination to confer a more comprehensive meaning to 'non-discrimination' principle, comparing to its traditional meaning, could be seen within following sentence:

> "[T]he principle of non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets"[78]

[73] *BT/MCI*, OJ [1994] L 223/36, [1995] 5 CMLR 285.
[74] *Atlas*, OJ [1996] L 239/29, [1997] 4 CMLR 89.
[75] In these cases, the Commission based its competitive assessment on a perceived link between the potential of the notified mergers to make discrimination in supplying upstream facilities, i.e. cable capacity for downstream activities, i.e. packet-switched data services, considering that any uncontrolled combination of the two facilities would cause the merging parties to favour their affiliates. Larouche implies that the if the failed BT/MCI merger would have been realized there had not arisen any anti-competitive effects since BT/MCI together would neither become the market leader in US nor affect UK market. He concludes that Commission in said cases sought a 'loose link' between creation of mergers and possibilities of abuses (e.g. discrimination) in order to justify the imposition of conditions thereto (Larouche, *supra* note 36, p. 275-283).
[76] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector – Framework, Relevant Markets and Principles [1998] OJ C265/2 (hereinafter "Access Notice"), para. 86.
[77] See Access Directive, *supra* note 23, Articles 9, 12(1).
[78] Access Directive, *supra* note 23, Recital 17.

In view of above facts, any discrimination instigated by dominant and/or vertically-integrated market players is likely to be caught under the Community rules in absence of objective justification. By the same token, digital content suppliers and delivery operators who have market powers are ought to comply with non-discrimination principle in their activities. As CAS operators are obliged to grant all the broadcasters access to their proprietary technical platform in a non-discriminatory, fair and reasonable way under Access Directive,[79] anyone would expect no discrimination problem with regard to provision of digital media services.

Yet, discrimination, albeit in different forms, is always likely to be seen in provision of CAS-related services, and such possibilities are acute at the level of EPGs. In order to bring service and network components together and deduct efficiency gains from this, each network provider creates its own EPG and displays all the channel information therein according to its own interests, having the ability of highlighting its affiliated channel(s). Only in this way can they give their customers an idea of the range of their channel spectrum which is important for emphasising the differences which exist vis-à-vis competing platform providers with regard to content.[80] However, determining the order of rank of the listed programmes could cause debates about discrimination, that is, EPG providers would be offended for giving prominent slots to their affiliated channels and leaving others at the bottom of the list. The rows between UK pay-TV channels could be shown as a concrete example to such offences.

In spring 2003, this issue became of particular relevance to the BBC which moved off Sky's satellite to the Astra 2D satellite and, as a counter-move to this, was threatened by Sky that it would lose its top position on the provider's EPG.[81] Similarly, in April 2005, after BSkyB has arranged its EPG listing, ITN has complained to Ofcom about its place in the list which is below other channels, i.e. Sky News, BBC News 24,

[79] See *infra*, p. 47.
[80] Anja Wichmann, Electronic Programme Guides - A Comparative Study of the Regulatory Approach Adopted in the United Kingdom and Germany: Part I, *Computer and Telecommunications Law Review*, Vol. 10, Issue 1, 2004, p. 16.
[81] *Ibid*.

CNN.[82] Both cases revolved around whether or not BSkyB, being a mandated EPG provider, has had programmes of other pay-TV companies encrypted and shown in 'fair, reasonable and non-discriminatory' terms as laid down in Section 74 of Communications Act. Besides, such debates relate to to what degree public service channels, i.e. BBC are to be given prominent slots within the meaning of Section 310(2) of the Communications Act.[83] It was for this reason that BBC not only called in the ITC when it was in its listing dispute with BSkyB, but also appealed to the government to use the Act in order to define the term "due prominence" in detail and to guarantee public service broadcasters the top slots on EPGs.[84] Accordingly, Ofcom published a Code of Practice on EPGs in 2005, and specified the conditions that apply to EPG providers pursuant to the Act.[85]

Not only EPG lists but also simulcrypt[86] agreements would include discriminative conditions in absence of effective measures. That is, in an environment where every network operator has its proprietary set-top box and API, interoperability between competing platforms, namely offering interactive services through various platforms, can be realised only via licensing agreements called 'simulcrypt agreements' between the parties (e.g. CAS operator and digital broadcaster). Unless and until multicrypt[87] model is adopted, every network operator would favour its digital channels in terms

[82] See http://business.guardian.co.uk/story/0,,1471073,00.html

[83] The said provision of the Act requires that public service channels are given a degree of prominence which Ofcom considers appropriate to the listing or promotion, or both the listing and promotion, of the programmes included in them, and appropriate to the facilities for selecting or accessing those programmes (Communications Act, s. 310(2), http://www.opsi.gov.uk/acts/acts2003/20030021.htm)

[84] Anja Wichmann, Electronic Programme Guides - A Comparative Study of the Regulatory Approach Adopted in the United Kingdom and Germany: Part II, *Computer and Telecommunications Law Review*, Vol. 10, Issue 2, 2004, p. 46.

[85] See Ofcom, Code of practice on electronic programme guides, http://www.ofcom.org.uk/tv/ifi/codes/EPGcode-/epgcode.pdf. However, the Code draws access-related conditions in a quite broad and flexible manner, under which, *undue discrimination* or *appropriate prominence* concepts are widely-interpretable (See para 4).

[86] Simulcrypt means that several encryption variants or the CA passwords for several CA systems are broadcast simultaneously, so that if the viewer has only one of the encryption systems used, he can still decrypt the signal without having to buy a second decoder. (Alexander Scheuer and Michael Knopp, *supra* note 5, p. 11)

[87] With the multicrypt system, the ability to take advantage of various, differently-encrypted services is built into the set-top box itself. The idea behind the multicrypt process is to make the CA module in the set-top box interchangeable or make it possible to use several CA modules in the set-top box, so that set-top boxes need only be expanded or only a single part has to be changed (Alexander Scheuer and Michael Knopp, *supra* note 5, p. 16).

of supply conditions, and dictate onerous conditions to third parties under simulcrypt agreements which are already costly in nature. To dismiss application of selective conditions, two solutions appear at the first sight, first; application of account separation which could extend to structural separation,[88] second; adoption of a common interface. In this context, a duty to mandate a common interface appears to rely on Commission, who, however seems to be concerned about the chilling effects on innovative services that are potentially deployed by network operators, manufacturers and software developers. Summarising, to find out permanent solutions to discrimination problems, further steps are needed to be taken, even by mandating a common API as well as narrowing the manoeuvrability of EPG providers via more strict rules.

III.D. Pricing Issues

Many pricing strategies may be exploited in order to gain a competitive advantage in offering electronic communications networks and services. One strategy is predatory pricing which means setting the prices below the costs that are associated to the product or service. In economic terms, predatory pricing must satisfy two conditions: (1) low prices which truly induce the exit of a competitor; and (2) that the exit of that entrant or competitor will lead to a recoupment of the losses incurred.[89] In legal terms, *AKZO*[90] judgement frames the conditions under which a discount or price cutting may be deemed 'predatory' or 'abusive'. Therein, prices below average variable costs are regarded as abusive, whereas prices between average total costs and average variable costs can be deemed so if and when they are part of a plan to eliminate a competing firm.[91] In *Tetra Pak,*[92] the Court focused on other criteria than

[88] See also Michael Rosenthal, Open Access from the EU Perspective, *International Journal of Communications Law and Policy*, Issue 7, Winter 2002/2003, p. 9, saying "[O]nly a neutral and independent licensor could guarantee that licensing conditions in a simulcrypt agreement are fair and non-discriminatory".
[89] Bavasso, *supra* note 64, p. 197.
[90] *AKZO Chemie BV* v. *Commission* (Case C-62/86) [1991] ECR -3359, [1993] 5 CMLR 215 (hereinafter "*AKZO* decision")
[91] *Ibid*, paras. 71-72.
[92] *Supra* note 71, paras. 150-151.

losses being recouped, in particular, competitors being driven out of the market; and implied that for the latter to be realised the former is not sought every time.

In regard to excessive pricing, Community case-law is less clear in terms of the criteria to be applied. Although unreasonably higher prices as to the costs of a given product are generally claimed to reflect excessive pricing, there seems no threshold for 'excessiveness' under Community law. In *United Brands*, varying levels of prices (up to 100%) charged to distributors who carry out a number of activities, i.e. ripening, marketing in different MSs are evaluated in a comparative manner; and upon comparison United Brands was condemned for excessive pricing.[93] Therein, prices were found excessive "in relation to the economic value of the product supplied", but not owing to the costs associated to the banana production.[94]

Given the scarcity of Community precedents as well as the lack of sound criteria, it appears that many instances could fall under predatory and excessive pricing in EC competition law. Excessive and/or predatory pricing may be used in combinative manner such in 'vertical price squeezing'. The price squeezing operator would either increase its wholesale price or reduce its retail price or do both of them so as to narrow the margin between the two prices, aiming to aggravate the competitive conditions for its downstream competitors. Conventional price squeezing act could be seen in *National Carbonising*,[95] where a vertically-integrated raw coal producer increased its prices towards the intermediaries for processing and distribution while maintaining its downstream prices. *British Sugar*,[96] where a raw sugar producer, maintaining its wholesale prices, used reduction of its distribution prices to eliminate one of its downstream rivals, is a vice versa situation demonstrating margin squeeze.

Another combinative (pricing) strategy, called 'cross-subsidisation', is observed in vertically integrated markets alike price squeezing. In case of a cross-subsidisation,

[93] See *supra* note 69.
[94] See *supra* note 69, para. 250.
[95] *National Carbonising Co* (Case 109/75R) [1975] ECR 1193.
[96] *British Sugar plc* v. *Commission* (Case C-359/01P) April 29, 2004.

dominant firm would choose to allocate all or part of the costs of its activity in one market to its activity in another market with the aim of sustaining or strengthening its position in the latter. Cross-subsidisation, as set out in 1991 Competition Guidelines, can be deduced from following instances:

> *(i)* funding the operation of the activities in question with capital remunerated substantially below the market rate; *(ii)* providing for those activities premises, equipment, experts and/or services with a remuneration substantially lower than the market price.[97]

The latter scenario stated above directly relates to the pay-TV services which are associated with adjacent markets, i.e. CAS, content production. In order to increase digital TV consumption and speed up the digital switch-over, either vertically-integrated pay-TV companies, i.e. Sky[98] or governments, i.e. Italy[99] would choose to subsidise the purchases of set-top boxes. However, the former type of cross-subsidisation should be distinguished from the latter, since the first situation is more complicated and legally more susceptible to (competition law) interventions.[100] This also relates to the problem of cost recovery in pay-TV industry, which raises the issue of to what extent platform operators are entitled to recover related costs from service suppliers on the one side; how to split recovery of the set-top box subsidies from

[97] Commission Guideline on the application of EEC competition rules in the telecommunications sector [1991] OJ C233/02, para 104, http://europa.eu.int/ISPO/infosoc/legreg/telecom.html#Directives%20Lib

[98] BSkyB adopted a policy via which it offered free digital set-top boxes to convert the entirety of its customers to digital over a three year period from 1998 to 2001 (Martin Cave, The development of digital television in the UK in Martin Cave and Kiyoshi Nakamura (eds.) Digital Broadcasting – Policy and Practice in the Americas, Europe and Japan, Edward Elgar, 2006, p. 107).

[99] The successful introduction of MHP in Italy is closely linked to the consumer subsidy scheme that applies there; the purchase of a decoder with interactive capabilities and return channel has been subsidised by the authorities. The subsidy served to overcome the price differential between MHP products and cheaper products without interactive capabilities, and as a consequence the interactive decoder market has been dominated by MHP resulting in increased demand and considerable price reductions (Communication from the Commission to the Council, COM(2006) 37 final, *supra* note 42, p. 6).

[100] On the other hand, subsidy of the purchase of set-top boxes through state funds could fall under competition law scrutiny in so far as it involves any misappropriation of funds or other advantages from a public source (See Nihoul P. and Rodford P., EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Market, Oxford University Press, 2004, p. 440).

other services than broadcasting, i.e. interactive services offered through the same set-top boxes on the other.[101]

Another question arising in the context of cross-subsidisation is that of whether public service broadcasters can afford their financial needs against the competitive and economic pressures put on themselves.[102] There appear some concerns about the issue of state funding given the risk of creating competitive disadvantages for others as well as that of cross-subsidisation of other services than public broadcasting, i.e. e-commerce. However, considering the need to further public broadcasting even in convergence era, to ensure that public service channels could resist budgetary pressures, some measures not limited to funding would be encouraged by policy makers. In fact, such channels increasing their revenues could be achieved if they are given the opportunity to expand into the digital environment and make full use of the new technologies, such as the Internet and digital broadcasting.[103]

It must be borne in mind that, without measurement of costs and linking them to the specified services, any anti-competitive practices including cross-subsidisation could not be identified thoroughly. As such, with regard to all the pricing problems including cross-subsidisation, cost recovery stands out as the main issue from the perspective of not only regulators but also operators. In relation to this fact, CA services have so far been the very subject-matter of the discussions. In provision of CA services, there appear two red lines: a charge would be undue and discriminatory if it imposed on a particular customer a price which was *less than the incremental cost* of serving that customer *or greater than the stand-alone cost* of service.[104] While the resultant 'ceiling and floor' cost test alleviates the setting CAS charges, allocating

[101] Cave, *supra* note 49, p. 589.
[102] For a brief information about concept of 'public service broadcasting' see *infra* p. 33.
[103] Nikolinakos, *supra* note 32, p. 398
[104] Martin Cave, Competition and the exercise of market power in broadcasting: a review of recent UK experience, Vol. 7, Number 5, *Info*, 2005, p. 25; See also Ofcom, The setting of access-related conditions upon Top-Up-TV Limited, para 5.18, http://www.ofcom.org.uk/consult/condocs/tutv/topup.pdf, para. 5.17.

costs between digital television services and interactive services, which relates to set-top box subsidies, is a rather complex and a political issue.[105]

Yet, it is worthy noting that, strict cost recovery rules would burden so much as to deter targets of digital TV from being realised. In early stages of growing markets such as digital pay-TV until a reasonable level of maturity, regulatory policies would rather be shaped in favour of encouraging distribution of digital content and investments to digital platforms as widely as possible, and of involvement into intervention in case of sharp contrast with the above-mentioned principles.[106]

III.D. Information Policy Matters

As implied above, terms of 'access' and convergence-based relationships generally refer to the access of market players to bottlenecks and do not involve access of the public to the information. The former, when ensured at an adequate level, is often deemed to suffice the latter. Hence, it is arguable that, more abundant and competitive the transmission facilities are, less there arise public policy problems relating to access of the public to the information available. What's clear in this viewpoint that, building up a civil and democratic society via broadcasting is subordinated to securing a competitive environment where simply needs of consumers/end-users are fulfilled. Thus, it is remarkable that rights of citizens are overlooked from such a perspective, to the possible extent where regulation of broadcasting content is considered needless in a commercialised multi-channel environment.

Notwithstanding convergence-based effects, broadcasting content thus far has been subject to strict regulation on the ground that spectrum is scarce and media pluralism[107] could not be achieved otherwise. Along with this rationale, spectrum

[105] Cave, *supra* note 104, p. 25.
[106] As such, Ofcom's views relating to new digital services, i.e. Top-Up-TV reveal a flexible regulatory approach which allows a reasonable rate of return and reflection of the risk undertaken by broadcasters when gaining access to an emerging platforms (Ofcom, *supra* note 104, para 5.18)
[107] The Committee of Ministers of the Council of Europe made a determination in its Recommendation that, "[M]edia pluralism should be understood as 'diversity of media supply, reflected, for example, in the

frequencies, which are used to be deemed a public good, have been allocated and monitored by governments but not through market mechanisms; and (traditional) television services have been considered as a part of public mission. In this regard, positive/negative content regulation is generally regarded as an instrument to enrich the televised content under rather a paternal approach. In this context, public service broadcasting (hereinafter "PSB") is seen as the safeguard for the 'non-commercial' aspects of broadcasting, producing a wide range of programming that caters to different interests and groups, as well as providing good quality, innovative programming.[108] In line with this focal point, both Council of Europe and EU authorities have paid attention to the role that PSB would have to play in creation of civil, moral and democratic values, as well as to funding possibilities for realising this target.[109]

However, as implied above, new challenges coming up with digital convergence are of the potential to undermine the perceived role of PSB in achieving certain quantitative as well as qualitative standards. This is why, thanks to the transmission efficiencies and increased capabilities of operators, broadcasting activities would no longer be conducted solely in a linear way, i.e. by pushing content from various platforms, and are being expanded into new modes of delivery, i.e. interactive services, whereby content is enabled to be pulled from user terminals; and these new technological developments make many question the validity of pursuing existing

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existence of a plurality of independent and autonomous media (generally called structural pluralism) as well as a diversity of media types and contents (views and opinions) made available to the public". (Committee of Ministers, Council of Europe, Explanatory Memorandum to Recommendation No. R (99) 1 of the Committee of Ministers of the Council of Europe on measures to promote media pluralism, para. 3, http://www.ebu.ch/departments-/legal/pdf/leg_ref_coe_r99_1_pluralism_190199.pdf).

[108] Lorna Woods, Broadcasting, Universal Service and the Communications Package, Vol. 7, Issue 5, *Info*, 2005, p. 30. 'PSB is a broad and widely-interpretable term which corresponds to a number of central tenets. The core attributes of PSB identified by some study groups of European Broadcasting Union as well as commentators are diversity, universality and impartiality (Richard Collins, From Satellite to Single Market - New communication technology and European public service television, *Routledge*, 1998, p. 62).

[109] The Protocol (No. 32) on public broadcasting annexed to the EC Treaty specifies that 'the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society', and states that it is within 'the competence of Member States to provide for the funding of public service broadcasting' subject to a number of principles (Protocol No. 32 on the system of public broadcasting in the Member States (1997), annexed to the EC Treaty). See also Recommendations, Resolutions and Declarations of the Committee of Ministers of the Council of Europe in the media field at http://www.coe.int/t/e/human_rights/media/4_documentary_resources/1CM_en.asp

measures concerning spectrum management and content regulation given a convergent world where everyone could reach whatever content he/she wishes from numerous kinds of distribution means.

Notwithstanding, convergence is not a value-free process and the arguments for preserving media pluralism continue to be relevant to all manifestations of the media industry.[110] Still the need to protect minors from harmful content, prevent incitement to hatred and preserve human dignity is valid, and there is no reason to think otherwise in view of the fact everyone would need to protect himself/herself from the increasing amount of harmful, unpleasant and defamatory content. Besides, convergence-based developments that abrade broadcast regulation are not always self-correcting as they make assumptions about viewers' ability, and do not take into account personal and environmental factors affecting both consumer and citizen viewers.[111]

Thus, proliferation of distribution means does not remove the need to safeguard media pluralism and does not, by no other means, solve information policy problems. From this point of view, as many commentators specify, goals of the PSB paradigm seem to be still valid in the foreseeable future, though with a more or less adaptation of its traditional elements to the digital era.[112] Notwithstanding, related problems such as how to meet financial needs of public broadcasters, and what the indispensably-needed values of PSB are still valid questions to be solved in shaky ground of convergence. More explicitly, how process of deregulation regarding both spectrum management and content regulation responds to information policy needs of the public remains as an important question to be answered by policy makers and law enforcers.

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[110] Thomas Gibbons, Thomas Gibbons, Concentrations of Ownership and Control in a Converging Media Industry in Christopher T. Marsden and Stefaan G. Verhulst (eds.), Convergence in European Digital TV Regulation, *Blackstone Press Limited*, 1999, p. 158, p. 161.

[111] See Jackie Harrison and Lorna Woods, EC Broadcasting Law and Policy, *Cambridge University Press*, 2007, p. 289.

[112] See Beth Simone Noveck, Thinking Analogue About Digital Television? Bringing European Content Regulation Into the Information Age in Christopher T. Marsden and Stefaan G. Verhulst (eds.), Convergence in European Digital TV Regulation, *Blackstone Press Limited*, 1999, p. 37-63.

IV. Community Law Measures Applicable to Access-related Problems

Access-related problems stretch over a wide area, being echoed with vertically-integrated new media markets, possibilities of access foreclosure and market tipping, appearance of information poor/information rich societies, etc. Referring to different dimensions of monopsonistic and/or non-pluralistic market situations, content-related access problems would appear at different levels even with unique symptoms and thus require distinctive solutions within a harmonised approach. Below are examined the prevailing Community law measures, including competition law remedies as well as sector-specific rules, i.e. electronic communications and media law, that could be invoked to solve the access-related problems framed in this study.

IV.A. Application of EC Competition Rules

Application of EC Competition rules, namely the Articles 81-90 of the EC Treaty, could be considered as the principal tool to tackle any actual or potential problem relating to 'access to digital content' under EC law. This is because other tools do not directly originate from the EC Treaty; yet, EC competition law and related measures are directly linked to the Treaty. This fact could be seen from the paragraph (g) of Article 3, which specifically refers to 'a system ensuring that competition in the internal market is not distorted', as well as Articles 81 and 82 which draw up the main principles and prohibitions to reach the EC competition law goals. While the Article 81 bans the agreements, concerted practices, and decisions that affect trade between MSs and have as their object or effect the prevention, restriction or distortion of competition within the common market; Article 82 prohibits any abuse of a dominant position within the common market or in a substantial part of it that affect trade between MSs.

The very objective of the application of EU competition rules is to prevent dominant market participants reserving markets for themselves that have been opened.[113] As such, under the Commission's practice concerning new markets for offering digital content services, not only the actual abuses but also strong evidences as to potential abuses are treated in a punitive manner. While under the application of Article 82 not possessing but abusing dominant position is condemned, the threshold is lowered down to creating and/or strengthening dominant positions under the application of Article 81. Interrelations between downstream (e.g. CAS) and upstream (e.g. pay-TV) markets mainly drives Commission's competition policy in digital era, and makes the Commission define narrow markets, take preventive measures and approach the joint ventures in a suspicious manner. So-called suspicious approach could easily be seen in Commission's practice regarding merger controls where not only matured but also emerging markets, i.e. market for interactive television services are intervened via application of strict conditions. Under this section of the study, cases concerning application of both Article 81 and Article 82 to access to digital content are elaborated in light of previous Community precedents.

IV.A.1. Article 81: Merger and Joint Ventures

In conjunction with steady technological developments, Commission had to deal with varying levels of access relationships in its merger/joint venture decisions. *MSG*[114] decision, representing the initial precedent for subsequent cases of similar character, concerned a joint venture between Deutsche Bundespost Telekom ('Telekom', supplier of transmission network), Bertelsmann AG ('Bertelsmann', programmes right holder) and Taurus Beteiligungs who was subsidiary of Kirch group ('Kirch', provider of access-controlled television services). The planned joint venture under the name of MSG clearly demonstrated the parties' aspiration to vertically integrate across the neighbouring digital media markets.

[113] Herbert Ungerer, Competition in the media sector - how long can the future be delayed?, Vol. 7, No. 5, *Info*, 2005, p. 57.
[114] Case IV/M. 469, *MSG Media Service*, Commission Decision of 9 November 1994, OJ L 364, 31 December 1994 (hereinafter "*MSG* decision").

The notified undertaking would prevent possible competition within the relevant markets, namely CAS provision, content rights, and pay-TV markets. That is to say, a new entrant would have no chance to market any other decoder than the one which MSG intended to use, could not possess a customer base against the combined audience of Kirch and Bertelsman, and would not be able resist the existing means of transmission (cable and fixed) owned by Telekom in view of its economies of scope. This line of concerns resulted in MSG having proposed a number of commitments including usage of a common interface in its CASs, however its commitments could not make Commission convinced in respect of the impacts of the merger within the meaning of Article 81.

The failed parties to MSG case attempted secondly to merge via a further notification called Bertelsman/Kirch/Premiere.[115] The Commission again found the notification detrimental to competition with particular emphasis to pay-TV market. This stems from the fact that Premiere (the only German pay-TV channel) would be jointly controlled by Bertelsman and Kirch and, thus, able to benefit from Kirch's set-top box and service packages as well as its programme rights. Besides, the joint venture's pay-TV arm would act jointly with CLT-UFA's (a company to which Bertelsman is a shareholder) free-to-air TV service distribution programme. In spite of the commitments such as opening CASs to third parties, Commission concerned about competitive disadvantages for third parties not only active in the market for technical platform services but also acting in the market for free-to-air TV which seemed to rely on the pay-TV programming according to the proposed merger.

Commission, under its other decision of the same date (Deutsche Telekom/Beta Research),[116] did not approve the second part of the abovementioned merger notification. According to the proposed merger, Deutsche Telekom and Beta Research would jointly control BetaResearch, which is the exclusive license holder to

[115] Case IV/M. 993, *Bertelsman/Kirch/Premiere*, Commission decision of 27 May 1998, OJ L 53, 27 February 1999 (hereinafter "*Bertelsman/Kirch/Premiere* decision").
[116] Case IV/M. 1027, *Deutsche Telekom/Beta Research*, Commission decision of 27 May 1998, OJ L 53, 27 February 1999 (hereinafter "*Deutscher Telekom/Beta Research* decision").

manufacture CASs and sell them. Commission's doubt was relating to exclusive usage of Beta Research by Deutsche Telekom, which in its eyes, would result in a de facto digital d-box standard. Commission's corresponding fear that third parties' potential investment and innovative services would not take place due to a single-type CA technology drove itself to reject the application. Parties' commitment to involve into cooperation with competitors via using a standardized interface as well as licensing agreements could not change Commission's mind.

Kirch/BSkyB,[117] concerning the combination of the powers between BSkyB (who is the only satellite platform provider in UK) and Kirch (who is the pay-TV supplier in Germany) in order to deploy interactive services, represents a milestone under enforcement of EC merger control mechanism. This is because in this case Commission, unlike its previous decisions, authorized the creation of the said trans-border merger in view of compensating advantages against market leveraging risks. Another feature of this decision stems from its relation to "convergence concept", i.e. the Commission's intention to protect competition in the markets it defines, including those outside the broadcasting sector, and to monitor the dangers of vertical integration.[118]

In Commission's analysis, the expressed concerns focused on the prospect of the emerging digital interactive services in German market. In fact, Kirch, with its lead in pay-TV market in Germany, would be able to dominate the (emerging) market for interactive services in aftermath of its merging with BSkyB. Management of subscriber data via proprietary set-top boxes and BetaResearch technology, owing to Kirch's strength in pay-TV market, was another fact that would affect the access relationships in the overall industry.

[117] Case IV/M. 0037, *BSkyB/KirchPayTV*, Commission decision of 21 March 2000, OJ C 100, 15 April 2000 (hereinafter "*BSkyB/KirchPayTV* decision").
[118] Natali Helberger, Alexander Scheuer and Peter Strothmann, Non-discriminatory Access to Digital Access Control Services, *IRIS Plus* (Strasbourg, European Audiovisual Observatory), 2001, p. 6.

However, Commission pointed out that the undertakings[119] made by the merging companies compensated for the creation of a dominant position in the market for digital interactive television services.[120] Commission acknowledging that "[e]ntry into a new market by a dominant firm on a closely related one does not automatically lead to the creation of a dominant position"[121] demonstrates a deviation from its former standpoint. Helberger specifies that there appear two main observations implied by the Commission in this case, first; pay-TV markets are in their nature still natural markets and that competition from foreign pay-TV markets was rather unlikely, and the absence of dominant party does not guarantee the development of a competitive environment.[122]

Subsequent cases, Vivendi/Canal+/Seagram[123] and Vodafone/Vivendi/Canal+[124] illustrate new business trends in area of joint ventures along with the increasing cross-border links between neighbouring markets. While the former concerned an undertaking between the parties to take the joint control over Seagram, who is a Canadian media and entertainment firm involved in cinema, television and music rights industry, the latter involved an attempt to conduct a merger between Vodafone (a major mobile telephone company), Vivendi (a multimedia company) and Canal+ (a pay-TV company). In both cases, Commission concerned about the merging companies combining all the distribution channels, i.e. from content acquisition to delivery to consumers. It would be feared that, attractive web-based interactive services provided by Vivendi in a multi-platform environment, when combined with entrenched customer bases of Canal+ and Vodafone, would bear anti-competitive risks in relevant markets. However, such concerns did not prevent Commission from authorizing the parties of two notified mergers.

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[119] Kirch committed to ensure non-discriminatory third party access to its technical services supported by its platform, and to implement a standardized API (developed by DVB group) to other broadcasters.
[120] *BSkyB/KirchPayTV* decision, para. 93.
[121] *BSkyB/KirchPayTV* decision, para. 78.
[122] Helberger, *supra* note 47, p. 141.
[123] See *Vivendi/Canal+ /Seagram* decision, *supra* note 17.
[124] Case IV/M.0048, *Vodafone/Vivendi/Canal+*, Commission decision of 7 July 2000 (not published), See Commission Press Release IP/00/821 of July 24, 2000 (hereinafter "*Vodafone/Vivendi/Canal+"*).

In the first decision (concerning Vivendi/Canal+/Seagram), Vivendi's relinquishment from its shares within BSkyB as well as its undertaking not to exceed fifty per cent in the so-called "first windows rights"[125] for Universal films and to offer non-discriminatory access to Universal music content to third parties lessened the overall concerns and gave way to Commission's approval. In the second decision (concerning Vodafone/Vivendi/Canal+), commitments of Vivendi and Vodafone to allow open access to their mobile handsets from portal providers as well as to enable the subscribers of the notified merger to deviate from the default portal called 'Vizzavi' to others, and Canal+'s undertaking to grant third parties access to its CA systems, likewise, disseminated the Commission's fears about the merger.

Later on, the approval of Commission in Newscorp/Telepiù[126] case far more relied on the commercial realities, comparing to its previous decisions. The case related to the intention of Newscorp to acquire control over Telepiù, who was the subsidiary of Vivendi. The planned strategy envisaged that the two major Italian pay-TV operators would jointly act in acquiring exclusive film rights and football coverage from the suppliers. Such a scenario would result in an environment where Newscorp would become the digital gatekeeper of the only satellite platform and associated facilities, i.e. CA systems. Besides, competition in digital content market would be foreclosed given the accessibility of premium content via alternative channels was to be limited to a considerable extent.

Depending on the concerns mentioned above, Commission stipulated a number of conditions, including limitation of duration of exclusive agreements (three years for films and two years for football), disclosure of the premium content to competing firms, waive from exclusive rights with respect to TV platforms other than DTH (terrestrial, cable, UMTS, Internet). The conditions attached to the merger would, to a considerable extent, ensure a more competitive and transparent marketplace, whilst

[125] Rights holders try to extract maximum value of their programming rights by a variety of commercial practices. One of the referred practices is selling movies several times, being called 'windows system' in common business language (See Geradin, *supra* note 50, p. 70).
[126] Case COMP/M.2876, *Newscorp/Telepiù*, Commission decision of 2 April 2003, OJ L 110 of 16 April 2004.

not undermining the innovation desires of the parties. The fact that Commission limits the scope and duration of exclusivity agreements with premium content providers is a clear indication of Commission's attempt to strike the right balance in order to facilitate the entry of new competitors and support technological progress without seriously distorting competition and damaging the market structure.[127]

The merger cases examined above, in general, demonstrate the attitude of EU Authorities, particularly that of the Commission, in relation to mergers/acquisitions, from the very beginning to the recently notified cases. At the beginning, the expressed concerns focused on creation and strengthening of dominance via combination of market powers, i.e. along with pay-TV and CAS markets in order to deter vertically-integrated formations. A number of high-profile merger cases in the mid-1990s demonstrated that, notwithstanding the infancy of various new media markets and the high start-up costs of developing new technologically intensive enterprises, the Commission was still prepared to intervene to prevent ventures that created dominant positions.[128] Commission, in its investigations, sought whether notified joint ventures would exclude their competitors via either exclusively controlling technical platforms or privileged access to premium content as well as whether comprehensive service packages spreading out to all neighbouring markets between the parties would foreclose effective competition in emerging as well as traditional markets.

However in time, Commission, along with the convergence-based developments, inclined to accept merger applications though many of them proposed vertically-integrated entities. Vertically-integrated market forms simply became one of the potential hazards to overall competitive structure for which Commission would query about compensating advantages including achievability of interoperability, third party access, etc. to make a decision. While interoperability solutions were considered

[127] Nikolinakos, *supra* note 19, p. 15.
[128] Thomas Gibbons, Control over Technical Bottlenecks – A Case for Media Ownership Law?, in Susanne Nikoltchev (eds.) Regulating Access to Digital Television: Technical Bottlenecks, Vertically-Integrated Markets and New Forms of Media Concentration, *IRIS Special*, European Audiovisual Observatory, Strasbourg, 2004, p. 62.

crucial to stimulate inter-platform competition, open access to the exclusively controlled technical platform was considered necessary to create the conditions for intra-platform competition.[129] In conclusion, Commission exploited the competition law tools which it possesses to the fullest extent, and tried to use them to shape an environment where new entrants are capable to deploy their services, easily interact with the existing technical platforms and able be collaborate with content providers.

IV.A.2. Article 82: Applicability of Essential Facilities Doctrine

As seen above, Commission's merger decisions revealed a strong attitude in favour of ensuring adequate access at all levels, both at the level of premium content including programming as well as windows rights, and at the transport level that entails transmission network and technical platform. Even, Commission sometimes followed very strict principles which went beyond sector-specific rules detailed below. On the other hand, neither Community Courts nor Commission have yet had to deal with a case arising out of a dominant firm's refusal to grant access to digital content, i.e. encrypted television services to third parties. Likewise, so far a Community precedent concerning denial of access to technical platform services has not been taken place under the application of Article 82.

One might consider that access problems would not arise under the close monitoring of Commission, who consistently challenges the conditions of mergers/acquisitions should they capably affect the competitive structure of relevant markets. However, by-products of convergence would bear anti-competitive risks including potential problems regarding access foreclosure. ICT-based networks and services would bring out new technical bottlenecks, which, in the hands of vertically-integrated dominant players would cause access problems. In fact, access problems mainly surround structural barriers which are often called 'essential facilities'. Essential facilities would appear in aftermath of the merger approval in different forms that were unpredicted during merger control, and would indicate the prospect of new entrants in

[129] Helberger, *supra* note 47, p. 153.

relevant markets. In a case where position of the owner of the essential facility is not contestable, general merger control will be of no use and the abuse of market power can only be prevented by opening the essential facility to competitors and thus granting access according to merely economic criteria.[130]

Essential facilities doctrine (hereinafter "EFD") specifies the conditions under which a refusal to supply or grant access can be considered abusive behaviour in the sense of Article 82 of the EC Treaty.[131] Using the Doctrine, Article 82 has been construed, in one part of the case-law, as constraining an obligation for dominant undertakings to share access where a facility under their control is necessary for the exercise of activities on an adjacent market.[132] As to the so-called case-law, two interim decisions (*Sealink Harbours Ltd*/*B&I Line plc*[133]and *Sea Containers*/*Stena Sealink*[134]) taken by Commission could be shown as the pertinent examples. The cases that resulted in said decisions originated from the complaints of ferry operators who had not been allowed or allowed under more onerous conditions than those applied by the dominant port owner to its respective services, to use the port (Holyhead). Commission found that the dominant port owner has abused its dominant position, depicting the situation within the following manner:

> "[A]n undertaking which occupies a dominant position in the provision of an *essential facility* and itself uses that facility (i.e., a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility *without objective justification* or grants access to competitors only *on terms less favourable than those which it gives its own services*, infringes Article 86 if the other conditions of that Article are met".[135]

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[130] Wolfgang Schulz, Extending the Access Obligation to EPGs and Service Platforms?, in Susanne Nikoltchev (eds.) Regulating Access to Digital Television: Technical Bottlenecks, Vertically-Integrated Markets and New Forms of Media Concentration, *IRIS Special*, European Audiovisual Observatory, Strasbourg, 2004, p. 54.
[131] Helberger, *supra* note 47, p. 162.
[132] Nihoul and Rodford, *supra* note 100, p. 470.
[133] Decision of 11 June 1992, *B&I Line plc/Sealink Harbours Ltd.* [1992] 5 CMLR 255.
[134] Decision 94/19 of 21 December 1993, *Sea Containers/Stena Sealink* [1994] OJ L 15/8.
[135] *Ibid*, para. 66.

One of the most peculiar characters of the EFD cases is the 'special responsibility' resulting merely from controlling bottleneck-type facilities, which are tended to be attributed to a duty to deal without any behavioural consideration.[136] Commission, who seems to have been attracted with this pragmatic feature of the doctrine, has displayed an over-ambition in applying EFD with the particular aim of opening reserved markets to competition. In *Oscar Bronner*,[137] ECJ watered down the aspirations to use the doctrine in favour of competitors who wish to rely on the existing facilities built by incumbent undertakings. The Court focused on economic viability of access seeker against the facility owner, and stipulated the fulfilment of the following conditions in order for a refusal to grant access to an alleged essential facility to be unlawful:[138]

1) The refusal must be *likely to eliminate all competition* in the relevant market on the requesting party,
2) The refusal must be incapable to be *objectively justified*,
3) The facility in question must be *indispensable* in order for business of the requesting person to be carried on (inasmuch as there is *"no actual or potential substitute in existence"*).

Under the light of *Oscar Bronner* rule, a primary source, i.e. critical physical infrastructure, which is non-substitutable in nature and without access to which new entrants would not be able to compete in relevant market, is required to exist to warrant application of EFD. In view of the lack of a comparable case regarding multimedia markets, competition law enforcers should be more cautious in respect of making a decision to apply EFD to digital content markets. As a matter of fact, both premium content and technical bottlenecks are far from being considered as an essential facility within the meaning of *Oscar Bronner*. The attribute of 'essential' is different from establishing that the facility in question is less advantageous among

[136] Larouche, *supra* note 31, p. 204-211. See also Richard Whish, Competition Law, 5th ed., Butterworths, 2003, p. 670, saying "[U]ndertakings controlling a bottleneck might be considered to be 'super-dominant', implying that they have a higher responsibility than the obligations attaching to 'merely' dominant firms".
[137] Case C-7/97, *Oscar Bronner GmBH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag GmbH & Co KG and Others* [1998] ECR I-7791, [1999] 4 CMLR 112.
[138] *Ibid*, para. 41.

alternatives, and the 'indispensability' and 'non-substitutability' tests brought out by *Oscar Bronner* make clear that EFD is not easily applicable to all 'denial of access' cases. For instance, against the residual pay-TV platforms vertically-integrated with technical platforms which indicate a high level of network externalities, economies of scope and scale, new entrants would face serious difficulties but yet not a death or life struggle. As such, commentators feel reluctant to qualify components of technical platforms for digital television services as an essential facility.[139]

Microsoft[140] case, which is currently under review of CFI, is supposed to enlighten the way the EFD is applied truly in software-related markets. For settings similar to *Microsoft*, prospective CFI decision would draw the lines under which mandating third party access via competition law rules will be possible. *Microsoft*'s importance, furthermore, stems from the question of to what extent network effects are considerable as a key factor to mandate dominant firms for non-discriminatory third-party access. Hence, if and when new entrants face huge network externalities that deter them from carrying out related activities, whether or not the response of competent authorities should be application of EFD and opening proprietary technologies to third parties arises as a serious question still remaining unanswered.

IV.B. Application of Electronic Communications Law: Relevant Provisions of 2002 Regulatory Framework and Possible Amendments

Content-related access issues could affect not only provision of services to end-users in a competitive manner but also formation of public opinion and thereby creation of a civil and democratic society. Its contribution to public awareness and pluralism turns content-related access rules into a more sensitive form of regulation. Though relying on competition law principles, 2002 Regulatory Framework, admits the peculiarity of access matters relating to digital (TV) content by acknowledging that "Competition rules alone may not be sufficient to ensure cultural diversity and media

[139] See Helberger, *supra* note 47, p. 163.
[140] See *supra* note 45.

pluralism in the area of digital television".[141] This acknowledgement seems to have influenced European legislators in respect of the particular emphasis given to regulation of access to CAS since 1995.

Regulation of technical platform services and specifically that of CASs lied at the heart of the Advanced Television Standards Directive,[142] which is aimed at harmonisation of conditions that apply to digital TV services and standards relevant to these services that were newly introduced at the time. It is clear that TV broadcasts, in the way every citizen has known them in the last half of the century, have been *non-excludable* and, to a large extent, *non-rival*.[143] While traditional TV services have started to be replaced with new modes of broadcasting that requires using CA and d-box systems, end-users have started to command their styles to receive TV programmes. No longer have they had to receive the automatically transmitted TV programmes, and they could be able to choose whatever they wish to watch on the screen.

This trend, on the one hand meant more involvement of viewers into the realm of digital TV in respect of interactive services, etc., on the other hand brought about new questions of access as regards new digital gateways to access to end-users. While the former relates to accessibility of end-users to digitally transmitted programmes via reception equipments and could ultimately extend to sovereignty of end-users over digital content, the latter entails new areas of regulation from the perspective of NRAs in view of monopolisation of customer bases via controlling of technical gateways. In fact, no end user device will be operable in the near future without a kind of "navigator", which will also be used as an interface to manage the content

[141] Access Directive, *supra* note 23, Recital 10.
[142] Directive 95/47of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television rights, 95/47/EC, OJ L 281/51 (hereinafter "Advanced Television Standards Directive").
[143] Luca Di Mauro, Regulation of digital TV in the EU: divine coherence or human inconsisitency? in Martin Cave and Kiyoshi Nakamura (eds.) Digital Broadcasting – Policy and Practice in the Americas, Europe and Japan, Edward Elgar, 2006, p. 205. Mauro explains the shift from traditional TV services to digital ones by referring two features of traditional broadcasting mode: non-'excludability' and 'non-rivalry'.

owned by the end user.[144] As a result of users commanding content and terms of access to it which is already scarce, problems of foreclosure of access to digital content would be aggravated in future.

Questions of access in eyes of European legislators has so far revolved around how to regulate access to CAS and its components in order to facilitate distribution of digital television services. In this regard, both Advanced Television Standards Directive and Access Directive required MSs to ensure that CAS operators *offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers authorised by means of decoders administrated by the service providers.*[145] One of the most remarkable points detectable here is the maintenance of the access regime regarding CASs for digital television services under the new regulatory package. While via adoption of 'proportionate regulation' concept that relies on competition policy rules a sharp departure from the old regime is clearly seen with regard to general access obligations, a notable exception to this trend has been witnessed in area of CASs for digital television services which is separated from the main access rules and subjected to the initially-adopted rules.[146]

According to the Article 8 of Access Directive, when an operator is designated to have *significant market power*[147] (hereinafter "SMP") on a specific market as a result

[144] Screen Digest Ltd, CMS Hasche Sigle, Goldmedia Gmbh, Rightscom Ltd, (A Report on 'Interactive content and convergence'), *supra* note 9, p. 183.
[145] Advanced Television Standards Directive, *supra* note 142, Article 4 (c); Access Directive, *supra* note 23, Article 6(1).
[146] It must be borne in mind that, CA systems other than those used for digital television services are not addressed under EU regulatory system. Though open to doubt, it seems that recently emerged high-speed data interfaces and software navigators included in PC-like devices that are able to process all kinds of TV-centric or Internet-centric applications are not covered under the Access Directive.
[147] An undertaking shall be deemed to have *significant market power* if, either individually or jointly with others, it enjoys a position *equivalent to dominance*, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers [Framework Directive, *supra* note 25, Article 14(2)]. This definition, in respect of its core meaning, is the same as that of the 'dominant position' enshrined in *United Brands* judgement (see *supra* note 69).

of a market analysis,[148] relevant national regulatory authority (hereinafter "NRA") should impose one or more access-related obligations envisaged under the Articles 9-13 of Access Directive. However, according to the Article 6 of Access Directive, CAS operators, irrespective of their market powers, are obliged to offer to all broadcasters their technical services enabling the subscribers of the latter to receive all types of encrypted digital TV broadcasts. This special deference clearly shows the intention of European legislators to distinguish CA services from other access services in view of ensuring media pluralism and cultural diversity as well as other concerns such as promotion of competition.

Europe-wide objective of securing adequate level of access to technical platform services also encompasses opening the proprietary APIs and/or EPGs to third parties. According to the Article 5(1) of Access Directive [with reference to Annex I, Part II of the Directive], NRAs -to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the MS- shall be able to impose obligations on operators to provide access to APIs and EPGs on fair, reasonable and non-discriminatory terms.[149] Given the widely-interpretable formulation of the said provision, it seems that MSs are given a wide discretion on whether or not to impose an access obligation as regards APIs and EPGs.

Notwithstanding, so-called FRND (fair, reasonable and non-discriminatory) terms are ought to be attached to imposition of any access obligation relating to either CASs or APIs/EPGs pursuant to the Articles 5-6 of Access Directive. FRND regulation is considerably simpler to apply than proportionate regulation since it does not rely on complex market analysis.[150] However simply framed, FRND terms are rather vague

[148] Market analysis procedure as laid down under the Article 16 of Framework Directive, is a compulsory step to be taken in order for imposition of access-related obligations referred to thereunder. [(Framework Directive, *supra* note 29, Article 16(2)]. This is an important aspect demonstrating transposition of competition law rules into 2002 Regulatory Framework.
[149] Access Directive, *supra* note 23, Article 5(1)(b).
[150] OVUM and Squire, Sanders & Dempsey LLP, Study on the Development of Competition for Electronic Communications Access Networks and Services, together with an inventory of EU 'Must-Carry' regulations, Study *(Final Report prepared for the European Commission Directorate-General Information Society)*, Brussels, February 2001, http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/OVUM-regcasys.pdf, p. 15.

in respect of their widely-ranging meaning. They draw up a general framework in order for a level playing field to be achieved by NRAs, who need to assess the level of accessibility for end-users to digital radio and television broadcasting services to implement the FRND regulation. More explicitly, the so-called terms could be applied in a more stringent manner to ensure that newly emerging media operators could pass through the monopolised digital gateways easily and reach a customer base on equal foot with the incumbent operators.

On the other hand, after a maturity of multimedia markets, FRND terms would be interpreted as broadly as allowing access agreements to be concluded freely between the parties, subject to regulatory monitoring that mostly takes the form of *ex post* intervention, i.e. in case of conflict. Flexible rules of Ofcom illustrate this type of regulatory approach, which does not rely on a strictly applied cost-orientation and/or discrimination principle, by contrast, leaves a large margin of appreciation to market players.[151] This approach reflects the consideration that broadcasters of premium channels may have a greater willingness to pay for the services and be less likely to exit the market in response to a higher price charged by CAS providers (as they receive a greater retail price for their channels, and therefore have more to lose if they are barred from access).[152] However, such a flexible approach would be meaningful after weighing the efficiency gains that would be attached to a free-riding environment which is at the same time supposed not to affect media pluralism and cultural diversity. However, the latter concerns are usually considered in other contexts that are not related to economic regulation of access, and this disjunctive viewpoint undermines social aspects of broadcasting which serves to creation of public opinion as well as fulfilment of the expectations of consumers (who are generally seen as individuals simply trying to maximize their economic benefits and entertainment needs).[153]

[151] See *supra* notes 104 and 106.
[152] Mauro, L. Di., *supra* note 143, p. 214.
[153] For the discussion of non-economic aspects of broadcasting that need to be dealt within the field of electronic communications and the response of 2002 Regulatory Framework to these concerns see Woods, *supra* note 108.

While Access Directive provides NRAs with a toolbox comprising access obligations regarding CAS and its components to create a competitive environment in realm of broadcasting and -to a lesser extent- to ensure pluralistic views are broadcast via different platforms, the latter aim is echoed under the Article 31 of Universal Service Directive (hereinafter "USD") more explicitly and in a more responsive manner. Therein, MSs are permitted to impose reasonable 'must-carry' obligations for the transmission of specified radio and television broadcast channels and services on providers of electronic communications networks where *a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts*.[154] Not all the network providers but those whose networks are used for the distribution of radio and television broadcasts to the public are covered under the referred provision.

What makes the Article 31 of USD more responsive to content-related access concerns is hidden under the following prescription: "Such obligations shall only be imposed where they are *necessary to meet clearly defined general interest objectives* and shall be proportionate and transparent".[155] Accordingly, any obligation imposed under Article 31 (or rather the national implementing legislation) must be for public interest goals, presumably linked to ideas of plurality and freedom of expression recognised within the 2002 Regulatory Framework generally, and any obligations imposed must be reasonable.[156] Notwithstanding the possible disparities between MSs regarding how to define 'general interest objectives', question of 'proportionality' and the scope of economic burdens to be met under must-carry obligations,[157] the said Article grants a clear competitive advantage for broadcasters who are in a weak position in terms of negotiating access.

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[154] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (hereinafter "Universal Service Directive - USD"), OJ 24.4.2002, L 108/51, http://www.europa.eu.int/information-_society/topics/telecoms/regulatory/new_rf/index_en.htm#reg, Article 31(1).

[155] *Ibid*.

[156] Woods, *supra* note 108, p. 30.

[157] This issue is touched upon under the Article 31 of USD, being referred to as 'determination of appropriate remuneration' to be conducted 'in a proportionate and transparent manner' [Universal Service Directive, *supra* note 154, Article 31(2)]. However, alike other details of must-carry obligations, issues relating to remuneration, i.e. relevant criteria for payment is left to implementation of Member States.

At this point, must-carry obligations could contribute not only to creation of a competitive broadcasting environment but also distribution of a more diversified (and possibly more qualified) range of programmes to TV audiences. In view of this fact, a comprehensive approach is preferable to a restrictive one by which only owners of traditional platforms used by the vast majority of households are given a chance to deliver their services to end-users. For the fruitful conclusions to be deducted from the implementation of must-carry obligations, a justified and balanced approach which emphasizes pluralistic views is needed.[158] Thus, in order to attain the public objectives pointed out under the Article 31 of USD, policy makers would primarily identify the need that warrants application of must-carry provision, specify the range of TV programmes and impose the obligation in respect of the capacity shortages, economic burdens, etc.

The existing remedies of the 2002 Regulatory Framework regarding must-carry and CAS-related access obligations are put into discussion under a recently published consultation document along with other proposed changes by the Commission.[159] Considering the need to reduce administrative burdens and to repeal outdated measures, Commission drew up a number of legislative proposals for the modification of the current framework to be presented to the European Parliament and the Council, accompanied by specific impact assessments.[160] In spite of the announced objective of 'progressive removal of regulation', proposed changes bring out additional requirements to be complied with by NRAs.

[158] The given opportunity for local communities to establish independent programme councils under Dutch media law would exemplify such a pluralistic viewpoint. This is because, the said councils are able to advise (having a binding effect) cable operators on the composition of the must-carry package which must reflect the interests and preferences of the local population (Helberger, *supra* note 47, p. 114).

[159] See Commission Staff Working Document, COM(2006) 334 Final, *Proposed Changes*, SEC(2006) 816, Brussels, 28.06.2006, http://ec.europa.eu/information_society/policy/ecomm/doc/info_centre/public_-consult/review/staffworkingdocument_final.pdf

[160] Commission Staff Working Document, COM(2006) 334 Final, *Impact Assessment*, SEC(2006) 817, Brussels, 28.06.2006, http://ec.europa.eu/information_society/policy/ecomm/doc/info_centre/public_-consult/review/impactassessment_final.pdf

The most notable proposed change relates to extension of the veto powers under the market review procedure[161] so as to cover proposed remedies by NRAs. In line with this general modification, it is proposed that NRAs should submit a request to the Commission for authorisation to impose an access obligation on a non-SMP undertaking under the Article 5 of Access Directive.[162] Commission asserts that this would prevent the risk of over-regulation and a fragmentation of the internal market through the imposition of inconsistent non-SMP obligations.[163] Although this viewpoint looks somehow arguable, the most appropriate way, as some commentators suggest,[164] would be adjusting the Article 5 to the general procedure envisaged for access-related obligations. That is to say, without any exception, access obligations would rather be imposed by following a market analysis with the view to overcome market failures encountered rather than a top-down approach just focusing on technical bottlenecks.

Likewise, Article 31 of USD, which lays down must-carry rules, is also included under the abovementioned review process. In this regard, implementation of the existing must-carry obligations including definition of general interest objectives is asserted to be ill-found by Commission, and it is proposed to introduce a deadline for reviewing all national 'must carry' rules (e.g., one year following the application of the new legislation).[165] While it is advanced by Commission that 'must- carry' obligations of the future must be kept to the minimum necessary to achieve the general interest objectives at stake, and must reflect evolving market and

[161] As far as measures concerning market definitions, SMP assessments and relevant obligations under Access Directive and USD are concerned, NRAs are obliged to "make the draft measure accessible to the Commission and the national regulatory authorities in other Member States, together with the reasoning on which the measure is based" [(Framework Directive, *supra* note 25, Article 7(3)]. Under the scope of this procedure, Commission has the right to take a decision requiring the NRA concerned to withdraw the draft measure if the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Community law [(Framework Directive, *supra* note 25, Article 7(4)]. However, the so-called veto power does not extend to remedies envisaged under the said Directives but to the market definitions and SMP assessments, for the time being.
[162] *Proposed Changes*, *supra* note 159, p. 20.
[163] *Proposed Changes*, *supra* note 159, p. 20.
[164] Luca Di Mauro, *supra* note 143, p. 223-225.
[165] *Proposed Changes*, *supra* note 159, p. 23.

technological developments,[166] it seems to be overlooked that every MS would have varying levels of content regulation which reflects the TWFD's minimalist approach as well as the different public policy concerns on the ground of the discretion given to MSs under the Treaty.[167] That is more explicitly to say that, review process concerning 2002 Regulatory Framework would not be the ideal place to discuss how to demarcate general interest objectives including PSB needs, since it is more appropriate to see such concerns as a part of a comprehensive public policy realm though they are interrelated with electronic communications.

IV.C. Application of Media Law: Relevant Provisions of TWFD and AMSD Proposal

As explained above, neither current remedies under 2002 Regulatory Framework nor EC Competition Rules include a statutory provision as regards access to content of public importance or right of the public to information. Though not including a general right to information, EC media law, unlike the referred bodies of law, provides a crucial tool enabling the public to access exclusively-held TV programmes that are of overriding importance among others. To this end, Article 3a of TWFD[168] permits MSs to ensure that broadcasters under their jurisdictions do not broadcast on an exclusive basis events which are regarded by themselves as being *of major importance for society* in such a way as to deprive a substantial proportion of the public of the possibility of following such events via live coverage or deferred coverage *on free television*.[169] To this end, MSs choosing to implement this provision

[166] *Proposed Changes*, *supra* note 159, p. 23.
[167] For examination of competence of EU and Member States in the social, cultural and educational aspects of broadcasting in conjunction with relevant Articles of the EC Treaty as well as the jurisprudence of the ECJ, see Harrison and Woods, *supra* note 111, p. 116-149.
[168] TWFD, based on 'minimal harmonisation' scheme, was adopted to provide a set of content-related rules to ensure a basic level of harmonisation in realm of broadcasting as well as to ensure free movement of broadcasting activities across Europe [(Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, as amended by Directive 97/36/EC of the European Parliament and of the Council, OJ L 202/60, 30.07.1997 (hereinafter "TWFD")].
[169] See TWFD, *supra* note 168, Article 3a.

are required to draw up a 'list of important events' including the so-called events *of major importance for society* to enable them to be broadcast on free-to-air TV.

The most controversial issue to be tackled under the Article 3a of TWFD seems to be designation and implementation of the criteria on how to identify the list of important events. This is because, concerning some parameters that are necessary to identify the so-called events, i.e. 'major importance for society', 'substantial proportion of the public', is not given any explanation under the Directive. TWFD solely gives some illustrative events that are worth being qualified as of major importance for society: the Olympics, the Soccer World Championship and the European Soccer Championship.[170] It is evident from these examples that major events for society point to an interest for society as a whole because of their importance for the forming of a national and/or cultural identity, and not only to the 'right of the public to be properly informed'.[171]

In any way, Article 3a of TWFD serves to the needs of the public in respect of increased coverage of socially important programmes on (free) TV that are normally displayed on exclusive basis via pay-TV. Yet, it should be distinguished from the PSB scheme since the latter encompasses quality standards and positive/negative content regulation that are applicable to a larger proportion of programmes televised by a broadcaster (which do not necessarily be available (free) to all viewers). Likewise, purpose and scope of the Article 3a are different from those of any statutory 'right of access to information' which is sometimes mistakenly matched with the Article 10 of the European Convention on Human Rights (hereinafter "ECHR").[172]

[170] See TWFD, *supra* note 168, Recital 18.
[171] Helberger, *supra* note 47, p. 99.
[172] [A]rticle 10 does not provide a right to freedom of information independent of others' rights to communicate, although the Council of Europe recognizes the importance of freedom of information to freedom of expression (Lorna Woods, Freedom of Expression in the European Union, *European Public Law*, Vol. 12, Issue 3, Kluwer Law International, 2006, p. 375).

As a matter of fact, the opportunity given for the public to view the listed important events on free-to-air TV via putting some constraint on pay-TV operators is a limited right in respect of both the range of programmes catered to people and the need to ensure access to content that broadcasters crucially depend on. Besides, it does little to restore the balance between controllers of access to content and those individual viewers who are seeking access to information.[173] With the exception of the listed events, pay-TV providers are entirely free to foreclose electronic access to all kinds of content and content services and make access to such content subject to their own conditions and requirements.[174]

Since its inception in 1997, the list-of-important-events could be seen as the main strand of the (content-centric) access regime of EC media law which does not include a directly enforceable right to force broadcasters to make their content available to third parties. While this fact *prima facie* represents light-touch broadcasting regulation at EC level, a new right consisting of 'short reporting' provided under AMSD Proposal[175] could be able to change mind of anyone with its obligatory and widely-applicable facet. Reflecting the need to use the information resources available to the fullest extent to make EU citizens informed about the major events, AMSD Proposal includes a provision requiring MSs to ensure that for the purpose of short news reports, any broadcaster established in the Community has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.[176] This concession is considered to fill the gap arising from the lack of

[173] Natali Helberger, The "Right to Information" and Digital Broadcasting - About Monsters, Invisible Men, and the Future of European Broadcasting Regulation, *Entertainment Law Review*, Vol. 17, Issue 2, 2006, p. 75.
[174] *Ibid*.
[175] As a part of the i2010 strategy, TWFD has undergone a review process which started in December 2005 with the Commission Proposal on adoption of a new AMSD and is about to end up in December 2007 with the enactment of the revised Proposal on which both the Parliament and the Council agreed via a common position.
[176] AMSD Proposal, May 2007, Article 3j (1), http://ec.europa.eu/avpolicy/docs/reg-/modernisation/proposal_2005/avmsd_cons_may07_en.pdf

Europe-wide incentive to commercially compel exclusive rights-holders to grant such types of critical news, with a view to spur pan-European channels.[177]

Under the proposed AMSD, the principal method to grant access to the short new reports is determined as the right to choose any of the prepared short news extracts from the transmitting broadcaster's signal (with, at least, the identification of their source).[178] On the other hand, MSs are allowed to arrange modalities and conditions regarding the provision of such short extracts, in particular any compensation arrangements, the maximum length of extracts and time limits regarding their transmission. In any way, provision of such news extracts is bound with FRND terms and is stipulated to be conducted without prejudice to Directive 2001/29/EC and the relevant international conventions in the field of copyright and neighbouring rights.[179]

Unlike the Article 3a of TWFD, the right to short reporting does not impose any restriction on the exclusivity of the transmission – the event can still be broadcast on an exclusive basis, whereas it resembles an exception in copyright law since it does not oblige the entity that carriers out the exclusive transmission to allow certain uses, namely the making of short reports.[180] While the list-of-important-events is limited to provision of a number of selected TV programmes that are conceived of having major importance for society, right to short reporting grants broadcasters a more reliable and enforceable right in respect of the fact that under new AMSD they would be granted a guaranteed right to access short extracts whichever they opt (out of the ones transmitted within other EU countries).

However, both rights do not confer an active role to citizens, notwithstanding their given objectives, i.e. either to keep citizens informed about general news or to cater to

[177] Commission Staff Working Document, *Impact Assessment* – Draft Audiovisual Media Services Directive, COM(2005) 646 final, p. 19.
[178] AMSD Proposal, *supra* note 176, Article 3j (2). As an alternative to this, a Member State may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means [AMSD Proposal, *supra* note 176, Article 3j (2)]. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal (Recital 27a, AMSD Proposal).
[179] AMSD Proposal, *supra* note 176, Article 3j (1) and (3); AMSD Proposal, *supra* note 176, Recital 27a.
[180] Helberger, *supra* note 47, p. 109.

them socially important events, i.e. major sport programmes on free television. Also, it is arguable that both rights do not respond to the prevailing access needs in respect of those of the EU citizens to reach to full coverage of major events and of those ensuring a level playing field between broadcasters. Thus, reliance on these rights would not be an effective solution alone without additional tools that are legally and economically feasible as well as do ensure that all the evolving information policy needs of individuals besides access needs of wholesale character are met effectively.[181] In future information society, each citizen should be able to benefit from new services that become available by means of advanced communications.[182]

V. Conclusion

Whereas content-related access matters spread out to a wide area, main discussions surround how to secure competition in vertically-integrated content delivery markets and solve the structural problems arising out of technical bottlenecks such as so-called new digital gateways, i.e. CA components. Behavioural barriers, i.e. anti-competitive bundling activities, discrimination, margin squeezing also affect the competitive conditions of content-related markets, arousing the question of how to deal with such problems in a dynamic and highly-commercialised environment. As the ways to tackle such problems are influenced by the process of convergence, decision makers and law enforcers inevitably question to what extent they are to look the cross-border links between the neighbouring markets, and where to separate/unify the regulatory rules in respect of newly emerging ICT networks and services.

[181] Helberger argues that one way of promoting individual access to content without interfering disproportionately with the programming autonomy of the content provider (as would be the case with an individual access right), is to create the conditions for fair and affordable access to broadcasting content. In her viewpoint, [t]he fairness and openness of the individual commercial relationship between service provider and viewer is key to preventing electronic access control from being used to the detriment of competition, viewers and public information policy (Helberger, *supra* note 173, p. 77). Notably, in order to ensure fairness and openness in provision of access-controlled technical platform services and to deter platform owners from preventing their subscribers to reach other platforms, interoperability solutions are inevitably seen as an appropriate tool in respect of future ICT-based objectives.

[182] Helberger, *supra* note 173, p. 77.

While a widely shared set of beliefs about the information revolution and its economic implications – a 'techno-economic paradigm' – forms the basis and the environment for the technological visions and programs of governments and industries around the world,[183] the so-called paradigm could not be immunised from public and moral values which policy makers consistently consider in shaping some of the content-related access rules. That is more explicitly to say, when the access-related problems involve socially sensitive issues such as public broadcasting, the rule-making tends to focus on not only opening technical bottlenecks for competition but also sharing informational values to meet the societal, democratic and cultural needs of the citizens.

However, the latter concerns find a little place to themselves within the sector-specific rules for electronic communications sector which generally prioritizes creating and maintaining competition in relevant markets. Representing another component of EU regulatory system, competition law enforcement is aimed at solving market failures through merger control, clearance of joint ventures and penalising abuses of dominant firms. Putting general competition law and sector-specific rules together under a regulatory umbrella contributes to the prospect of sustainable competition whereby consumer demands are fulfilled to a considerable extent. While these facts generally fashion the EU access regime, this regime is impugned for disregarding information needs of the public, namely those of the EU citizens to reach premium content including educative and multi-cultural programmes at the highest level.

Under this light, it could be concluded that a disaggregated approach to solve content-related access matters hardly responds to the future as well as prevailing problems of information society. Given that access-related problems extend to consumer level, appropriate measures require involvement into access needs of the individuals to the

[183] Herbert Kubicek and William H. Dutton, "The Social Shaping of Information Superhighways: An Introduction" in Herbert Kubicek William H. Dutton and Robin Williams (eds.) The Social Shaping of Information Superhighways: European and American Roads to the Information Society, Campus Verlag – St. Martin's Press, 1997, p. 27.

same extent as other concerns which competent authorities consistently deal with, i.e. access needs of wholesale character. Reminding of this fact, enforcement of reliable information policies towards dissemination of digital content as widely as possible should accompany monitoring relevant markets and fulfilment of consumer needs. It must be borne in mind that, the Community law measures which decision makers and law enforcers have in their hands would be effective enough to respond the ICT-centric needs of EU citizens given the leeway for designation of general interest objectives as well as enabling provisions for interoperability solutions. Yet, how to put them in a toolbox and implement in an effective manner is a multi-level political choice requiring a well-harmonised and truly-justified approach which would not lag behind the information needs of EU citizens at all.

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