Controlling access to content: regulating conditional access in digital broadcasting

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Chapter 3

Conditional Access and General Competition Law

3.1. Introduction

Chapter 3 takes a look at the relationship between electronic access control and European competition law. Content, has become a profitable commercial commodity. Today, a significant share of content distribution is an economic undertaking. Content is the fuel that keeps the engines of the ‘information economy’ running. This also means that the shape of today’s information markets is the result of the structuring force of economic mechanisms. Determined by fundamental economic considerations and strategic thinking, the activities of the players in these markets are protected by individual economic freedoms.

The idea of freedom of competition, which is part of the individual economic autonomy, includes the freedom to pursue one’s own economic advantage in a competitive environment. This is, in its positive sense, the ability to participate in the marketplace, for example, by concluding contracts, by offering access-controlled services according at one’s own will and according to one’s own economic interests. In its negative sense, freedom of competition refers to the freedom from public influence, which includes the right to determine the way one organizes one’s business as well as the freedom not to be forced to promote competitors to one’s own disadvantage. On the other hand, the freedom of competition is limited, it’s most obvious restrictions being the interests of competitors in providing services themselves and the overall competition. In other words, freedom of competition is relative and reaches only as far as it is tolerated under general competition law and policy.\(^{357}\)

The study’s choice of European law is based on a number of reasons. The first reason derives from the fact that many conflicts in this sector are likely to be relevant for the European Internal Market due to the size of the actual market players, their increasing international involvement, and the widespread distribution of services by means of cross-border transmission techniques such as the use of satellite and IP protocol. Second, European competition law influences, to a considerable extent, existing national competition law and the way it is interpreted.\(^{358}\) The relevant provisions discussed in this context can probably be

\(^{357}\) Herdzina 1999, p. 12.
found in similar form in national competition laws. Finally, Articles 81 and 82 of the EC Treaty create direct rights with regard to the individuals concerned—rights that national courts must protect.359

This study distinguishes between general European competition law, as discussed in this chapter, and sector-specific rules that are specifically designed for a particular sector and regulate, among other things, aspects of competition. Such sector-specific rules are discussed in Chapter 4 (Telecommunications Law). Among the sector-specific provisions that are relevant to this study are the access rules in the Access Directive, related rules in the Framework Directive and the Universal Service Directive. In addition to competition-related aspects, these sector-specific rules also realize other public interest objectives.

It is worth noting that competition law focuses primarily on the relationship between economic entities that are in competition with each other. Competition law only considers consumer interests indirectly, to the extent that functioning competition is a process of approximation towards the consumers’ demands and for the consumers’ benefit (see section 3.5. for a detailed discussion). This is also why the question of if and how consumers access pay-TV services will only fall under the scope of competition law in a situation where the way in which and the conditions under which they are granted access to access-controlled services has a broader anti-competitive impact.

The second part of Chapter 3, section 3.2., starts with a brief overview of relevant European competition law (section 3.2.1.). It also looks into the way the European Commission has defined pay-TV and the associated markets (section 3.2.2.). Because market definitions in competition law are created on a case-by-case basis, the purpose is not so much to categorize certain markets, but rather to give an idea of the arguments underlying the European Commission’s market definitions and how these arguments were refined in the course of time. The ensuing analysis of European competition law consists of two aspects. The third part of Chapter 3 (section 3.3.) discusses the aspect of merger control as well as some of the major merger decisions made by the European Commission in the pay-TV sector (section 3.3.1.). This is to determine whether it is possible to identify some guiding principles of the European Commission’s practice in this field (section 3.3.2.). Part 4 (section 3.4.) deals with antitrust issues and the applicability of European competition law. It investigates the applicability of Article 81 and 82 of the EC Treaty to some of the possible anti-competitive practices that were identified in Chapter 1, namely access refusals (section 3.4.1.), discriminatory practices (section 3.4.2.) and tying strategies (section 3.4.3.). The analysis ends with two brief parts on economic and non-economic considerations in European competition law, namely the position of consumers (section 3.5.) and the role that non-economic

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359 Wyatt/Dashwood 2000, pp. 643-644, who also point out the practical problems that arise during the application of these provisions.
considerations can or should play in competition law procedures (section 3.6.). The last part (section 3.7.) is the conclusion.

3.2. Rules and Markets

3.2.1. OVERVIEW OF RELEVANT EUROPEAN COMPETITION LAW

European competition law distinguishes between three main categories of anti-competitive behaviour. The first two deal with antitrust; the third concerns mergers: Article 81 of the EC Treaty prohibits all collusive agreements between enterprises that may affect trade between the Member States and that aim at or have the effect of preventing, restricting or distorting competition within the common market. This concerns forms of collusive behaviour such as coordinated behaviour, cartels and price control that directly influence the performance of the parties involved. Examples could be (the so far rather theoretical case of) an agreement between leading providers of conditional access systems on access prices for third-party broadcasters or a joint agreement on a particular API standard with the intention of making market entry for other service providers more difficult.

Article 82 of the EC Treaty is concerned with the market power exercised by a company and the extent to which it allows market players to use its market power to inhibit the activities of competitors and thereby influence the normal working of market mechanisms. This provision deals with impeding strategies, namely the contractual or factual limitations on the economic freedom of actual or potential competitors. The denial of access to the conditional access system or components thereof could fall into this category, as would the granting of access under discriminatory terms and conditions. Other possible examples are the use of proprietary standards with the intention of blocking market access and undue bundling practices that restrict the economic freedom of programme providers to choose on which digital service platform they market their content.

The third category involves concentrative structures and the abuse of a dominant position, which may be covered by Articles 81 and/or 82 of the EC Treaty when the conduct involves the weakening of competition. This refers to economic action that aims at reducing the number of independent economic entities, meaning competitors, in a market through mergers or joint ventures at the horizontal or vertical level. Although Article 82 of the EC Treaty does not expressly mention any kind of merger control, the European Court of Justice decided that, under certain circumstances, mergers also constitute an abuse of a dominant position.360 They can fall under Article 82 of the EC Treaty and the Council’s Merger Regulation No.

Joint ventures can also fall under Article 81 of the EC Treaty providing that agreements that restrict competition are involved.

3.2.2. MARKET DEFINITION

From both an economic and legal perspective, the identification and definition of product markets is a necessary precondition for market analysis because the identification of actual and potential competitors and the relevant economic behaviour are relative and can only be identified within the context of the respective market.

Market definition is not an exact science, and economic theories for defining markets are numerous. One aspect shared by all theories is that market definition involves an element of subjective assessment. Moreover, the definition of a relevant market can—and does—change over time because the characteristics of products and services evolve and the possibilities for demand and supply substitution change. Depending on the dynamics of the market, a definition can rarely be much more than a snapshot of the actual competitive situation in a certain market. This is especially true in fast evolving markets such as in the converging markets for broadcasting, information society and telecommunications services. For this reason, one should refrain from putting too much emphasis on the way the European Commission defines markets in a particular case; in the next case, it might adopt a different market definition. The analysis acknowledges that market

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362 In the language of the European Commission, a relevant product market comprises ‘all those products and/or services which are regarded as interchangeable or substitutable by the consumers, by reasons of the products’ characteristics, their prices and their intended use’ (this is the so-called substitutability principle), European Commission, Commission Guidelines on Market Analysis and the Assessment of Significant Market Power, paragraph 44.

363 Herdzina 1999, 73.


365 See European Commission, Notice on the application of competition rules to access agreements in the telecommunications sector, 22 August 1998, OJ C 265, p. 2 [hereinafter ‘Access Notice’], paragraph 47: ‘Any attempts to define particular product markets in [the EU] would run risk of rapidly becoming inaccurate or irrelevant. The definition of particular product markets ... is best done within the context of a detailed examination of an individual case’.
definition under general competition law is case-oriented and that the following
analysis can be no more than a first and simplified impression of existing practice.\footnote{366} Nevertheless, market definition constitutes an important part in the competitive
analysis, and it is helpful to understand the criteria according to which the European
Commission proceeds. The following analysis of the European Commission's
decision practice may provide an indication of its previous practice for the pay-TV
sector, the criteria on which it has based its market definitions so far, and how it
considers the impact of convergence and change in the economic environment.\footnote{367}
The below list of recognized markets is therefore indicative rather than exhaustive.

Given the impact of market definition, and bearing in mind the particular
difficulties associated with assessing very dynamic markets such as in the area of
digital broadcasting, the European Commission has developed additional, sector-
specific guidelines to assist national competition authorities in defining markets and
assessing the level of competition.\footnote{368} Two important elements in the European
Commission's market definition procedure in telecommunications markets are
demand-side and supply-side substitution.\footnote{369} A third element is the existence of or
the potential for future competition.\footnote{370} Relevant product or service markets comprise
all of the products or services that are sufficiently interchangeable or substitutable,
not only in terms of their objective characteristics (price, intended use, etc.) but also
in terms of the conditions of competition.\footnote{371} The Commission, however,
acknowledges that 'product substitutability between different electronic
telecommunications services will arise increasingly through the convergence of
various technologies'.\footnote{372} As far as pay-TV is concerned, the Commission makes a
general distinction in at least two main types of relevant markets, namely markets of
services or facilities provided to end users (retail markets) and markets of facilities
necessary to provide such services offered to operators (wholesale markets). Within
these two types of markets, the European Commission further differentiates for

\footnote{366}{For a more elaborate analysis, see the study by Bird/Bird (2002).}
\footnote{367}{The other aspects of the decisions will be discussed in more depth in section 3.3.1.}
\footnote{368}{European Commission, Access Notice; Commission Guidelines on Market Analysis and the
Assessment of Significant Market Power, to name but some.}
\footnote{369}{See European Commission, Access Notice, paragraph 40; Commission Guidelines on Market
Analysis and the Assessment of Significant Market Power, paragraph 48.}
\footnote{370}{See European Commission, Access Notice, paragraph 40.}
\footnote{371}{Demand-side substitutability is used to measure the extent to which consumers are prepared to
substitute other services or products for the service or product in question, whereas supply-side
substitutability indicates whether suppliers other than those offering the product or service in question
would switch in the immediate to short-term their line of production or offer the relevant products or
services. See also European Commission, Commission Guidelines on Market Analysis and the
Assessment of Significant Market Power, paragraphs 49-54.}
\footnote{372}{European Commission, Commission Guidelines on Market Analysis and the Assessment of
Significant Market Power, paragraph 47.}
each of the levels in the production chain between demand and supply-side characteristics.\textsuperscript{373}

Distinct from market definitions for the purpose of a general competition law analysis are market definitions within the context of the application of telecommunications law, as described more in depth in Chapter 4.\textsuperscript{374} To this extent, Articles 14 to 16 of the Framework Directive set out the procedure that must be followed by National Regulatory Authorities (NRAs) in relation to a series of specific regulatory obligations in telecommunications law. For the purpose of the application of telecommunications law, the Commission Guidelines on Market Analysis and the Assessment of Significant Market Power, according to Articles 14 to 16 of the Framework Directive are particularly relevant.\textsuperscript{375} The guidelines provide a (sector-specific) list of criteria for the definition of relevant product and service markets at the transport level, as well as an overview of the existing European Commission’s decision practice. Within the context of Article 15 of the Framework Directive, the European Commission also issued a Recommendation on Relevant Markets in the telecommunications sector with the intention of updating the list on a regular basis.\textsuperscript{376} For Chapter 3, it remains to be said that, as the European Commission indicated itself,\textsuperscript{377} market definitions according to the Communications Framework do not necessarily follow the principles of market definition under general competition law. Therefore, general competition law authorities can identify diverging product markets. Moreover, restrictions can be imposed on enterprises by sector-specific NRAs in addition to sanctions imposed by the general competition authorities. Hence, it is important to understand the complementary character of general competition law in areas in which sector-specific rules exist.

\textbf{Retail Markets}

\textbf{Pay-TV/Free-TV—}The European Commission decided repeatedly that access-controlled services, namely pay-TV services, would constitute a product market separate from that of free-TV, meaning advertising or licence-fee financed television.\textsuperscript{378} It was argued that, in the case of fee and advertising-financed

\textsuperscript{373} Access Notice, paragraph 45, Commission Guidelines on Market Analysis and the Assessment of Significant Market Power, paragraph 64.

\textsuperscript{374} See section 4.6.2.

\textsuperscript{375} European Commission, Commission Guidelines on Market Analysis and the Assessment of Significant Market Power, see above.

\textsuperscript{376} European Commission, Recommendation on Relevant Markets, see above.

\textsuperscript{377} European Commission, Recommendation on Relevant Markets, Explanatory Memorandum, p. 8.

television, there is a trade relationship between the programme supplier and the advertising industry, whereas in the case of pay-TV the programme supplier enters a contractual relationship with the subscriber. Because of this, different conditions for competition were given.

Interestingly, the European Commission also indicated that this distinction might blur due to the convergence of the sectors as well as in cases in which programmes are financed from a mixture of sources. This is true in situations in which pay-TV providers have opened their platforms to advertisers and/or in which pay-TV platforms also carry free-TV programming for their subscribers. Consequently, it cannot be excluded that the European Commission will, at some stage, find that pay-TV and free-TV services operate in one and the same market. Were the European Commission to move away from its two-separate-market assumption, this could have consequences for the finding of a dominant position of pay-TV providers and the applicability of competition law. And, indeed, NewsCorp made exactly this argument in the NewsCorp/Telepiù case in order to demonstrate that the suggested merger would not lead to the creation of a dominant position in the Italian broadcasting sector. The Commission did not follow this argument, though, because of the observed differences in the supply-side substitutability (different means of financing, revenue models for channel suppliers, the ‘windows’ licensing policy of programme producers, etc.) and the demand-side substitutability (different content offered, different financing models and business strategies) between pay-TV and free-TV. On the other hand, and as was remarked by the parties consulted, both pay-TV and free-TV providers were competing for the attention of consumers. To this extent, both providers were competing in the retail market for viewers and in the wholesale market for attractive content. In contrast, consumer organizations pointed to the differences between subscribers to pay-TV offerings and free-TV viewers. It would lead too far to weight all of the arguments mentioned in this decision. The NewsCorp/Telepiù case demonstrated, however, that the existing distinction between pay-TV and free-TV is based on a number of factors that can change with ongoing economic and technological developments, notably those in the wake of digitization and convergence:

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379 European Commission, Commission decision of 2 April 2003 declaring a concentration to be compatible with the common market (Case IV/M.0057 - TPS) according to Council Regulation (EEC) No. 4064/89, 8 June 2002, OJ C 137, p. 28 [hereinafter ‘TPS’], paragraph 14.


381 European Commission, NewsCorp/Telepiù, paragraph 18.

382 European Commission, NewsCorp/Telepiù, paragraphs 19-25.

383 European Commission, NewsCorp/Telepiù, paragraph 26.

384 European Commission, NewsCorp/Telepiù, paragraphs 32-33.
'convergence between media and telecommunications on the other hand is likely to bring about an increasing proximity between the different ways in which entertainment and information are brought to consumers, and the ways in which these consumers enjoy them'.

It should be noted that, so far, the European Commission has not seen the need to distinguish between analogue and digital pay-TV. It is argued that digital pay-TV is only a further development of analogue pay-TV and therefore does not constitute a separate relevant product market.

So far, no attempt has been made to claim that instead of defining one joint market for pay-TV that each (proprietary) pay-TV platform constitutes a market of its own. The argument would be particularly plausible in situations where consumers are strictly bound to one particular pay-TV platform due to long-term subscription contracts, proprietary conditional access technology, high switching costs, etc. In such situations, the presence of any additional platform might not constitute a real choice, meaning no real demand substitutability exists. For the time being, however, no cases are known to the author in which the Commission has argued in this way.

**Digital Interactive Television Services**—In its BiB decision, the European Commission for the first time defined a separate market for digital interactive broadcasting services. According to the European Commission, in the BiB decision, the difference between pay-TV and digital interactive TV was that the latter was 'largely transactional or informational', whereas pay-TV was essentially entertainment oriented. Underlying this distinction is the traditional idea of broadcasting as a point-to-multi-point medium as opposed to information society services that are distributed on an individualized basis. Chapter 1, however, explained why this distinction is increasingly difficult to maintain in practice.

In the BSkyB/Kirch decision, the European Commission further described and differentiated between markets for digital interactive services that are available via television and personal computers. The European Commission explained this to be a result of the relatively small number of households with personal computers and the fact that interactive services intended for reception via the TV set can be integrated into traditional broadcasting entertainment channels. Again, one may

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385 European Commission, Newscorp/Telepiù, paragraph 39.
386 European Commission, TPS, paragraph 14.
387 European Commission, BiB, paragraph 23.
388 See section 1.2.
wonder to what extent this finding will hold true bearing in mind that it does not take much more than a simple TV card to turn the computer into a television set.

**Paid-for Content Provision via the Internet/Portals/Internet Advertising**—The European Commission has indicated that there are distinct markets for the provision of internet advertising, portals and particular types of paid-for content and advertising-funded content. This distinction is based on the assumption that these different activities earn revenues in different ways and from different sources, and that they are frequently carried out by different undertakings and require substantially different inputs. As the Commission remarked on another occasion, different content markets will be relevant to each delivery mechanism as long as consumers regard the provision of services across the different access mechanisms as non-substitutable.

**Intermediary Platform**—It is also worth noting that the European Commission has already acknowledged a distinct role for intermediary platforms. The European Commission repeatedly uses the notion of ‘programme platform’ or ‘direct-to-home distribution platform’ to describe a pay-TV marketing platform that is distinct from the technical conditional access platform. To this extent, existing market definitions reflect a strict distinction between the technical and content-related aspects of pay-TV. The fact that there is a demand and a market for particular products or services does not prevent the existence of a separate market for aggregation services such as pay-TV platforms, internet portals and services from traditional industries such as the Yellow Pages or business guides. The European Commission considers the bundling or ‘packaging’ of services, for example, that are different from the provision of individual services as part of a package. Moreover, the European Commission explains that the promotion and marketing of a service bouquet differs from the marketing of single services because of the economies of scope involved. The demand substitutability of a

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392 European Commission, Bertelsmann/Kirch/Premiere, paragraphs 26 and 27.


394 European Commission, BiB, paragraphs 16-18 (for the bundling of interactive services); European Commission, Newscorp/Telepiù, paragraph 74.
package of interactive services is distinguishable from the demand substitutability of the individual services that form part of the package. The finding in a later decision that access-controlled single channels and access-controlled platforms might constitute one market does not change much in this respect, as in both cases intermediary services, namely the operation of the technical conditional access platform and the marketing platform are needed.

Wholesale Markets

Licensing of Broadcasting Rights—The European Commission identified separate markets for the licensing of broadcasting rights, which it further divided in the course of time into markets for:

- Football events that take place regularly (annually) and in which national teams participate.
- Football events that do not take place regularly and in which national teams participate.
- Other sports.
- TV thematic and generic channels (for example, animation, documentary and fiction).
- TV programmes.
- Premium films.

Interestingly, the European Commission distinguishes for the latter between films produced by major Hollywood studios (Universal, MGM, Paramount, Sony (Columbia), Disney (Buena Vista, Touchstone and Miramax), Twentieth Century Fox and Warner) and those produced by other studios. This distinction into different markets for broadcasting licenses is still somewhat rough, particularly from the point of view of demand-side substitutability. The majority of consumers do not value sports events or feature films in the same way. According to their personal preferences, the transmission of a soccer game might not be substitutable with the transmission of a table soccer game, a consumer who wants to watch horror movies might not want to watch Disney movies instead, etc. Consequently, even if the leading producer of horror movies does not have dominant market power in an overall national market for premium films, it could still have dominant market power in the national market for horror movies. On the

395 European Commission, Vodafone/ Vivendi/ Canal+, paragraph 47, for internet portals.
396 European Commission, Newscorp/Telepiù, paragraphs 44-46.
397 For example: European Commission in Commission Decision of 13 October 2000 declaring a concentration to be compatible with the common market (Case IV/M.2050 - Vivendi/Canal+/Seagram), 31 October 2000, OJ C 311, 31, p. 3 [hereinafter Vivendi/Canal+/Seagram'], paragraphs 17-18; Newscorp/Telepiù, paragraph 52 et seq., to name but some.
398 See European Commission, Newscorp/Telepiù, paragraph 57.
399 See also European Commission, Newscorp/Telepiù, paragraph 51.
other hand, from a broadcaster’s or even advertiser’s point of view, the genre or popularity of a particular programme might count.\(^{400}\)

**Markets for the Wholesale Supply of Niche Films and Sports Content, and Channels for Pay-TV**—The European Commission found that the licensing of broadcasting rights for pay-TV is a distinct market that can be divided into first-window and second-window licensing. It also found that the wholesale supply of premium films and sports a) content and b) channels for pay-TV forms a separate market from the supply of services for free-TV.\(^{401}\) It is also distinct from thematic and general interest channels.\(^{402}\) The argument used by the European Commission was that while thematic or general interest channels were supplied to customers as part of a package, film and sports channels are charged on an individual basis. Moreover, the wholesale price of acquiring film and sports channels is far higher than that of other channels. It was not excluded that, in the future, additional separate markets for sports and film channels will be defined.\(^{403}\) Within this context, the European Commission has so far worked with rather rough estimates, taking only rudimentarily into account distinct consumer preferences.

**Technical Services Necessary for Pay-TV**—Beginning with the MSG decision, which will be discussed more extensively in section 3.3.1., the European Commission defined a product market for the wholesale provision of the technical services necessary for pay-TV.\(^{404}\) So far, the European Commission has seen no need to further differentiate, and instead referred in its decision to one common market that would involve:

- The making available of a descrambling system (decoder) and, as long as there are still analogue receivers, a digital-analogue converter (integrated into a set top box or directly into satellite receivers or television sets).
- The handling of the conditional access system.
- Subscriber management.
- A transaction management system.

In the BiB decision\(^{405}\) the list was extended to include:

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\(^{400}\) Rumphorst 2001, p. 3.

\(^{401}\) European Commission, Newscorp/Telepiù, paragraphs 55-77.

\(^{402}\) European Commission, BiB, paragraphs 28-29; European Commission, Commission decision of 2 December 1998 declaring a concentration to be compatible with the common market (Case IV/M.1327 - NC/Canal+/CDPQ/Bank America) according to Council Regulation (EEC) No. 4064/89, 14 August 1999, OJ C 233, p. 21 [hereinafter ‘NC/Canal+/CDPQ/Bank America’], paragraph 15; European Commission, Newscorp/Telepiù, paragraph 54.


\(^{404}\) See also European Commission, Bertelsmann/Kirch/Premiere, paragraphs 19-21; European Commission, BiB, paragraph 30-32.

\(^{405}\) See section 3.3.1.
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- Electronic Programme Guides.
- Application Programme Interfaces.

This does not exclude that additional specialized product markets could be identified later if the situation so required.

Interestingly, in its BiB decision, the European Commission did not see the need to differentiate between conditional access services that control access to interactive services and conditional access systems that control access to broadcasting services. Furthermore, no distinction was made between the different infrastructures to which technical services would be connected. The European Commission saw no difference between technical conditional access services for satellite or cable transmitted services. This finding is in line with the ongoing process of the convergence of transmission means that was described in Chapter 1. The European Commission does not rule out the possibility that the need to make a distinction could arise in the future. In contrast, it is worth noting that sector-specific law, notably Articles 6 and 8 to 13 of the Access Directive, which will be discussed in Chapter 4, does strictly distinguish between technical services for digital interactive services and pay-TV.

Distinct Markets for Transmission Capacities—In its decisions, the European Commission considered that there is a separate market for cable, (digital) satellite and (digital) terrestrial television networks. According to the European Commission, the technical and financial conditions of operating each infrastructure differ considerably. This was explained, among other things, by the fact that each medium has a different footprint.

On the other hand, the European Commission concluded in other decisions that no distinction could be made between pay-TV services broadcast via cable, satellite or digital terrestrial means. To this extent, the European Commission argued,

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407 See section 1.4.3.
408 European Commission, BiB, paragraph 32.
409 See sections 4.4 and 4.6.
410 See European Commission, Nordic Satellite Distribution, paragraphs 61-64. The Commission argued that, from the perspective of the viewer, there were considerable differences between the possible transmission routes—terrestrial, direct-to-home satellite and cable—which would affect both the technical requirements and costs. While terrestrial transmission and satellite television only required the viewer to install an aerial or a satellite dish at his own expense, cable TV was dependent on the maintenance of a cable network, which is financed by the viewer by means of cable fees [with reference to the MSG decision of the Commission], paragraph 62.
411 See also European Commission, Nordic Satellite Distribution, paragraph 57: This decision defined a separate market for the provision of satellite TV transponder capacity and related services to broadcasters; the distribution of TV signals via satellite (transponders) was found to be a market distinct from TV distribution by terrestrial links, since considerable technical and economic differences existed between the two modes of distribution.
services were fully substitutable.\textsuperscript{412} Again, this consideration acknowledges the impact of convergence for the pay-TV sector.

\textit{Relevant Geographical Market}

According to the decisions of the European Commission, and for linguistic, cultural, licensing and copyright reasons, the pay-TV markets follow national or language borders. The same was claimed for the acquisition of programme rights,\textsuperscript{413} and for telecommunications networks and services because of the 'national nature of the regulatory regime and of the demand of services to be delivered across the telecommunications infrastructure'.\textsuperscript{414} On the other hand, the European Commission acknowledged that the proliferation of far-ranging transmission techniques, such as satellite networks, has the potential to extend the geographic market progressively to the entire EU territory. Obviously, such developments would be in line with the progressive realization of a single Internal market.

Still, the departure from the idea of a national character of media markets is apparently not easily realized. Even for internet services, which are genuinely considered international if not global in scope, the European Commission initially found that the different geographic product markets for internet services could essentially be considered national in nature, with the exception of certain emerging pan-European markets.\textsuperscript{415} It took a while until the European Commission found, for example, in its AOL/Time Warner decision, that the geographical dimension of the market for online music delivery, due to the possibilities offered by digital technology, 'certainly extends beyond national borders' and could be even global in character.\textsuperscript{416} The same was argued for the markets of technical facilities for such services—in this case player software—where the European Commission found the market to be global. It was observed that the language of the music player's file menu text could be readily adapted to support a multitude of languages. The impact of language differences was thus minimal and the localization of the player

\textsuperscript{412} European Commission, TPS, paragraph 14.
\textsuperscript{413} European Commission, Newscorp/Telepiù, paragraph 62, stated that 'nothing prevents operators from acquiring rights for more than one territory at a time, broadcasting rights are divided and sold on a mainly national basis or, at the most, by language area and the price is structured in such a way that the economic value of the contracts depends on the specific territory for which the rights are acquired'.
\textsuperscript{414} European Commission, BiBi, paragraph 50.
\textsuperscript{415} European Commission, Commission decision of 24 April 2001 declaring a concentration to be compatible with the common market (Case IV/M.2222 – UGC/Liberty Media) according to Council Regulation (EEC) No. 4064/89, 16 June 2001, OJ C 172, p. 20 [hereinafter 'UGC/Liberty Media'], paragraph 16; European Commission, Commission decision of 23 July 1999 declaring a concentration to be compatible with the common market (Case IV/M.1551 - AT&T/Media One) according to Council Regulation (EEC) No. 4064/89, 30 September 1999, OJ C 277, p. 5 [hereinafter 'AT&T/Media One'], paragraph 23.
\textsuperscript{416} European Commission, AOL/Time Warner, paragraph 27.
software, meaning adapting the software to the needs of a local market, was customary and easy to accomplish.\footnote{417}

Still, the language argument is persistent. In the same decision, the European Commission argued that the geographical scope of the market for online paid-for video distribution was, due to the language requirements of the different national consumers for film and TV programming, likely to be national, similar to the case of its equivalent in the broadcasting sector, pay-TV.\footnote{418} Therefore, even though the European Commission acknowledged for online music that the language problem could be overcome thanks to technological progress, it assumes that something different applies to video services. On the other hand, the European Commission assumed that, at least for the internet, the film offering is mainly focused on US films and programmes, notably cartoons, which have an international appeal and are popular in all of the European Member States.\footnote{419} It remains to be seen whether the European Commission will apply this argument to pay-TV.

**Conclusion**

The analysis of the decisions of the European Commission regarding the definition of relevant markets in the pay-TV sector clearly demonstrates that market definition for the purpose of the application of general competition law is performed on a case-by-case basis, and that it can be subject to changes in the economic or technological environment. Unlike the exercise of market definition within the framework of telecommunications law, the definition of markets for a general competition law analysis is based on an actual market situation rather than on the more general assessment of the specific problem areas in a particular sector.\footnote{420} The analysis shows that market definition under European competition law is constantly ‘on the move’ and that the European Commission regularly reserves the right to amend market definitions where new technological or market developments so require. This also means that it is difficult to predict how the European Commission will decide in future cases. For market players in the pay-TV sector, this results in a certain degree of legal uncertainty. Because market definition is a crucial precondition for the application of general competition law, general competition law is obviously not very suitable when it comes to providing consistent and predictable rules. On the other hand, the case-by-case approach is also what makes general competition law a rather flexible tool.\footnote{421}

At a more detailed level, the analysis shows that convergence plays a prominent role in the European Commission’s practice of defining relevant markets.\footnote{422}
However, it can also be observed that convergence at the transport level is a more readily acknowledged fact than convergence at the service level, meaning the level at which pay-TV, interactive and other services are offered to consumers. For the service level, there is still a tendency to distinguish between information society services and broadcasting services. The analysis also shows that the Commission sometimes operates with rather general criteria and does not thoroughly investigate the different valuations that consumers may have for different content and services. Finally, it can be noted that intermediary service platforms play a distinct role in pay-TV markets, and that this fact is acknowledged in the Commission’s decision practice.

3.3. Concentrative Structures and European Competition Policy

In its function as the ‘watchdog’ of European competition law, the European Commission has been directly involved in a number of significant merger cases that involved pay-TV markets. An examination of some of the major European Commission’s decisions in this sector is interesting and relevant for this analysis because the European Commission, in its function as merger authority, did its share to shape the structures of pay-TV markets in Europe. A number of major players, or ‘usual suspects’, frequently re-appear in these decisions, which are either based on Article 81 and/or 82 of the EC Treaty and the relevant merger regulation. In the following paragraphs, some of the most relevant pay-TV cases are described, generally in chronological order. The description provides an overview of the dynamics of the pay-TV sector and the kinds of players involved. It also provides an overview of some of the most relevant issues for the competitiveness of this sector. The description also seeks to identify if there are any guiding principles in the European Commission’s practice when dealing with such cases, and if yes, what they are. Another question is if those principles, should they exist, have evolved over the course of time. Subsequently, some of the particularly relevant aspects will be highlighted.

3.3.1. MAJOR DECISIONS IN PAY-TV

**MSG**

Beginning with the MSG decision from 1994, the European Commission demonstrated its awareness of the state of competition in pay-TV markets. It also started a trend that can be found in its later decisions, namely the recognition of the potential of pay-TV to drive digitization as well as the development of a new and innovative distribution channels and digital services. The MSG case concerned a joint venture between Deutsche Telekom (distribution infrastructure), Bertelsmann (programme rights) and Kirch (programme rights, operation of the German digital service platform Premiere) to provide pay-TV services. The goal of the planned joint venture was to offer the technical, business and administrative infrastructure
for pay-TV. MSG would produce decoders, Subscriber Management System and SAS services, lease decoders to end users, provide billing services and conclude agreements with network operators and programme suppliers.

The impact of the control over the technical platform already played a major role in this European Commission’s first pay-TV decision. The European Commission noted that the planned entity would be likely to establish a durable dominant position in the market for technical and administrative services in Germany, and that this could eventually result in a situation in which all newcomers would depend on access to the technical conditional access platform that is operated by the one and only leading pay-TV operator. The latter would then be in a position to influence terms, conditions and market processes in a way that was advantageous to its own services. At the same time, the new entity would also be in a position to impede or postpone new entries. It is worth noting that already then, when the future Standards Directive, which deals with the refusal to provide access to the conditional access and which is the predecessor of Article 6 of the Access Directive, was drafted, the European Commission did not focus its attention only on conditional access technology. In its MSG decision, the European Commission explicitly recognized the competitive relevance of other components of the technical platform, including the EPG and the Subscriber Management System.

In the MSG case, the European Commission found that the presence of such a powerful joint venture might deter competitors from entering the market. In particular, the European Commission attached importance to the vertical integration between the technical platform and the business of providing own access-controlled services via the same platform, thereby addressing the aspect of leverage. The European Commission examined the market position that the three participants would hold in their ‘native’ markets and the level of vertical integration that would be the result of the joint venture. The European Commission’s final decision was, indeed, motivated by the leverage argument. The prospects of the likely effects of market power that is vested in one upstream or downstream market but might be used to restrict access to a related market was a main reason why the merger was barred. The European Commission found that the joint control over several levels in the distribution chain and the resulting competitive advantages would have a) prevented possible competition between the companies involved and b) given the companies the power to determine conditions for new market entrants. This, together with the dominance of each party in their ‘native’ markets and vested economic interests in the new market for pay-TV services, led the European Commission to the conclusion that the situation might prejudice the parties’ decisions of whether to grant access to facilities, namely, technical facilities such as conditional access, to potential competitors.

The proposed commitments (notably the implementation of a common interface in the decoder, the promotion of freely available decoders and non-restrictive

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423 See also Bertelsmann/Kirch/Premiere, paragraphs 108-112.
consumer contracts, non-discriminatory EPG representation and the commitment from Deutsche Telekom to make more digital capacity available for competitors) could not alleviate the suspicion of the European Commission. The Commission feared the potentially harmful effects of a strongly vertically integrated market structure that would not only provide incentives for discriminatory access decisions, but also offered, according to the European Commission, various possibilities of hidden discrimination with the effect that compliance with the largely behavioural undertakings was difficult to monitor. This is an argument that returns in later decisions. This is, however, also the place to remember that, as explained in Chapter 1, the idea that vertical structures would constitute as such a danger to functioning competition is by far not uncontested. In Chapter 1, it was explained that a number of influential scholars defended the view that the mere existence of vertically integrated structures is not automatically a risk to functioning competition.\footnote{See section 1.5.3.} The Commission, in its argumentation in the MSG decision did, however, little to take these concerns into account. But, as will also be shown, in later decisions the European Commission showed a tendency to abandon some of its rigid approach concerning vertically integrated structures.

**Bertelsmann/Kirch/Premiere**

The parties to the failed MSG merger launched a second attempt. This operation, too, ended (in two separate cases) before the European Commission and, here too, the parties did not succeed in getting the approval of the European Commission. The first case concerned the plans of Bertelsmann (in the form of CLT-UFA, which is a joint venture between Bertelsmann and Audiofina) and Kirch to jointly control Premiere (formerly controlled by Canal+ and CLT-UFA). Kirch would close down its own pay-TV platform DF1 and transfer its assets to Premiere. Premiere would subsequently use Kirch’s set top box, the d-box, market programme packages, and operate its own Subscriber Management System and conditional access system. CLT-UFA would also acquire fifty per cent in BetaDigital and BetaResearch, both subsidiaries of Kirch. They would both produce pay-TV technology and offer it to third parties. The European Commission found that, after the operation, Premiere would enjoy a near-monopoly in the German pay-TV market. That this was the case, had, on the one hand, to do with the strong position of CLT-UFA in the markets for programme rights. On the other hand, it had to do with Premiere’s control over the technical platform.

The European Commission concluded that a combination of Premiere and CLT’s free-TV channels might induce rights suppliers to sell the rights for pay-TV and free-TV as a package to the joint venture. CLT and Premiere could then implement programme strategies for free-TV channels aimed at securing pay-TV subscribers for Premiere Digital. In so doing, the decision is based strongly on the assumption of interaction, if not competition, between free-TV and pay-TV, and that the
prospects of pay-TV largely depend on the strength of free-TV. In this constellation, Premiere and CLT-UFA would have the power to strongly limit the attractiveness of free-TV. The decision clearly articulates the wish to maintain competition between free-TV and pay-TV. On another occasion, namely the TPS case in which the European Commission showed less concern, TF1 and M6, two French free-TV broadcasters, acquired a fifty per cent interest in the French pay-TV operator TPS. Here, the Commission considered that even in the event of joint control over free-TV and pay-TV channels, the competitive position of TPS regarding its rival Canal+ was so weak that there was no need to fear that TPS would even try to unduly influence competition in the free-TV market.

In Bertelsmann/Kirch/Premiere, the European Commission again found the risk of a lasting monopoly in technical pay-TV services. A critical factor was, in the eyes of the European Commission, that parties would operate closely with Deutsche Telekom (the Deutsche Telekom/BetaResearch case will be discussed subsequently). Again, this is the aspect of the possible anti-competitive effects of vertical integration. Deutsche Telekom was then the dominant cable-network operator and would exclusively carry Premiere.

The European Commission was also concerned because the d-box used at the time had a proprietary API, meaning that third parties wishing to process services via the d-box would require Premiere’s approval. On the other hand, the European Commission also acknowledged that the investments made by the parties in the joint venture could pave the way for other service providers who would then be able to offer access-controlled services to consumers without having to invest in an own access control infrastructure. In this respect, the proposed operation could have a positive effect and even accelerate the progress of digitization in Germany. As the European Commission explained, ‘viewers’ psychological barriers to additional payments are progressively lowered with the penetration of digital pay-TV’.

In the end, however, the parties could not dispel the European Commission’s serious doubts that, instead of paving the way for a competitive digital service market, the parties would use their position to monopolize the consumer base on a lasting basis due to technical lock-ins. The package of commitments that was suggested by the parties could not change the European Commission’s opinion. The parties were willing to commit to granting access to programme material (namely to hold twenty-five per cent of the output deals of pay-TV rights open for third parties, to unbundle and refrain from acquiring free-TV rights) as well as to more openness at the technical level (compulsory licensing of the conditional access system to third

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425 Also, European Commission, NewsCorp/Telepiù, paragraph 37.
427 European Commission, Bertelsmann/Kirch/Premiere, paragraph 121.
parties, disclosure of API information, licensing of conditional access technology to third-party decoder manufacturers, cooperation with competing cable operators). The European Commission, however, did not consider these commitments sufficiently far-reaching.

_Deutsche Telekom/BetaResearch_

The proposed operation between Bertelsmann, Kirch and Premiere had a second component to it, namely the plan that Deutsche Telekom and BetaTechnik would acquire joint control over BetaResearch, which is the exclusive holder of a license for the BetaResearch conditional access technology that is implemented in the d-box. BetaResearch would manufacture conditional access modules and smart cards, and provide services for third parties. Deutsche Telekom would use exclusively the BetaResearch technology when distributing pay-TV via its cable networks. Because Deutsche Telekom was by then the dominant German cable operator, the European Commission feared that the d-box technology would become the digital standard in the German-speaking area. An alternative platform could, in the best case, emerge only for a satellite transmission platform. Satellite transmission, however, was then not widely available in Germany. Second, after the transaction, Premiere, with its major programme resources, would provide digital television via the d-box technology and Deutsche Telekom’s networks. This, so said the European Commission, was an additional obstacle to the development of alternative technical platforms. Third parties would only invest in an alternative technical platform if it had the corresponding opportunities for market penetration. It was unlikely, according to the European Commission, that there would be many of these opportunities given the established position of Premiere. The decision suggests that there is a close link between the success of an alternative technical platform and the market position of an established service platform with access to a vast subscriber base428 and programme resources. This is in line with the findings of this study, which are discussed in Chapter 1. Moreover, Chapter 1 also indicates why it is critical to take this to be an automatism.429

Deutsche Telekom and BetaResearch also sought to dispel the doubts of the European Commission by committing to, on the one hand, cooperating with private cable operators, issuing compulsory conditional access licences and using a standardized API interface, and, on the other hand, allowing cable operators to market their own programmes and basic packages and develop their own customer relationships. However, the parties made these commitments dependent on a number of restrictions, one of which was that cable operators were not allowed to market Premiere’s pay-per-view services. Cable operators would also be obliged to market Premiere’s programmes unchanged and in unbundled form. Capacity restraints were not to be used as an excuse for cable operators not to transmit

428 European Commission, Deutsche Telekom/BetaResearch, paragraph 35.
429 See 1.5.3. See also European Commission, Deutsche Telekom/BetaResearch, paragraph 38.
Premiere’s programmes. Furthermore, cable operators would make subscriber data available to Premiere. The European Commission found, correctly, that the latter was anything but common practice and that, all in all, the commitments would not be sufficient to allow cable operators to establish and operate programme platforms on their own. Interesting were the comments of the European Commission concerning the compulsory licensing of conditional access technology to decoder manufacturers and the granting of access to the technical platform for third parties. In this context, it should be mentioned that the Standards Directive had since been put in place, and that its Article 4c mandated access to the conditional access system, which was also the subject of the commitments in the Deutsche Telekom/BetaResearch case. The Deutsche Telekom/BetaResearch decision made no reference whatsoever to Article 4c of the Standards Directive. Also interesting is that the European Commission observed that the compulsory licensing of the access technology to third-party programme providers and decoder manufacturers might go ‘some way to ensuring that parties are not subject to discrimination’, but that it would not suffice. It would not alter the fact, so said the European Commission, that the parties to the operation still controlled the technical developments. Or, in the words of the European Commission,

‘[t]he parties are not willing to surrender their absolute control of this technology, and in particular its further development. Nor will the proposed undertakings give any alternative programme and marketing platform a realistic chance. At the same time, without the chance of an alternative programme platform, the undertakings with regard to technology, or at least to licensing for the purposes of controlling access, are rendered even more meaningless by the fact that, without a second programme platform, no alternative technological platform can be expected to be developed’.

Hence, the decision expresses clear doubts whether access obligations are the optimal tool or are sufficient to create the conditions for a competitive pay-TV environment. This is a question that will be dealt with extensively in Chapter 4 (Telecommunications Law).

**BiB**

The next major decision in this sector was the BiB/Open decision. BiB/Open was an Article 81 EC Treaty case. It involved, among others, British Telecom and BSkyB. The plan was to form a joint venture ‘BiB’ to provide the necessary infrastructure for the provision of digital interactive television services and to provide such services across that infrastructure (also for use by third parties). The plan was to use the same infrastructure used by TV companies to allow the integration of interactivity in television. BiB would not only operate the technical platform, it would also offer certain services directly to consumers, such as email,

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430 European Commission, Deutsche Telekom/BetaResearch, paragraph 65.
walled garden internet access and computer game downloads. Such services were not yet provided on a significant scale in the UK. BiB would use a proprietary conditional access system and API technology, and its set top boxes would support only one proprietary EPG. Significant was the close relationship with BSkyB; BSkyB and BiB’s infrastructure would be largely complementary so that consumers would have to buy only one set top box to be able to receive services from both undertakings. BiB intended to promote the proliferation of its set top box by subsidizing it. Only upon the interference of the European Commission were separate companies created for BiB’s set top boxes and for the creation and operation of BiB’s interactive services.431

The European Commission found that the modified joint venture would result in a considerable restriction of competition in the market for digital interactive television services, and that this would affect trade between Member States. Prior to the joint venture, British Telecom and BSkyB were potential competitors in the provision of interactive television services, a situation that was, so anticipated the European Commission, eliminated by the joint venture. The decision acknowledged the ongoing process of convergence, and, that as a consequence thereof, telecommunications operators would be competing with content service providers and providing content-related and e-commerce services over their networks themselves.

Nevertheless, the European Commission decided not to oppose the joint venture because it considered the conditions of Article 81 (3) of the EC Treaty to be fulfilled. Article 81 (3) of the EC Treaty allows a joint venture to be exempted from the prohibition clause in Article 81 (1) of the EC Treaty despite its restrictive effect on competition providing certain conditions are met. Those can be a contribution towards improving the production or distribution of goods or the promotion of technical or economic progress, allowing consumers to have a fair share of the resulting benefit, indispensability, and the non-elimination of competition in respect of a substantial part of the products in question. Because the joint venture would enable the provision of a new form of services that had not yet been offered, it was found to contribute to an improvement in the distribution of goods and technical and economic progress. Correspondingly, it would allow consumers to access interactive services via the TV set. To this extent, it would also benefit consumers. But the European Commission insisted on a number of conditions, one of which was that BSkyB must distribute its film and sports channels with and without interactive applications to competitors. This unbundling-condition addressed the link between BSkyB’s existing operation in pay-TV and its new activities in the interactive service sector. The European Commission hereby sought to prevent an existing dominant player in a pay-TV market from exporting its market power to a new market, namely the market for interactive services. The European Commission acknowledged that pay-TV is likely to be an important driver for digital interactive

431 Insofar, European Commission, BiB/Open, paragraph 126.
television services. Other conditions imposed consisted of giving consumers the choice to acquire the set top box with or without subscribing to BSkyB’s pay-TV offer and requiring that British Telecom not expand its existing cable television interest in the UK. These measures were taken to enable cable networks to compete, to create separate businesses for BiB’s activities with regard to the subsidization of set top boxes, to recover profits from letting third parties use the box, and to enable the operation of interactive services. The latter was considered to ensure transparency and non-discrimination and to prevent subsidized set top boxes from being used as artificial barriers to market entry. The reason why the European Commission considered access for competitors to the (subsidized) BiB set top boxes so crucial was that it seriously doubted whether a competing infrastructure would establish itself. In the opinion of the European Commission, consumers were all the more reluctant to acquire more than one set top box because the first box would allow access to the whole range of BSkyB’s programming, too.

The assumption that consumers are indeed unwilling to acquire several set top boxes (particularly if they are subsidized) is not an uncontested one. After all, consumers are willing to buy a computer in addition to a TV. Furthermore, with digitization, the set top box problem might lose much of its relevance, considering that each owner of an analogue television set will have to have a set top box irrespective of whether he or she has subscribed to a pay-TV platform. Still, the hardware argument is an argument that plays an important role throughout the discussion around conditional access. And it is not limited to pay-TV markets. A very similar discussion accompanied, for example, the launch of Apple’s iPod. The iPod is the music player of Apple’s online music store iTunes. The iPod, which proved to be a very successful and popular hardware device among consumers, only supports one technical content protection format, meaning Apple’s DRM called FairPlay. It does not support any of the standards used by competing digital music services, nor does it license its own format to rivals. Here too, the question is whether the hardware, in combination with proprietary content protection technology, could form an obstacle for competition in the online music sector. More about the iPod example can be found in the discussion further below (section 3.4.1.). At this point, it remains to be said that much will depend on the value consumers attach to a particular hardware device (for example, because it is popular, because they know how to use it or because it is clearly superior), on the consumers’ expectations of the speed of technological progress, as well as on the price of the hardware.

BSkyB/Kirch

A year later, the European Commission had to decide on another important case that involved the provision of interactive television services, this time in Germany.

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432 European Commission, BSkyB/Kirch, paragraph 78.
433 See section 1.5.2.
This was the BSkyB/Kirch merger. The plan was that BSkyB and Kirch jointly control Kirch PayTV. Because of its experience and financial resources, BSkyB would play a major role in deploying interactive television services in Germany. BSkyB said that it was not planning to enter the German pay-TV market. To this extent, and because of the strength of free-TV in Germany and Kirch’s control over a proprietary conditional access infrastructure, the European Commission did not consider BSkyB a potential competitor to Kirch in Germany’s pay-TV market. Consequently, a factor that could have been a strong argument against the operation was not given, at least not in the view of the European Commission. The European Commission’s stance was heavily criticized by the German public broadcaster ARD in a proceeding before the European Court of First Instance against the decision in BSkyB/Kirch.434 ARD claimed that the European Commission’s approach—to assume that BSkyB would not enter the German pay-TV market in the short term, nor that Kirch would be able to maintain its dominant position alone—departed from a status quo. Instead, the European Commission should have considered the likely future evolution of the market, namely that without a merger the situation for third parties could improve considerably. Consequently, the European Commission should have regarded BSkyB as a potential competitor. The court did not follow this argumentation. It held against it that the argumentation was based on the unsubstantiated premise that financial failure by Kirch PayTV would be likely to favour access to the market by potential competitors. The two observations that seem to be implied here, namely that pay-TV markets are in their nature still national markets and that competition from foreign pay-TV operators was rather unlikely,435 and that the absence of one dominant party does not guarantee the development of a competitive environment, will play a role in two other decisions (NewsCorp/Telepiù and Sogecable/ViaDigital) that will be discussed in more depth at a later stage.

Similar to the BiB case, one major concern about the BSkyB/Kirch merger was the proprietary conditional access technology in the d-box, which would have been used to process not only interactive services but also digital broadcasting services. According to the European Commission, this was likely to raise significant barriers to entry for potential suppliers. To this extent, Kirch, through his control over the

434 European Court of First Instance, Judgment of the Court of First Instance of 30 September 2003, Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v Commission of the European Communities, Case T-158/00, European Court reports 2000, p. 0 [hereinafter ‘ARD/European Commission’].

435 Also, European Commission, Commission Decision of 2 August 1994 declaring a concentration to be compatible with the common market (Case IV/M.410 - Kirch/Richemont/Telepiù) according to Council Regulation (EEC) No. 4064/89, 13 August 1994, OJ C 225, p. 3 [hereinafter ‘Kirch/Richemont/Telepiù’], paragraph 20: ‘Furthermore, the national character of the television markets seems to show that Kirch and FilmNet are not in a particularly advantageous position in order to enter the Italian market on their own with the setting-up of a new pay-TV channel as compared to other television operators in the EC. Therefore, the present transaction does not amount to an appreciable elimination of potential competition in the television market in Italy’. 

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technical platform, and BSkyB, because of its know-how, marketing experience and financial resources, could export their dominance from already existing markets to the new market for interactive television services in Germany. This could have had recourse to the classic leverage argument if the European Commission had not explained further: ‘[i]n itself entry into a new market by a dominant firm on a closely related one does not automatically lead to the creation of a dominant position’.

Instead, it held that the ‘link between control over attractive programming and decoder technology’ would raise barriers to market entry. In this respect, it seems that the European Commission had given up some of its strict approach regarding vertically integrated structures. The decisive factor in this context, said the European Commission, was the existence of first mover advantages and (indirect) network effects. According to the European Commission,

‘[i]t should be recalled that the demand from “content providers” for access to an operator’s digital interactive television “platform” is likely being determined by the popularity of the “platform” whilst the attractiveness of the “platform” to final consumers will be determined by the range and types of services they can find on it. It has already been noted that pay-TV is likely to be an important “driver” for digital interactive television services. As a result of its monopoly position on the pay TV market, Kirch PayTV will be the only undertaking in Germany able, in the foreseeable future, to offer pay-TV in combination with digital interactive television services. This is likely to mean that consumers will choose Kirch PayTV as it will allow them access, through the d-box, to both interactive services and pay-TV without the cost or inconveniences of having two boxes. As a result, the d-box will become the standard decoder in Germany for interactive services, as well as pay-TV’.

And, unlike in its previous decisions, the European Commission held that even a de facto standard in form of the d-box technology would not necessarily amount to a dominant position for Kirch PayTV on the market for digital interactive television services if other operators were also able to supply services via the d-box. In other words, the European Commission made it clear that an alternative to inter-platform competition (meaning competition between two different platforms, for example, between Canal+ and ABSat in France or competition between cable and satellite pay-TV platforms) could be intra-platform competition. Intra-platform competition, means competition between different service providers that are carried via the same pay-TV platform. But similar to the Deutsche Telekom/BetaResearch case, the European Commission was not convinced that third parties would have the possibility to compete within the platform because of the proprietary nature of the

436 European Commission, BSkyB/Kirch, paragraph 78.
437 See also section 1.5.2.
438 European Commission, BSkyB/Kirch, paragraph 78.
439 European Commission, BSkyB/Kirch, paragraph 79.
d-box technology and the fact that BetaResearch would control the technological developments.

Unlike the Deutsche Telekom/BetaResearch case, however, BSkyB/Kirch was cleared in the end; this time, the European Commission accepted the commitments that the merger parties made. Essentially, the commitments concerned the guarantee of giving third parties access to Kirch’s BetaResearch d-box technology. The parties undertook to provide access to the technical platform, including the conditional access system, the subscriber authorization system, the EPG and any other technical services needed, also to providers of interactive services at fair, reasonable and non-discriminatory conditions. Again, no reference is made to the then relevant access obligations in Article 4c of the Standards Directive. Still, the European Commission pointed to the practical problems involved in granting access to the conditional access system, namely the ability of the conditional access controller to hamper third parties by means of slow proceedings or the requirement for third parties to submit their plans in advance to BetaResearch.

The parties, however, made further-reaching commitments. The d-box would be equipped with a Multimedia Home Platform (MHP) API, an open API standard, and any extensions or plug-ins developed or deployed by Kirch would maintain the openness of the API interface so that no additional licenses for developing applications to run on the API would be required from Kirch. Kirch would provide the information enabling rivals to write applications that are compatible with the d-box API and grant access to its API. Kirch undertook to provide information on d-box functionality upgrades and not to occupy the d-box’s memory with applications that are not strictly necessary for the functionality of the services Kirch offers. Kirch would also be willing to licence its technology to competing platforms and would not prevent third parties from building their own conditional access into the d-box or withhold consumers from using an alternative box. Interesting from a policy point of view is the commitment to exchange consumers’ analogue set top boxes for digital ones and so to promote the digital switchover. Finally, Kirch agreed to offer and develop Simulcrypt agreements for its platform and to distribute its own programmes, subject to a Simulcrypt agreement, on competing platforms.

All in all, and in anticipation of the later analysis of telecommunications law in Chapter 4, this would seem to be a very comprehensive package of commitments that go far beyond mere access obligations and that in many points clearly exceed the level of statutory obligations according to Article 4c of the Standards Directive and its successor, Article 6 (1), Annex I of the Access Directive.

Vivendi/Canal+ / Seagram and Vodafone/Vivendi/Canal+

The expansion of established pay-TV providers, or more generally, players in broadcasting markets, into new and convergent service markets was subject to a number of other interesting decisions. One case concerned the merger of the media enterprises Vodafone, a major mobile telephony operator, Vivendi, a multimedia company, and the pay-TV provider Canal+. The other case concerned the merger of
CHAPTER 3

Vivendi, Canal+ and Seagram, which was affiliated with the major media enterprise Universal. Vivendi, which at the time of the decision held forty-nine per cent in Canal+ and twenty-five per cent in BSkyB, would take sole control over Seagram, a Canadian enterprise involved in cinema, television and music rights, and television channels (SCI FI, 13th Street, Studio Universal).

In terms of content, the merger was expected to create the world’s second largest film library, the second largest TV programming library in the European Economic Area (EEA) and move a substantial part of the theme channels’ production to France, Germany, Italy and Spain. In terms of music content, the merged entity would be number one in recorded music. In terms of distribution, the parties already operated a leading pay-TV service platform in a number of Member States and were likely to become a leading player in paid-for information society service distribution via Vivendi’s multi-access portal, called ‘Vizzavi’. Vizzavi would provide customers with a multi-platform environment for a range of web-based interactive services that can be received across a variety of platforms, for example, on mobile phones, PCs and broadcasting set top boxes. In the case of Vodafone/Vivendi/Canal+, the parties agreed to acquire joint control of Vizzavi.

The European Commission expressed serious concerns that the combination of highly attractive content and major pay-TV, internet and mobile distribution platforms would considerably strengthen the overall market power of the merging parties and generate strong network effects and first mover advantages in their favour. It particularly stressed the competitive advantages that intermediary platforms enjoy in a multi-platform environment. Vizzavi’s branded and integrated approach to the provision of services across various platforms would allow for the cross-selling and bundling of offers and thereby strengthen the position of the parties involved. This again was a factor that, in the eyes of the European Commission, favoured leveraging market power by means of bundled offers. Players in traditional broadcasting markets, such as Canal+ in the pay-TV market, would be able to migrate their consumer base to other platforms, such as the internet market. The fact that Vizzavi was vertically organized further added to the European Commission’s concerns; consumers would be at risk of being ‘walled in’ and having to pay higher prices for services due to the lack of competition. In addition, the Vizzavi portal would combine a potentially powerful new internet access mechanism with paid-for content and an installed customer base of pay-TV subscribers with relatively well-documented preferences who were accustomed to paying for content. The European Commission, hence, had serious concerns that the parties would extend their positions of dominance into national pay-TV markets (Canal+) and their market power in national mobile markets (Vodafone) into the national markets for portals used via mobile handsets and/or set top boxes.

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440 European Commission, Vodafone/Vivendi/Canal+, paragraphs 68-70.
441 European Commission, Vodafone/Vivendi/Canal+, paragraph 70.
443 European Commission, Vodafone/Vivendi/Canal+, paragraph 75.
The European Commission, nevertheless, approved both mergers subject to the undertakings the parties made. Notably, Vivendi agreed in the Vivendi/Canal+/Seagram case to divest its interest in BSkyB, thereby cutting the link between Universal and Fox. It was further agreed not to guarantee Canal+ more than fifty per cent of the so-called ‘first window rights’ for Universal films. Moreover, the parties undertook to provide access to Universal music content on a non-discriminatory basis regarding the pricing and the terms and conditions, and to provide for an arbitration procedure. This would enable competitors to offer competing music services via competing portals. The decision underpins the importance of access to attractive content for the launch of alternative service platforms, as well as the advantageous position already established pay-TV players can have when they venture into new, non-broadcasting markets.

In Vodafone/Vivendi/Canal+, Vodafone and Vivendi have undertaken to open access to their mobile handsets to third-party portal providers. Interestingly, the parties did not simply commit to granting access to rivals at fair, reasonable and non-discriminatory terms, they also agreed to give subscribers to the Vodafone/Vivendi group the choice of overriding the default Vizzavii portal with the portal of their choice. Similarly, Canal+ agreed to give other portal operators access to its set top box and offer consumers the choice between rival portals. The European Commission found that ‘ensuring third-party access based on consumer choice’ removed the serious doubts it had regarding this merger. Most importantly, allowing for consumer choice prevents the parties from bundling their offers on a fully exclusive basis, as consumers would be allowed to choose other portals. In other words, the European Commission addressed and emphasized the problem of technical and contractual consumer lock-ins. The European Commission found that the key to the solution of this problem laid in the consumers’ freedom to choose between competing offers.

**Cegetel/AOL/Canal+/Bertelsmann**

In the Cegetel/AOL/Canal+/Bertelsmann case, the European Commission showed less concern for the potential threat of dominance over the paid-for internet content market. The case dealt with a planned joint venture between Cegetel, a subsidiary of the Vivendi Group, Canal+, AOL and Bertelsmann with the aim to market, develop and provide interactive services via the internet to consumers. Interesting enough, the European Commission did not believe that the joint venture would create or strengthen a dominant position, arguing that ‘the size of the market for paid-for content is currently extremely small … given the fact there is a vast array of information providers that develop and make content available, no single provider accounts for more than a small part of the content available’. In this case, the fact

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444 European Commission, Vodafone/Vivendi/Canal+, paragraphs 90-93.
445 See section 1.5.2.
446 European Commission, Cegetel/Canal+/AOL/Bertelsmann, paragraph 36. See also AT&T/Media One, paragraphs 25-30; European Commission, Vodafone/Vivendi/Canal+, paragraph 74.
that parties were then dominant in ‘old’ markets was not automatically considered by the European Commission to be an indicator that the parties would leverage their market power into new markets. Their ability to do so depended, so said the European Commission, on whether the market was already sufficiently competitive.

**AOL/Time Warner**

Having said that, the situation can be different where control over content comes together with control over a proprietary technology, such as an encryption technology. This was one of the findings in the European Commission’s AOL/Time Warner decision. The AOL/Time Warner case concerned a combination of AOL’s transmission platform (here: broadband internet access and service platform) and Time Warner’s content rights (here: broadband content, in particular music). The European Commission found that the parties could move into a position to dictate the technical standards for delivering music over the internet by developing or acquiring proprietary formatting or DRM technology. In combination with the breadth of the publishing rights available to the parties, the new entity would be in a position to impose its technology as an industry standard. And because of its control over the relevant content protection technology, AOL/Time Warner would be in a position to control the content business (here: downloadable music) and increase competitors’ costs through excessive licence fees.

The reason why the European Commission concluded in the AOL/Time Warner case that, as opposed to, for example, the MSG case, which concerned a similar constellation, the combination of Time Warner and AOL would probably not result in a dominant position in the market for broadband content was mainly based on the following argument: Time Warner would not be a unique or dominant supplier of broadband content because the parties committed themselves to breaking their links with Bertelsmann. Time Warner had also agreed not to acquire the major music publishing company EMI. Similarly, one could conclude that where a dominant position in content supply is given, such a combination could create considerable gateway concerns—a situation the European Commission did not have to decide on in this case. The fact that a) Bertelsmann (which is part of a joint venture with AOL in Europe) offered to exit from AOL Europe and that b) the parties undertook not to make Bertelsmann music available online exclusively through AOL were additional reasons to clear the merger. Another undertaking that finally contributed to the clearance of the merger, and this is an important one for the given context, was that the parties agreed not to provide their broadband offering in a proprietary format that could be processed only via the AOL platform.

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447 The parallels between DRM and conditional access are pinpointed in sections 1.2. and 4.3.2.
448 European Commission, AOL/Time Warner, paragraphs 55-56.
NewsCorp/Telepiù

The deployment of a de facto standard for the technical platform also played a major role in the case NewsCorp/Telepiù. The NewsCorp/Telepiù case concerned the fact that NewsCorp, the entertainment company owned by Rupert Murdoch, would acquire control over Telepiù and Stream in Italy, the two major Italian pay-TV platforms. The idea was to combine the Italian operations of Telepiù and Stream under the control of NewsCorp. The European Commission found that the concentration would lead to the creation of a near-monopoly in the pay-TV market in Italy because it combined the two competing pay-TV operators and because it was unlikely that new competitors would emerge quickly from cable or digital terrestrial television. The European Commission also paid particular attention to the vertical effects of the merger, namely its integration with an in-house proprietary conditional access technology. The European Commission reminded of the fact that the pay-TV sectors in Europe have so far been characterized by a strong tendency towards vertical integration between the technical and the service platform. It held that the operation of a proprietary conditional access system by a monopolist was a factor that would increase barriers to entry into the related pay-TV market. Summarized, the concerns were as follows: there was a chance that the new entity would grant access to its conditional access platform at unfair terms and conditions and that it would obstruct the entry of alternative pay-TV platforms that use a different conditional access technology.

For the first time, the European Commission made an explicit reference in a pay-TV decision to legal provisions that apply to conditional access. It admitted that the existence of the access rules in telecommunications law could reduce some of the concerns about the accessibility of the technical conditional access platform. As regards the second concern, the chances of alternative platforms using their own conditional access technology, the European Commission referred to the Italian regulation. Italian law mandates the implementation of interoperability between different conditional access systems. The European Commission pointed to interoperability solutions as a means to stimulate competition between different technical platforms. It observed, however, that difficult and lengthy negotiations between the two Italian pay-TV operators Telepiù and Stream to conclude a Simulcrypt agreement also demonstrated how difficult interoperability is to realize in practice. Eventually, at least this is the view that the European Commission expressed, it was more likely that potential competitors would seek access to the already established conditional access technology than to launch their own alternative technology. This would further pinpoint the importance of access rules.

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450 European Commission, Newscorp/Telepiù, paragraph 114.
451 European Commission, Newscorp/Telepiù, paragraph 119.
452 European Commission, Newscorp/Telepiù, paragraph 133.
453 European Commission, Newscorp/Telepiù, paragraph 122.
454 European Commission, Newscorp/Telepiù, paragraph 123.
455 European Commission, Newscorp/Telepiù, paragraph 114.
Having said that, the European Commission did not seem to have very much faith in the effectiveness of the statutory access rules either:

‘Although the existence of access rules contained in Directive 95/47 and Directive 2002/19/EC [Access Directive] might reduce and assuage the concerns in this respect [access to the conditional access], third parties believe that access to NDS’ technology can be obstructed unless NewsCorp undertakes to comply with those rules and appropriate and effective dispute settlement is put in place. Should this not be the case, long disputes on prices will arise which in the meantime will undermine the possibility to compete...

The merged platform, in the absence of corrective measures, will thus be in a position to raise rival’s costs by controlling third parties’ access to the DTH platform services and to conditional access. Consequently, the possibility for a newcomer DTH broadcaster, which is not able to set up an alternative infrastructure, to be in a position to become operational will depend on NewsCorp’s goodwill not to raise barriers when giving access to its platform services’.

Another question is whether the pessimism of the European Commission regarding the benefits the competition gains from interoperability solutions is justified. One could also argue that once the Italian broadcasting market has been digitized most Italian households would have to purchase a set top box anyway. Eventually, those boxes would (also) be produced by independent hardware manufacturers who probably have an interest in producing boxes that can process a broad range of services instead of the services of one particular operator using one particular standard. Ideally, they would produce boxes that foresee some form of common interface or other interoperability solutions. In this case, one major cost factor for the deployment of an additional conditional access technology might have vanished.

In addition, the control of a vast array of attractive pay-TV content triggered, as it has in previous decisions, the concerns of the European Commission. As the European Commission observed,

‘[a]ccess to rights is even more important for pay-TV than for free-TV. In order to entice the consumer to subscribe, or to take particular productions on a pay-per-view basis, certain specific types of content are crucial’.

What is remarkable about the decision in the NewsCorp/Telepiù case is that it is the first pay-TV case in which the European Commission mentions a ‘fundamental right of consumers to choose’. In particular, the exercise of second window rights for programming would deprive consumers of this ‘right’. In this context, second window rights are exclusive broadcasting rights to the second screening of a film.

456 European Commission, Newscorp/Telepiù, paragraphs 201 - 203.
457 European Commission, Newscorp/Telepiù, paragraph 183.
More precisely, the European Commission referred to the second window rights that Telepiù held. Because Telepiù also owns the first window broadcasting rights to films, Telepiù would be able to prevent third-party broadcasters from ever screening these films. According to the European Commission, this would force consumers to consume in a ‘one-format-fits-all’ scenario at the time, meaning during the first window, and at the price established by the pay-TV operator. It would harm consumers because they could be prevented access to premium content. The reference to ‘fundamental rights’ in this context is a bit confusing. As was shown in Chapter 2, there is no fundamental right of individual access to particular content against broadcasters. But a reference to fundamental rights under, for example, the ECHR is apparently also not what the European Commission was aiming at. This becomes obvious in the subsequent paragraph of the decision. Here, the European Commission explains that consumers should be able to choose between ‘first tier’ and ‘second tier’ pay-TV services, meaning services that are close or less close to the release of a film in movie theatres. What the European Commission probably had in mind was to prevent exclusive control over a bundle of programme rights from being used to the detriment of service differentiation and consumers’ choice.

The European Commission concluded that the proposed merger would very likely eliminate any competition in the Italian pay-TV market for some time. It then considered the application of the concept of ‘rescue merger’ or ‘failing company defence’, a concept that has been applied before only rarely to respond to a situation in which the deterioration of the competitive structure as a result of concentration would occur in a similar fashion even if the concentration did not proceed. The European Commission found, however, that the conditions for authorizing a rescue merger were not fulfilled.

At the same time, the European Commission feared that Stream would exit the market and that this could harm consumers. The European Commission then sought to decide which was the lesser evil—Stream’s exit from the market (with the consequence that Telepiù would likely become the monopolist) or the authorization of the merger subject to conditions that could reduce at least some of the anti-competitive effects. The European Commission decided in favour of the latter.

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458 European Commission, NewsCorp/Telepiù, paragraph 192
459 See section 2.2.1.
The undertakings that were finally accepted by the European Commission can be distinguished in undertakings that are related to access to programme content and undertakings that are related to access to the technical platform. To the former belong the commitments to make existing and future exclusive contracts for the licensing of film and sports rights less exclusive and to grant unbundled access to the premium content broadcast by the combined platform. As far as the second category is concerned, NewsCorp undertook to offer access to its conditional access platform and the API based on a cost-oriented non-discriminatory formula, licence its conditional access system to third parties and enter into Simulcrypt agreements. In addition, Telepiù undertook the divestiture of its digital terrestrial television business (DTT) and proposed not to enter into new DTT activities. Finally, NewsCorp proposed arbitration procedures to guarantee the effectiveness of the commitments. All in all, and taking into account:

a. That the commitments did not greatly exceed what was already provided for in telecommunications law, at least as far as access to the technical platform is concerned.  

b. The European Commission's previous strict position in, for example, the MSG case and the Deutsche Telekom case, where it refused to accept very similar commitments, as well as

c. The BSkyB/Kirch case, where the Commission expressed its view that access obligations alone would hardly suffice to guarantee functioning competition and demanded rather far-reaching, additional commitments,

the remark with which the European Commission accepted NewsCorp's undertakings sounded somewhat over-enthusiastic: NewsCorp went 'a long way in providing accessibility to the combined platform with a view to allowing effective competition to be achieved'.

Another question is if one should follow the conclusion of the European Commission that the merger was indeed the lesser evil. One could argue that consumers would benefit from the merger because the integrated platform would offer more programmes from more service providers. Service providers would benefit from the merger because with the increasing popularity of the NewsCorp platform they would find in it an even more attractive distribution outlet. On the other hand, the merger would cause further consolidation of the Italian pay-TV market, and the chances that new pay-TV platforms would establish themselves would become even smaller. The European Commission had to decide between allowing a powerful and a very powerful monopoly on the Italian pay-TV market. It decided in favour of the latter. Moreover, the European Commission could not know for sure that Stream would indeed exit from the market. This decision radiates

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461 See section 4.4.
462 European Commission, Newscorp/Telepiù, paragraph 257.
463 See also Evans' description of demand-side efficiencies that are the result of increasing indirect network effects in two-sided markets, using the example of dating clubs, Evans 2003, pp. 48, 59-60.
464 See Galbiati/Nicita/Nizi 2004, 17pp. (describing the situation one year after the merger took place).
a certain ‘disillusion’ that competition in the Italian pay-TV market is unlikely. The European Commission seemed to have abandoned its earlier strategy of promoting inter-platform competition as the best solution to promote competition and enhance consumer welfare. Apparently, it accepted that in some markets the prospects of intra-platform competition are nihil.

Whether this is true or not must remain speculation. A point of criticism is, however, that the European Commission might have been too quick in assuming that the Italian pay-TV market would not support more than one pay-TV provider. Such competition already exists in other countries, such as France or the UK. Arguably, the conditions at the Italian market are different. However, the European Commission should also have considered that NewsCorp, which was partly invested in Stream, was of all possible competitors the one that was particularly well-suited to compete with Telepiù. This was, indirectly, also one of the reasons why the European Commission did not accept the failing company line of defence. In the European Commission’s own words:

‘Otherwise, every merger involving an allegedly unprofitable division could be justified under merger control law by the declaration that, without the merger, the division would cease to operate.’

In other words, Stream’s failure to operate profitably could also have been the result of an unprofitable and unsuccessful business strategy and not of the size of the Italian pay-TV market. Indeed, this is what some third parties have argued in the NewsCorp/Telepiù case. The European Commission did not pay further attention to this argument. By authorizing this merger, the European Commission may have done exactly what it wanted to avoid: authorize a merger between two potential competitors.

3.3.2. REGULATION THROUGH THE BACKDOOR?

Some scholars argued that authorizing the merger would give the European Commission at least the possibility to subject the monopolist to ‘regulation’ in the form of undertakings and conditions, and that the decision provided a ‘regulatory blueprint’ that would also be binding for the Italian telecommunications NRA. If this is so, and there are indications that the European Commission is not entirely averse to this idea, then the NewsCorp/Telepiù case is probably the most obvious example where the European Commission goes beyond its role as a competition

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465 See section 1.4.3.
466 European Commission, Newscorp/Telepiù, paragraph 212.
467 European Commission, Newscorp/Telepiù, paragraph 212.
468 European Commission, Newscorp/Telepiù, paragraph 213.
469 In this sense, for example, Caffarra/Coscelli 2003, with further arguments, p. 626; Bavasso 2003, 277pp.
470 See also European Commission, Newscorp/Telepiù, paragraph 221.
authority and seeks to act as a ‘quasi-regulator’ for the pay-TV sector. Or, as one scholar phrased it, the European Commission would engage in ‘regulation from the backdoor’\(^{471}\) This is an issue that the following paragraphs deal with. The question is can a general policy be identified in the European Commission’s decision practice, and if yes, could the decisions have an effect that goes beyond a case-by-case basis.

The previous analysis of some of the most important pay-TV decisions by the European Commission has demonstrated that the European Commission considers certain parameters essential for the contestability and functioning of competition in pay-TV markets in Europe. It repeatedly used its authority as a competition authority to preserve those parameters in the form of the authorization or non-authorization of mergers and in the form of the conditions imposed or undertakings accepted. The most important parameters that the European Commission considered crucial for competition in these decisions can be roughly divided as follows:

a. Access to programming material (in the form of transmission rights and the wholesale provision of pay-TV channels) and

b. Access to the technical platform.

Access to programme material is certainly a crucial aspect: without access to programme material neither an alternative programme nor a technical platform is likely to develop. Because this is an aspect that has been discussed already rather extensively by other scholars\(^{472}\) and because there is a need to restrict the scope of the present study, the present analysis focuses most of the attention on the question of access to the integrated pay-TV platform itself. ‘Access to the technical platform’ for pay-TV is, in the European Commission’s decision practice, a term that is understood more widely than access to the conditional access system. The European Commission acknowledged that the technical platform also comprises additional technical facilities and services, such as the API, the EPG, Subscriber Management System and Subscriber Authorisation System services as well as billing services and that they can be bottlenecks for functioning competition, too. Access to the service platform, that is the subscription and marketing platform via which services are offered to consumers, has played a lesser role so far, at least in the decisions concerning the broadcasting sector. This might have to do with the fact that the European Commission, in most of its decisions, treated the technical and the service platform as a functional unity rather than as separate components.

The European Commission’s discussion of matters of access to the technical platform for pay-TV reflects to some extent the technological developments in this sector. In the MSG decision, conditional access was considered a major bottleneck to market entry. Soon additional components appeared on the stage, such as the API and the EPG. Convergence also played an important role in the decisions. It is worth noting, however, that the deployment of conditional access systems, APIs

\(^{471}\) Bavasso 2003, p. 277.

\(^{472}\) See the extensive discussion in the papers by Galbiati/Nicita/Nizi 2004 and Harbord/Otaviani 2001 (discussing a number of possible remedies); Armstrong 1999; Cave/Crandall 2001 (and here in particular F18pp.); Neumann 1998, 159pp; Harbord/Szymanski 2005, 22pp.
and EPGs is still very much seen as a domain of the pay-TV operator. The possibility that conditional access, APIs and EPGs are manufactured and offered by independent manufacturers and the impact this has or could have on competition in the pay-TV market is an aspect that has not played a role so far.

Until the NewsCorp/Telepiù decision, most of the European Commission’s decisions in this sector were characterized by the wish to stimulate inter-platform competition. To this extent, the European Commission put a lot of hope on competition from alternative distribution platforms, such as platforms using cable, satellite or terrestrial transmission networks. In this respect, access to programme material was considered crucial, as was the strength of a technical platform that resulted from vertical integration, exclusive control over proprietary standards, indirect network effects and first mover advantages. Within the context of inter-platform competition, questions of conditional access interoperability played a major role. In many of the decisions, it was considered the second-best solution. While interoperability solutions were considered 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.

All in all, the European Commission’s decisions in this field are characterized by the wish to keep market structures open for competition within and between pay-TV platforms. The European Commission’s merger decisions are based on a process of balancing the positive and negative effects for prospective pay-TV markets. Exclusive control over the technical platform and its components, which was identified in Chapter 1 as one of the major challenges in pay-TV markets, indeed played a predominant role. In this context, most of the European Commission’s decisions in this field focus on finding vertical integration and the possibility of leverage. In the early decisions in particular, the European Commission showed a strong tendency to ban vertically integrated structures altogether because they provided, so said the European Commission, the conditions and incentives for leveraging market power from control of the technical platform into the pay-TV market. Over the course of time the European Commission tackled the issue of vertical integration, bottleneck control and leverage in a more differentiated manner. For example, in the BiB and BSkyB/Kirch decisions it acknowledged the positive effects vertical integration can have on innovation and the development of new services. In NewsCorp/Telepiù it concluded, perhaps too quickly, that vertically integrated structures were better than no structure. Furthermore, as later decisions such as the BSkyB/Kirch and NewsCorp/Telepiù cases demonstrated, the European Commission acknowledged that the surrounding factors play a role, too, such as the strength of a proprietary technical standard, the existence of interoperability solutions, the degree of competition in a service market, the impact of economic mechanisms such as indirect network effects and first mover advantages, as well as the business strategy pursued.

473 See section 1.5.2.
The European Commission frequently used its position to shape an environment that follows stricter rules than existing legislation provides for. The analysis of the European Commission’s decisions in the pay-TV sector showed that commitments often exceeded existing legal obligations, for example, with respect to access to the conditional access system. The package of commitments in the BSkyB/Kirch decision illustrated this well. Article 4c of the then relevant Standards Directive only mandated access to the conditional access system. In the BSkyB/Kirch decision, the European Commission accepted commitments from Kirch to grant access to the Subscriber Authorisation System, the EPG, the API, other technical services needed, and to technical information. This would not only apply to digital broadcasters, which was then the scope of Article 4c of the Standards Directive, but also to providers of interactive services at fair, reasonable and non-discriminatory conditions. In its decisions, the European Commission also specified what it means by ‘non-discriminatory access’ in pay-TV, a definition that is still missing in Article 6 of the Access Directive. According to the European Commission, discrimination-free access requires that the licensor of the decoder technology is able to conduct its business without being influenced by a programme supplier.474

Furthermore, on more than one occasion the European Commission expressed its view that mandated access to the conditional access system alone would probably not suffice to ensure functioning competition. Instead, it stressed the need for interoperable solutions to stimulate market contestability as a means to discipline the behaviour of single players. The European Commission also recognized that access to the technical platform alone may not be sufficient to realize intra-platform competition and that access to the service platform was of no less importance.475 Accordingly, the European Commission also intervened in the bouquet structure.

It is worth mentioning that, in the course of time, the focus of the interoperability issue in the decisions seems to have shifted. Initially, the European Commission’s decisions aimed at stimulating different standards and preventing the establishment of one dominant standard without it having been exposed to the competition test first, such as in Deutsche Telekom/BetaResearch. In its later decisions, the European Commission apparently turned its attention more towards the possibility of concluding interoperability agreements as a means to overcome the dominance of one standard.476 Regarding access to programme material, the European Commission went to quite some length to fight the exclusivity of programme material by imposing obligations to supply wholesale material at non-discriminatory conditions and insisting on decreasing the duration of exclusive

474 European Commission, Bertelsmann/Kirch/Premiere, paragraph 111. Interestingly, the Commission also noted in this context that such influence can be had if the technology is controlled by enterprises that also have interests as programme suppliers, thereby again drawing attention to the issue of vertical integration and leverage.

475 European Commission, Newscorp/Televiù, paragraph 257.

476 See European Commission, BiB, Condition No. 6 of the Commissions decision; European Commission, BSkyB/Kirch, Annex I, paragraph 5 (a).
contracts or reducing the scope of output deals.\textsuperscript{477} It also promoted different constructs of guaranteeing access for rivals to exclusive programme rights. One example was a model of ‘shareware’ that came up in the Bertelsmann/Kirch/Premiere decision. Here, parties proposed to open up the share of pay-TV rights they received from certain output deals with Hollywood to third parties (meaning the ability to obtain licences directly from Premiere).\textsuperscript{478}

Finally, many of the decisions are characterized by a bottom-up approach. This is in line with a more general approach of competition law. Here, the aspect of realizing consumer welfare through functioning competition and the knowledge of the power of consumers to shape demand dominate. The decisions demonstrated how important it is that consumers are not unnecessarily impeded in their ability to choose between different services. Moreover, the decisions sought to create the conditions under which consumers could exercise choice. The European Commission repeatedly addressed the issue of technical and contractual consumer lock-ins. The question of whether consumers are willing to switch set top boxes is an important reason why the Commission repeatedly insisted on access-to-the-decoder solutions, as well as on the consumers’ ability to define their own default portal. Moreover, the European Commission clearly opposed a situation in which providers made the subscription to basic packages a condition for the subscription to film or sports channels. Companies would have to provide unbundled access for consumers to programme channels.\textsuperscript{479} The European Commission also emphasized that it was not desirable to make the purchase of a BiB-subsidized set top box and digital satellite dish conditional on the subscription to BSkyB’s services.\textsuperscript{480}

Information problems were even discussed in the decisions, for example, when the Commission insisted on a neutral and non-discriminatory style of presentation within the EPG. Aspects of the consumers’ choice also played a role in the way exclusive programme rights were licensed. In this context, the European Commission, in its NewsCorp/Telepiù decision even coined the notion of a ‘right of consumers to choose’ as a protection-worthy aspect when assessing the competitive effects of a merger on the pay-TV sector.

Formulated somewhat poignantly, one could conclude that the European Commission in its role as competition authority had and still has its own ideas of what effective remedies are and are not. The European Commission regularly pushed parties to go beyond existing regulation, and the fact that in most of the cases it did not even refer to the current legal situation—to the extent that it was relevant—speaks for itself. In other instances, the European Commission was more explicit, such as in the NewsCorp/Telepiù case where it expressed little faith in the

\textsuperscript{477} See also Harbord/Ottaviani 2001, 18pp. and Harbord/Szymanski 2005, 22pp. suggesting a number of similar remedies.

\textsuperscript{478} European Commission, Bertelsmann/Kirch/Premiere, paragraph 124.

\textsuperscript{479} European Commission, Bertelsmann/Kirch/Premiere, paragraphs 125, 134.

\textsuperscript{480} European Commission, BiB, paragraph 129 and condition No. 2.
effectiveness of the existing legal framework.\textsuperscript{481} Statutory access obligations would not be sufficient to prevent NewsCorp from abusing its position, for example by exercising control over the technical developments. This interpretation would be in line with the findings of the European Commission in its earlier decisions.

In its function as a competition authority, the European Commission has its own toolbox from which it can draw to create the conditions for a competitive environment. An instrument that is important in shaping the development of pay-TV markets in merger cases is, in addition to the authorization or non-authorization of a merger, the acceptance or rejection of the parties’ commitments. The aim of commitments is to reduce the market power of the merging parties and to restore the conditions for effective competition.\textsuperscript{482} Often, a major distinction is made between behavioural and structural commitments. Structural commitments solve structural problems. Telepiù’s suggestion to divest its terrestrial network is an example of structural commitment. A commitment to grant access to the conditional access system is an example of behavioural commitment. The European Commission claimed in its earlier decisions to be very critical of behavioural commitments, in particular if they consisted of a promise not to abuse certain aspects of the dominant position.\textsuperscript{483} In its Notice on Remedies, the European Commission clearly explained that

‘[w]here the competition problem is created by control over key technology, a divestiture of such technology is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors’.\textsuperscript{484}

However, the distinction between structural and behavioural commitments is losing much of its significance in this sector, certainly after the decision of the European Court of First Instance following ARD’s attack on the BSkyB/Kirch decision.\textsuperscript{485} Citing earlier jurisdiction, the European Court of First Instance said that the decisive question was whether behavioural commitments, and the court explicitly mentioned in this context the granting of access to essential facilities, were equally capable of preventing the emergence or strengthening of a dominant position.\textsuperscript{486}

\textsuperscript{481} European Commission, NewsCorp/Telepiù, paragraphs 201 - 203.


\textsuperscript{483} See the European Commission decisions in the cases MSG, Deutsche Telekom/BetaResearch, Vivendi/Canal+/Seagram, to name but some.

\textsuperscript{484} European Commission, Commission Notice on remedies, paragraph 29.

\textsuperscript{485} European Court of First Instance, ARD/European Commission, paragraphs 186, 193. See, more generally, the discussion in Bavasso 2003, pp. 336-339.

Commitments (also referred to as ‘modifications’ or ‘remedies’) are offered by the parties themselves, and it is up to the European Commission to decide whether they suffice to remove its concerns about possible negative effects of the merger on the competitive structure. They are self-obligations made by the parties and accepted by the European Commission on a case-by-case basis.\(^{487}\) They are no regulations. According to the European Court of Justice,

‘Commitments, on the other hand, impose detailed obligations to be met within short periods of time, compliance with which is ensured by an effective, binding arbitration procedure which reverses the burden of proof.\(^{488}\)

One consequence of commitments is, however, their effect on a switch in the burden of proof. The monitoring of abuses, according to Article 82 of the EC Treaty, requires proof of a dominant position and an abuse of this position. In contrast, a commitment transfers the burden of proof of compliance to the undertakings concerned by the operation. And because commitments impose detailed obligations coupled with a binding arbitration procedure they offer a greater legal certainty to the market players than Article 82 of the EC Treaty.\(^{489}\) Having said that, the only way the European Commission can enforce commitments is by making the authorization of a merger subject to compliance with them. Where undertakings are in breach of the obligations from their commitments, the European Commission is entitled to revoke the clearance decision.\(^{490}\)

This begs the question whether the European Commission uses its position as competition authority to create (if not law than at least) an alternative ‘pay-TV’ policy. Because competition law decisions are case-by-case decisions, it is not adequate to distil more general rules from previous decisions or predict how future cases will be decided. Nevertheless, some parties have tried to use precedents in earlier European Commission decisions to enforce a particular decision practice in newer decisions. This was what ARD did in front of the European Court of First Instance in the BSkyB/Kirch case. ARD claimed that, following its practice in earlier decisions in Bertelsmann/Kirch/Premiere and Telekom/BetaResearch, the European Commission should not have authorized the BSkyB/Kirch merger.\(^{491}\) The European Court of First Instance was not very impressed by this argument. It observed that the fact that the European Commission rejected similar commitments in previous cases was of no relevance for this case as it was not comparable to the earlier cases. In addition, specific commitments could not be considered in isolation

\(^{487}\) European Commission, Commission Notice on Remedies, paragraph 9.

\(^{488}\) In this sense also European Court of First Instance, ARD/European Commission, paragraph 203, see also paragraph 267.

\(^{489}\) European Court of First Instance, ARD/European Commission, paragraphs 202-203.

\(^{490}\) European Council, Merger Regulation, Articles 6 (2), 8 (2). The European Commission can also impose fines and penalties, according to the Council’s Merger Regulation No. 139/2004, Articles 14 (2) and 15 (2).

\(^{491}\) See European Court of First Instance, ARD/European Commission, paragraph 232.
and the European Commission would have to assess the proposed commitments in each case as a whole.\textsuperscript{492} In the Sogecable/ViaDigital case, the ruling of the European Court of First Instance followed a similar line.\textsuperscript{493} This case dealt with the complaint of a number of Spanish cable operators against a decision of the European Commission in a case concerning a merger between Sogecable and Via Digital, two major pay-TV operators in Spain. The European Commission acknowledged that the merger would probably lead to a dominant position of the joint entity in the Spanish pay-TV market. But at the request of the Spanish government according to Article 9 (3)a of the Merger Regulation No. 4064/89, the European Commission referred the case to the Spanish authorities for decision. The Spanish authority subsequently cleared the merger. The applicants in the case that went before the European Court of First Instance complained that the European Commission should have decided rather than refer the case to the Spanish authorities. One of the applicants’ arguments was that the European Commission breached the spirit of Article 9 of the Merger Regulation No. 4064/89 and its own best practice in pay-TV merger cases. According to the applicants, the Spanish market was in this case a substantial part of the common market and the European Commission had before systematically prohibited concentrations with a Community dimension where they had the effect of excluding competitors from the market. The applicants’ argument was that:

‘it was necessary for the European Commission to examine the present concentration to ensure that the pay-TV market in Spain remained accessible to competitors. In that way the European Commission could have ensured that similar concentrations were treated in the same way in all the Member States. Furthermore, the applicants observe that the European Commission aims to liberalise the telecommunications sector. According to them, the European Commission is best placed to ensure that concentrations do not jeopardise the achievement of the aims of the Community telecommunications policy in a substantial part of the common market such as Spain’.\textsuperscript{494}

The parties further observed that the application of national law would create a risk to the uniformity of the policy currently implemented by the European Commission in the markets concerned.\textsuperscript{495}

The court did not follow the parties’ argumentation. First, it stipulated that the European Commission had broad discretion in assessing whether to refer a concentration or not. Second, reasons of consistency or uniformity with earlier

\textsuperscript{492} European Court of First Instance, ARD/European Commission, paragraphs 244-245.
\textsuperscript{493} European Court of First Instance, Judgment of the Court of First Instance of 30 September 2003, Cableeuropa SA and Others v Commission of the European Communities, Joined cases T-346/02 and T-347/02, European Court reports 2003, p. 0 [hereinafter 'Cableeuropa/European Commission'].
\textsuperscript{494} European Court of First Instance, Cableeuropa/European Commission, paragraph 162.
\textsuperscript{495} European Court of First Instance, Cableeuropa/European Commission, paragraph 169.
decisions were not reasons that should influence the decision of the European Commission. The court made very clear that:

‘the fact that, in a given sector, the European Commission has decided itself to examine the concentration and has prohibited certain concentrations in the past can in no way prejudice the referral and/or examination of a later concentration because the European Commission is required to carry out an individual appraisal of each notified concentration according to the circumstances of each case, without being bound by previous decisions concerning other undertakings, other product and service markets or other geographical markets at different times. For the same reasons, previous decisions of the European Commission relating to concentrations in a specific sector cannot prejudice the decisions to be taken by the European Commission on a request for referral to the national authorities of a concentration taking place in the same sector’.

Conclusion
In conclusion, and in response to the research question asked at the beginning of section 3.3.2., it can be said that the decisions of the European Commission have no binding effect beyond a concrete case. The European Commission is not a second telecommunications NRA, even if it does sometimes tend to evoke the impression. The case-by-case character of its decisions and the legal uncertainty that results from the non-prejudicial character of its decisions are a further powerful argument why one should not overestimate the ‘policy-making’ ambitions or abilities of the European Commission in its function of competition authority. Assuming any ‘rule making’ power would not only contradict the intended nature of decision-making in merger cases, it would also mean a circumvention of formal rule making procedures based on democratic and Community principles. This is not desirable. Finally, ‘rule making’ in the pay-TV sector is not only a question of economic considerations; there are also public information policy and other public policy interests to be considered, such as the promotion of pluralism, diversity, fair access opportunities, European integration and the Internal Market, etc.—questions on which only little time is spent in merger decisions.

Having said that, the analysis of the European Commission’s decisions also showed that a competition authority could be a powerful and well-informed body to prevent the emergence of potentially anti-competitive structures from the very beginning. To this extent, the European Commission contributed significantly to shaping some of the existing pay-TV markets in Europe. One advantage of the case-by-case character of its decision-making process is that it is in this respect rather flexible and open for new technical or economic developments. A review of its decisions gives some insight into the market dynamics and the competition

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496 European Court of First Instance, Cableeuropa/European Commission, paragraph 191.
problems involved in the pay-TV market. And in many instances, the cases generated a range of interesting, sometimes innovative solutions to potential competition problems; solutions that have been elaborated in close cooperation with the market parties themselves.

3.4. Access Control and Antitrust

Section 3.3. showed how the European Commission applies merger law to achieve open and competitive structures in European pay-TV markets. In section 3.4., European antitrust law and in particular Articles 82 and 81 of the EC Treaty (abuse of market power) are central, although the focus of the analysis lies on Article 82 of the EC Treaty.497 The most interesting question in this context is to what extent European antitrust law provides an effective instrument to address and stop anti-competitive behaviour. More specifically, section 3.4. focuses on the forms of anti-competitive behaviour that were described in Chapter 1 as particularly relevant to this context, namely the refusal of access (section 3.4.1.), discriminatory behaviour (section 3.4.2.) and bundling strategies (section 3.4.3.).498 So far, neither the European Commission nor the European Court of Justice have had to decide on such cases in the pay-TV sector. For this reason, all reflections on the possible outcome of cases remain somewhat speculative.

3.4.1. REFUSAL OF ACCESS

In the pay-TV sector, refusals of access can take the form of direct refusals to let competitors use a conditional access system, an API or programme resources that are under the exclusive control of the dominant pay-TV provider. There are also other forms of market behaviour that can have a similar effect, such as delayed access, the withdrawal of access from existing clients, unfavourable pricing and contract conditions, and tying agreements.500 Some situations have been addressed by sector-specific law, notably by Articles 5 (1)b and 6 of the Access Directive, provisions that will be discussed in Chapter 4. In addition to existing sector-specific

497 For Article 82 of the EC Treaty to apply, a number of general conditions must be fulfilled, which will not be discussed here, but which have to be identified on a case-by-case basis. Such conditions are the definition of a relevant product market, the finding of market power and that abuse must have an effect on trade between Member States and take place in a substantial part of the European Internal Market.
498 See also sections 1.5.2. and 1.5.3.
500 See also European Commission, Access Notice, paragraph 94: ‘Three important elements relating to access which could be manipulated by the access provider in order, in effect, to refuse to provide access are timing, technical configuration and price’.
regulation and cases in which no such regulation exists general competition law can apply.

Article 82 (a) of the EC Treaty contains a broad general principle that stipulates that companies in dominant positions must not refuse to supply their goods or services if refusal to supply would significantly impact competition. Accordingly, one could consider whether the refusal to provide, for example, conditional access services to rivals qualifies as a refusal to supply and whether Article 82 (a) of the EC Treaty would apply. One argument why access claims probably exceed the scope of the concept of refusal to supply is that the granting of access to a facility goes beyond the mere duty to supply. The duty to provide access amounts to the use of the operator's own resources, which are possibly resources that are used internally and have not even been offered to third parties. The duty to provide access can be, hence, a more far-reaching duty than the supply of services to third parties. The obligation to share one's own assets with competitors can result in considerable conflicts with commercial interests and economic freedoms, including the right to property and the freedom not to be forced to promote competitors at one's own cost. In addition, the sharing of one's resources could trigger considerable security risks for the resource operator, as well as capacity problems and financial losses. All these are reasons why the European Court of Justice and scholars have argued that the obligation to share one's resources should remain subject to stricter conditions than Article 82 (a) of the EC Treaty provides for and should be reserved to exceptional circumstances. Arguably, mandating access on a formal legal basis and by way of a constitutional law-making process is the preferable route to strike the needed balance.

501 European Commission, Access Notice, paragraph 58.
502 See sections 4.4. and 4.5.
503 See European Court of Justice, Judgment of the Court of 26 November 1998, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigenvertriebsgesellschaft mbH & Co. KG, Reference for a preliminary ruling: Oberlandesgericht Wien – Austria, Case C-7/97, European Court reports 1998, p. 1-7791 [hereinafter 'Bronner'], Opinion General Advocate Jacobs, delivered on 28 May 1998, Paragraph 56: '...it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognized principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification'.
504 See European Commission, Commission Decision of 29 July 1987 relating to a proceeding under Article 86 of the EEC Treaty (Case IV/32.279 – BBI/Boosey & Hawkes), 9 October 1987, OJ L 286, p. 36 [hereinafter 'BBI/Boosey & Hawkes'], paragraph 19: 'A dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportionate to the threat. ... There is no obligation placed on a dominant producer to subsidize competition to itself'. The judgements of the European Court of Justice in, for example, the cases Bronner and Magill support this view, European Court of Justice, Judgment of the Court of 6 April 1995, Radio Telefís Éireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities, Joined cases C-241/91 P and C-242/91 P, European Court reports 1995, p. 1-743 [hereinafter 'Magill'].
The European Commission’s past decision practice in Essential Facilities Cases might suggest otherwise. The problem of access refusals to bottleneck facilities, albeit never decided at the European level in a pay-TV case, is not new and has led to the application and development of the Essential Facilities Doctrine in European competition law. The Essential Facilities Doctrine 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. Instead of providing yet another detailed discussion of the Essential Facilities Doctrine cases that were decided by the European Court of Justice and the European Commission, this study will refer to the excellent treatises in which the doctrine has already been discussed at length and proceed to the main conclusions. Both the European Commission and the European Court of Justice concluded that there could be circumstances in which the overall public interest in open access to resources or facilities can outweigh the economic interests and freedoms of a single operator to maintain exclusive control over a facility. In their competition law analysis, economic reasoning prevails; public information policy considerations about open access, such as public broadcasters’ access and pluralism, do not play a role. Important economic considerations in this context are the existence of vertically integrated structures and leverage in the form of access refusals.

The Essential Facilities Doctrine says that any dominant company that controls a so-called ‘essential facility’ and that refuses access to competitors without objective justification or that grants access only on terms less favourable than those that it offers its own associates, acts in breach of Article 82 (a) of the EC Treaty providing:

a. The party requesting access is dependant on the facility for supplying customers and where constructing an alternative facility is not an economically viable option, in other words: a facility is ‘essential’.
b. The capacity of the facility is adequate to carry the additional traffic taking the owner’s own long-term plans into account.
c. The potential entrant’s traffic meets all relevant technical standards.
d. The entrant is willing to pay adequate compensation for using the system, and
e. The access request is reasonable and there is no objective justification for refusing access.

For the telecommunications sector, and therefore also for the example of conditional access, the European Commission specifies in its Access Notice the conditions under which the Essential Facilities Doctrine applies. For example, it

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507 An essential facility in the sense of the Essential Facilities Doctrine may be a product, a service, content, infrastructure, technical facilities or access to a physical thing such as a harbour or an airport. See also Opinion General Advocate Jacob in the case Bronner, paragraph 50.

508 As to relevant justifications in this context according to the European Commission, see European Commission, Access Notice, paragraph 91.
lists possible relevant justifications, such as an overriding difficulty of providing access to the requesting company or the need for a facility owner to have sufficient time and opportunity to use the facility in order to recoup its investments. If the conditions are fulfilled, a competition authority can impose the obligation to provide access to the facility in question.

Perhaps the most difficult question when applying the Essential Facilities Doctrine is the question of when a facility is 'essential'. The Access Notice explains that

'[i]t will not be sufficient that the position of the company requesting access would be more advantageous if access were granted - but refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic'.

And according to the European Court of Justice, an essential facility must be 'indispensable for carrying on a particular business'.

The application of this definition to facilities in the pay-TV sector is subject to controversial and incoherent discussions among scholars; this all the more as no case law exists for this sector—at least not at the European level. Some commentators seem to support the view that at least the conditional access is an essential facility. Cave and Cowie argued that, should a programme provider wish to have access to an existing subscriber base, it must first secure access to the dominant conditional access system because establishing an alternative decoder base able to bypass the dominant gatekeeper is prohibitively expensive. Similarly, Enßlin argued that, at least for the German market, no third undertaking possessed the technical and financial power to build a new, alternative pay-TV distribution structure alongside the systems of Kirch and Deutsche Telekom. At the same time, the same commentators, Cave and Cowie, claimed that, given the wide variety of organizations active in the business of billing customers and the ease of acquiring subscriber management technology, it is unlikely that a subscriber management system was an essential facility. Moreover, without further explanation, Enßlin claimed that the EPG was an essential facility (however, referring exclusively to the Basic Navigator), while the service platform was not.

At the heart of the controversy is the question whether viable alternatives are available. As the European Commission stated: 'under existing case law, a

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509 European Commission, Access Notice, paragraphs 91, 93.
510 European Commission, Access Notice, paragraph 91(a).
511 European Court of Justice, Judgement of the Court of 29 April 2004, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, Case C-418/01, European Court reports 813 [hereinafter 'IMS Health'], paragraph 38; European Court of Justice, Bronner, paragraph 41; European Court of Justice, Magill, paragraph 53.
514 Enßlin 2000, p. 133.
515 Enßlin 2000, p. 133.
product or service cannot be considered “necessary” or “essential” unless there is no real or potential substitute’.

The European Court of Justice argued along the same lines and specified that the denial of access amounts to an abuse only if it is apparent that there are serious technical, legal or economic obstacles that make it ‘impossible, or even unreasonably difficult’ for any other market player to duplicate the facility.

In the Bronner case, the European Court of Justice made it clear that the Essential Facilities Doctrine does not apply if alternative distribution channels exist, even if they are possibly less optimal.

The burden of proof lies with the party requesting access. The court continued and held that for a facility to be regarded as indispensable ‘it would be necessary at the very least to establish ...that it is not economically viable to create a second home-delivery scheme’. This also means that it is not enough that it is extremely difficult, expensive and time-consuming for a particular rival to duplicate the facility. The prospects would in effect have to ‘deter(s) any prudent undertaking from entering the market’ (stress by the author).

In the following paragraphs, three examples of facilities are given that may or may not qualify as an essential facility. The purpose of the examples is to elaborate arguments of how to assess when the Essential Facilities Doctrine might be applicable in pay-TV cases. The examples deal with the issues of market definition, essentiality and scope of the Essential Facilities Doctrine.

One important aspect in the process of identifying whether there are viable alternatives to a facility is the way in which the relevant market is defined. This is why the first example—conditional access—demonstrates some of the problems a competition authority can encounter when defining the relevant market.

**Example 1 - Conditional Access**

A conditional access system could qualify in a specific market as an essential facility if rivals had no viable alternatives to distribute access-controlled services to

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516 European Commission, Commission Guidelines on Market Analysis and the Assessment of Significant Market Power, paragraph 81. As the Commission further correctly observes in this context, the fact that a given facility is not essential for an economic activity in a distinct market does not mean that the owner of this facility might not be in a dominant position. The Commission gives the example of a network operator who can be in a dominant position despite the existence of alternative competing networks, if the size or importance of its network affords him the possibility to behave independently from other network operators.

517 European Court of Justice, Bronner, paragraph 44; European Court of First Instance, Judgment of the Court of First Instance (Second Chamber) of 15 September 1998, European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission of the European Communities, Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, European Court reports 1998, p. II-03141 [hereinafter ‘European Night Services’], paragraph 208.

518 European Court of Justice, Bronner, paragraph 43.

519 European Court of Justice, Bronner, paragraph 46.

520 European Court of Justice, Bronner, Opinion Advocate General Jacobs, paragraph 66.
subscribers in that market and therefore depended on access to the established conditional access system.

When adopting a rather broad market definition—the market for technical facilities for pay-TV—one might find that in a given market several conditional access systems are available. There are at least two or more competing providers of access-controlled services operating alongside each other and using different conditional access solutions in a number of Member States.\textsuperscript{521} In addition, in Europe alone there is a considerable range of independent conditional access providers, many of which also operate internationally and offer their services to third-party broadcasters.\textsuperscript{522} The Essential Facilities Doctrine does not apply to markets in which alternative systems are available, or in which market precedents suggest that it is not entirely unreasonable to launch an alternative system.

One could also adopt a narrow market definition. One could argue that the relevant market is not the market for technical facilities for pay-TV, but for one particular conditional access system. Subscribers who have purchased one set top box could be extremely unwilling to switch to an alternative system, in particular if the existing conditional access solution is not interoperable and/or the programme of the first platform is particularly attractive. This might justify the conclusion that each individual established conditional access system is a market in itself and that no alternative systems are available in the market. In fact, this would mean that each proprietary conditional access system is an essential facility, irrespective of whether alternative systems are available and irrespective of whether the operator of a particular system is dominant in the total conditional access market.

The outcome in the second alternative—narrow market definition—results in an unlimited—and unreasonable—extension of the Essential Facilities Doctrine to virtually all assets of property. The criterion of dominance was replaced by ‘essentiality’,\textsuperscript{523} which is not in line with the basic principles of competition law.\textsuperscript{524} The doors were wide open for political instead of economic arguments in the competition law analysis. Political arguments as a motive for mandating access, however, are better reserved for the sector-specific legislator rather than the competition authority.\textsuperscript{525}

Having said that, a conditional access solution might not be essential for market entry. Still, there can be competition or public information policy reasons why foreclosing access to a particular technical platform is not desirable. This, however, is an aspect that probably falls outside the scope of the Essential Facilities Doctrine and inside the scope of sector-specific regulation.\textsuperscript{526}

\textsuperscript{521} See section 1.4.3.
\textsuperscript{522} See section 1.4.3.
\textsuperscript{523} Larouche 2000, pp. 207, 209.
\textsuperscript{524} Larouche 2000, p. 212.
\textsuperscript{525} In this sense also Larouche 2000, p. 216.
\textsuperscript{526} See sections 4.2.2. and 4.4.
Example 2 – Apple’s FairPlay

The second example is not a pay-TV example, but originates from the online music market. It deals with Apple’s DRM solution FairPlay. Nevertheless, there are a number of interesting parallels with the pay-TV case. Moreover, Apple’s Fair Play was probably the first case, at least to the knowledge of the author, in which a competition authority in Europe had to decide if an electronic content management system qualifies as an essential facility.

Apple’s online music store iTunes sells music for download via the internet. Apple itself does not produce music, but it has concluded licensing agreements with the major record labels and many leading independent labels. Apple sells individual songs or whole tracks via its portal, iTunes. The songs can be played on Apple’s own portable music player, the iPod. The music is protected using Apple’s proprietary DRM solution FairPlay, but what is important to note is that Apple’s iPod only supports the FairPlay standard. The iPod does not support any of the rivaling standards used by competing download services, and Apple does not license FairPlay to rivals. Users of the Apple iPod can download unprotected MP3 files to their iPod, but if they wish to download DRM protected music they can only go to the iTunes music store.

One will see similarities and differences with the pay-TV case. The differences are that iTunes sells music, and that the music is sold via the internet. Apple does not use a conditional access solution, but a DRM solution, and is therefore able to control access and the way content is used. Furthermore, iTunes did not begin with a subscription model, but specialized in individual downloads and billing. However, these differences are less consequential than would seem at first sight. As mentioned in Chapter 1, conditional access systems can also be combined with elements of usage control in order to protect intellectual property rights in the distributed content. In addition, pay-TV platforms offer individual download services (on demand), and pay-TV services can be offered via the internet, too. In both cases, technical content control solutions support the selling of digital content services via intermediary platforms.

Some of the concerns that were voiced against the use of technical content control and (vertically integrated) intermediary platforms are very similar to the pay-TV case. A prominent example is RealNetworks’ complaint that the iPod does not process any other technical protection systems, including RealNetworks’ DRM solution, Harmony. By doing this, so said RealNetworks, iTunes monopolized all of the consumers who bought an iPod. In the end, however, it was another enterprise that challenged iTunes in Europe. The French entertainment company VirginMega filed in 2004 a complaint against Apple Computers France with the French

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527 For more information see <www.itunes.com> (last visited on 20 March 2005).
528 See section 1.2.
competition authority, the Conseil de la concurrence. VirginMega offers its own music download service and uses for this purpose a different DRM solution, namely Microsoft’s DRM. Because of the proprietary nature of the iPod, consumers who buy digital music files from VirginMedia cannot, so is the argument of VirginMega, transfer these files to their iPod. VirginMega requested a licence from Apple for FairPlay so that it could encode its music files in the FairPlay format. Apple refused. VirginMedia claimed that the refusal to grant access to the FairPlay DRM constitutes an abuse of a dominant position according to French competition law and Article 82 of the EC Treaty.

The French competition authority found that Apple was probably dominant in all three relevant French markets, namely the DRM market, the market for portable music players and the music download market. It then recalled the jurisdiction of French courts and the European Court of Justice in Essential Facilities Doctrine cases. It identified three aspects that were in its opinion relevant when deciding whether FairPlay is an essential facility:

a. The actual usage habits of consumers regarding music download,
b. Possibilities to circumvent the problem of lacking interoperability, and
c. The developments in the market for portable music players.

The Conseil de la concurrence concluded that FairPlay was not an essential facility for the following reasons: First, the competition authority found that only a minor share of the market would listen to music from a portable device, the majority would listen to music via the computer or burn songs onto a CD. Second, it thoroughly described a way consumers could get around the existing lack of interoperability and download music from VirginMega onto their iPod. Third, the French competition authority found that the market for portable music players was sufficiently competitive and offered several products in addition to the iPod. In other words, there were alternatives available that could process VirginMega’s music. In conclusion, the French competition authority did not consider FairPlay an essential facility because consumers had a choice: the iPod was not necessary to listen to VirginMega’s music, alternatives were available, and iPod owners were not excluded from access to VirginMega’s music. In addition to its doubts whether the FairPlay DRM was an essential facility, the French competition authority also questioned the causality between VirginMega’s lesser economic success and the access refusal. It argued that Apple probably had the more successful business strategy and was for this reason market leader, thereby raising the free-rider issue. It furthermore found that the market for online music was actually competitive as there were at least two major operators active in that market.

The French case provides a number of arguments that can also be useful in assessing whether it is adequate to apply the Essential Facilities Doctrine to the

529 Conseil de la concurrence, Décision du 9 novembre 2004 relative à des pratiques mises en œuvre par la société Apple Computer, Inc. Dans les secteurs du téléchargement de musique sur Internet et des baladeurs numériques, Case No. 04-D-54 [hereinafter ‘Apple Computer’].
530 Conseil de la concurrence, Apple Computer, paragraphs 96-103.
conditional access case in the first example above. To begin with, it is worth noting that the French competition authority acknowledged that a technology that implements a proprietary standard could constitute an essential facility. In other words, it is not the facility itself but the standard that is embedded in the facility that can make it essential for market entry for others. The European Commission reached a similar conclusion in the Microsoft Europe case. In this case, Sun Microsystems Inc, a competing manufacturer of computer operating systems, complained that Microsoft refused to disclose the technology necessary to allow the interoperability of its Sun server operating system with the Microsoft Windows Client operating system. This would prevent Sun Microsystems from competing in the workgroup server operating system market. The European Commission established that Microsoft was abusing its dominant position by refusing to supply interoperability information to Sun, that is the specifications for the protocols used by Windows workgroup servers in order to provide file, print, group and user administration services. The Commission noted that ‘interoperability with the client PC operating system is of significant competitive importance’. As the Commission also upheld, due to the lack of interoperability an increasing number of consumers were locked into a homogeneous Windows solution at the level of workgroup server operating systems. This impaired the consumers’ ability to benefit from alternative, innovative products. Likewise, it limited the competitors’ prospects to enter the market and/or develop new products. Similar to Apple’s defence before the French competition authority, Microsoft claimed in an Interim procedure before the President of the European Court of First Instance against the Commission’s decision that the Essential Facilities Doctrine did not apply, among others, because there were alternative ways of getting around the lack of interoperability meaning that alternative products were available. The President of

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531 The European Court of First Instance referred to ‘work group operating systems’ as operating systems designed and marketed to deliver services such as the sharing of files stored on services, sharing printers and the administration of the manner in which authorized users can access network services. The work of the work group operating system depends on interoperability with the client PCs and their operating systems. European Court of First Instance, Order of the President of the Court of First Instance of 26 July 2004, Microsoft Corp. v Commission of the European Communities, Case T-201/04, European Court reports 2004 p 0 [hereinafter 'Microsoft Europe'], paragraphs 10-11.


533 European Commission, Microsoft Europe, paragraph 586, see also the explanation in paragraphs 587-637.

534 European Commission, Microsoft Europe, paragraphs 642-646, but also claiming that ‘customers will thus have a tendency to underestimate the importance of interoperability in their purchasing decisions’, paragraph 643. It also should be mentioned that Microsoft criticized the survey as not being representative, see paragraphs 654-655.

535 European Commission, Microsoft Europe, paragraphs 694 and 695-701.

536 European Court of First Instance, Microsoft Europe, paragraphs 100-104.
the European Court of First Instance reserved the final decision to the Court dealing with the substance of the case.\textsuperscript{537}

Back to the conditional access example, the French competition authority followed the standing legislation of the European Court of Justice, namely that the Essential Facilities Doctrine must remain reserved to exceptional circumstances, notably those where alternative technologies and distribution channels are not available.\textsuperscript{538} To this extent, it is probably the third argument of the French competition authority that is the most relevant when applied to an access-to-a-conditional-access case. As far as the first argument is concerned—alternative reception devices—much will depend on how consumers will access pay-TV services. As was explained in Chapter 1, it is possible to receive access-controlled broadcasting services also via, for example, a PC, providing the PC is equipped with a TV card and media player software, and is connected to a broadcasting network. Pure software-based conditional access solutions would not even require substantial investments in additional hardware. At the time of writing, the reception of broadcasting services via the PC is still the exception. The majority of consumers tend to prefer to receive such services via the TV. The second argument—consumers being able to get around the lack of interoperability—is interesting because it takes both the supply side and the demand side into account when identifying the essentiality of a resource. Another question is, however, if consumers would really follow this route. Even though the procedure that the competition authority described was rather simple, its point of reference was a fairly technically experienced user. In terms of the third argument—competition in the technical-facilities market, and here more specifically the market for the consumer reception device, the set top box—an independent market for set top boxes already exists in some countries. Furthermore, once digitization has been completed, most households will probably need set top boxes or will have to be otherwise equipped to receive digital television. Arguably, this would lower some of the entry barriers for newcomers in the pay-TV service market. Newcomers could also stimulate demand for new or additional conditional access technology. Already now, the prices for set top boxes are falling. Likewise, the internet as a platform for the distribution of pay-TV can bring a new dynamic to the sector. The digitization of broadcasting platforms will also make it more attractive for new entrants from non-broadcasting sectors, such as infrastructure operators and entertainment industry representatives, to enter the pay-TV sector with the consequence of increasing demand for alternative systems.\textsuperscript{539} One important aspect in this context is interoperability. Arguably, one pressing obstacle to the development of an alternative conditional access system is the lack of adequate interoperability

\textsuperscript{537} European Court of First Instance, Microsoft Europe, paragraphs 198 -225.

\textsuperscript{538} See European Court of Justice, Bronner, paragraph 26; European Court of Justice, Magill, paragraph 50; Europe Court of Justice, IMS Health, paragraph 49.

\textsuperscript{539} See also Galbiati/Nicita/Nizi 2004, p. 21, highlighting the possibility to sustain competition models in the pay-TV sector that are not based on 'competition for the market'.

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solutions. In areas in which interoperability solutions are available, this might be a further argument to hold that the dependency upon one particular conditional access system and one particular set top box is less pressing with the consequence that it is not an essential facility. Interestingly, the French competition authority made its point clear that a competitive market must not mean that consumers have access to all content services through one and the same device.

**Example 3 – Access to the EPG**

It is widely acknowledged that, in a multi-channel environment, access to a popular EPG, meaning an EPG that is used by a large share of the audience, can be important to reach consumers, especially for smaller, yet unknown niche channels. So far, no cases are known in which the European Commission had to define a distinct market for EPGs. Unlike search engines and browsers on the internet, EPGs are commonly used for internal purposes, namely by the entity that also operates the pay-TV platform. Here, the role of the EPG is to guide the consumer to the programmes and services that are offered via the platform. The example of the EPG illustrates another difficulty with the application of the Essential Facilities Doctrine: what should be done in cases in which a market has not yet been defined and in which a facility is used entirely for internal purposes? In the decision practice of the European Court of Justice,

‘it is sufficient that a potential market or even hypothetical market can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable’.  

Still, forcing an enterprise to share a facility that it has not offered publicly is a particularly far-going intrusion on the property rights of the EPG controller. This would be an additional argument to apply the Essential Facilities Doctrine only in exceptional cases. Indeed, this was also the stance of the European Court of Justice in three of the leading Essential Facilities Cases. All three cases, Magill, Bronner and IMS Health, concerned a similar constellation in which a facility was originally used for internal purposes only. In Magill, it concerned programme information, in Bronner it was a home-delivery system for newspapers and in IMS Health it was a particular brick structure for the presentation of regional sales. It was in these decisions that the European Court of Justice substantially narrowed down the applicability of the Essential Facilities Doctrine. One additional criterion—in addition to the fact that a facility must be indispensable, not duplicable and that refusal of access to that facility must have a negative impact on competition in a secondary market—that the court developed in these cases and which has not yet

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540 European Court of Justice, IMS Health, paragraph 44.
541 Where a facility has been offered to third parties already, non-discrimination principles might apply.
been discussed here, is the condition that the refusal of access must prevent the emergence of a new product for which there is a potential consumer demand.\textsuperscript{542} Transferred to the EPG example, this means that access to the EPG is first and foremost needed to provide already existing services to consumers, namely pay-TV services and other services that are carried via a particular digital platform. The lack of a new product, the provision of which is only possible if access to the EPG is given, could be an argument why the EPG is not an essential facility.

This argument was developed in Magill and later in the case of IMS Health.\textsuperscript{543} The latter concerned a competitor’s request to obtain a licence to use a brick structure for the presentation of regional sales, which is developed by the defendant, IMS Health, and on which IMS Health holds intellectual property rights. The competitor wished to provide the same services in the same national market. The court found that refusal of access to a facility that is essential for operating in a secondary market may be regarded as abusive only where the access requester does not intend to just duplicate the goods or services already offered in that secondary market, but also intends to produce new goods or services not yet offered and for which there is a potential demand.\textsuperscript{544} Correspondingly, a refusal of access to the EPG would only be in conflict with competition law principles if access to the EPG was needed to provide services that do not exist yet. In contrast, access to programme data in order to produce and operate an independent, comprehensive EPG could be a case for the Essential Facilities Doctrine providing such a service does not yet exist in a market.\textsuperscript{545}

The EPG example is also instructive for another reason. Providing the Essential Facilities Doctrine is applicable, would it be useful? Access to the EPG is still no guarantee that the audience will take notice of a particular programme. Often, the decisive factor will be the position on the EPG list. Programmes that are placed at position 135 have a lower chance of getting consumers’ attention than programmes at position five. The question whether the Essential Facilities Doctrine can be used to not only enforce access to a particular facility, but also to enforce certain modalities of access has not yet been clarified. This is to say, it is still unclear if the doctrine can be used to enforce a particular position in an EPG—providing an EPG were an essential facility. The Essential Facilities Doctrine does not provide any guidelines as to the scope of the actual access obligation. In a complex multi-layered multi-standard service environment, remedies may not be as straightforward as mandating open access. Accessibility and compatibility are conditions that depend on complex procedures, including the disclosure of information on the technical interface, the implementation of common standards and interfaces, etc. The example of the EPG clearly illustrates this. To provide another example, access

\textsuperscript{542} European Court of Justice, IMS Health, paragraph 38; European Court of Justice, Magill, paragraph 54; European Court of Justice, Bronner, paragraph 40.

\textsuperscript{543} European Court of Justice, IMS Health, paragraph 32.

\textsuperscript{544} European Court of Justice, IMS Health, paragraph 49.

\textsuperscript{545} European Court of Justice, Magill, paragraph 54.
to an API, meaning the permission to operate via a third-party operator’s API, is not sufficient if not accompanied with the technical information that enables third parties to write compatible applications.

The situation is rendered more difficult by the fact that, as far as access to the EPG is concerned, editorial and public information policy considerations will come to the fore. Arguably, the EPG operator also enjoys a certain editorial freedom, similar to that of the editor of an off-line programme guide. The EPG operator may have content-related reasons not to grant a rival access to its EPG, for example, because the content of the rival’s programme does not fit with its programme offering, because it is not attractive enough to attract sufficient viewers, or because it simply does not want to tolerate the opinion presented in the rival’s programme. On the other hand, there can be public information policy interests why certain programmes, such as public service programmes, should not only be accessible but also have a prominent position. This is another reason why the Essential Facilities Doctrine is probably of limited value in particular in the broadcasting sector where content-related considerations play a prominent role.

**Conclusion**

‘A competitive advantage is not the same as an essential facility’.\(^{546}\) It is likely that most facilities in digital pay-TV will not easily qualify as an ‘essential facility’. It is also unclear to which extent the Essential Facilities Doctrine concept is able to provide satisfactory answers for access conflicts in this sector. Because of the many insecurities and difficulties in defining whether its conditions are given, the Essential Facilities Doctrine does not provide potential market players with the legal security that is necessary when launching a new business. The remedy, obliging an undertaking to share its facility, is probably not in all cases the appropriate and sufficient solution.\(^{547}\) One may doubt, therefore, whether the Essential Facilities Doctrine is indeed such a ‘powerful tool to pry open markets’\(^{548}\) or whether its potential is genuinely overestimated.\(^{549}\)

In most of the cases, the question of whether a conditional access system, a programme bundle, and an API or EPG constitute an essential facility or not, can probably be left open. A dominant company that selectively discriminates against a particular competitor—for example, to discourage it from competition by denying access to an important facility on the same terms granted to other companies—is likely to be acting unlawfully, even if the facility is not necessarily essential. As the European Commission explicitly states in its Access Notice:

\(^{546}\) Temple Lang 1997, p. 73.


\(^{548}\) Furse 1995, p. 473.

\(^{549}\) In this sense, also Scherer 1999, pp. 315, 318.
‘... it is clear that a refusal to supply a new customer in circumstances where a dominant facilities owner is already supplying one or more customers operating in the same downstream market would constitute discriminatory treatment which, if it would restrict competition on that downstream market, would be an abuse. ... In the absence of any objective justifications, a refusal would usually be an abuse of the dominant position on the access market’.550

This means that the Essential Facilities Doctrine is actually only relevant in cases where an operator does not offer this facility to third parties, but uses it exclusively internally. In such cases, it is already very questionable whether the obligation to grant access is too substantial an infringement on the facility operator’s property rights, and the conditions of the Essential Facilities Doctrine too vague as that it would be desirable to mandate access merely on the grounds of general competition law without specific codification in material law.551

3.4.2. DISCRIMINATORY TREATMENT

Once a provider of a conditional access system or any other bottleneck facility has opened its facility to third parties, unjustified refusal of access or the provision of access under discriminatory conditions, is very likely to be held in breach with Article 82 (c) of the EC Treaty. The preconditions for the application of Article 82 (c) of the EC Treaty are that the operator opened its facilities or provided access to third parties under substantially dissimilar conditions without reasonable commercial or comparable justification for the different treatment. This applies irrespective of whether the facility is essential or not. Another precondition is that the further requirements of Article 82 are fulfilled. As the European Commission explains in its Access Notice,

‘the dominant company’s duty is to provide 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’.552

Incompatible with Article 82 (c) of the EC Treaty could be a case of unjustified and discriminatory refusal of access to, for example, the EPG or a conditional access system. Discriminatory could also be the unfavourable presentation of a programme in an EPG if it is not done according to objective criteria. A discriminatory act may be the charging of different access prices or the imposing of different access conditions except where 'such discrimination would be objectively

550 European Commission, Access Notice, paragraph 85.
551 European Court of Justice, Bronner, opinion of Mr Advocate General Jacobs, paragraphs 56, 57. In this sense also Larouche 2002, p. 216, and more general Larouche’s critique of the EFD in pp. 211–217.
552 European Commission, Access Notice, paragraph 86.
justified, for example on the basis of cost or technical considerations or the fact that the users are operating at different levels'.\footnote{European Commission, Access Notice, paragraph 120.} One important case of the application of the principle of non-discriminatory treatment is price discrimination, such as the charging of different prices for different customers.\footnote{Another question is whether prices are unfair or excessive. In this case, they could (also) fall under Article 82(a) of the EC Treaty. Prices are excessive when they have no reasonable relation to the economic value of the product supplied. See e.g. European Court of Justice, Judgment of the Court of 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, Chiquita Bananas, Case 27/76, European Court reports 1978, p. 207 [hereinafter 'United Brands'], paragraph 235.} It could apply, for example, where an operator of a conditional access system charges different prices for different operators for the use of the system. As Larouche pointed out, however, in more diversified markets it can be difficult to determine whether the price charged to competitors is discriminatory or not.\footnote{Larouche 2002, p. 227.} When, for example, can two providers of a niche service be considered equal, and when is it justified to charge one a higher price for access to the conditional access infrastructure than the other? Are online music services comparable to online newspapers? Under which conditions is it justified to give one broadcaster a more prominent position in an EPG than another broadcaster? Obviously, comparability is a problem that does not only arise in context with pricing issues.

Knowing when a certain allegedly discriminatory practice is justified is another problem. For example, pay-TV providers, who at the same time produce the set top box technology, can find it economically efficient to offer set top boxes to consumers who subscribe to their platform at no or minimal costs and sell the same set top box to non-subscribed consumers at a high price. Here, the provision of the set top box can be used as an additional incentive for consumers to subscribe to a particular platform and thereby make this platform more attractive for potential subscribers and providers of access-controlled services. Although a discriminatory practice (consumers who are subscribed receive the set top box for free, while others have to pay), this strategy might be an acceptable strategy as it is intended to get the two sides, consumers and providers of access-controlled services, on board, and thereby make the pay-TV platform more attractive for both sides.

**Geographical Discrimination**

One form of discriminatory behaviour, which is particularly relevant within the context of European competition law, is geographical discrimination. Chapter 1 illustrated how electronic access control is used to re-enforce national borders in an environment of borderless transmission channels.\footnote{See section 1.5.2.} From a European law perspective, geographical discrimination is an issue of Internal Market principles and the European policies concerning the free flow of services. The latter was dealt
with in Chapter 2. However, it can also be an issue of European competition law in so far as Articles 81 or 82 of the EC Treaty apply. For the time being, no cases are known that would concern forms of geographical discrimination in pay-TV markets. The following considerations must hence remain speculative.

An example of geographical discrimination is an agreement between two service platform operators in different countries not to make access-controlled services available across the border and, thereby, refrain from competing with each other in non-native markets. This constellation is comparable to the situation in cases concerning export restrictions in other sectors, which has been repeatedly criticized by the European Commission and the European Court of Justice for its incompatibility with European competition law. To name but two examples, in the Volkswagen case, the European Commission found that agreements that make it difficult for nationals of one European country to purchase products from another European country could infringe Article 85(1) of the EC Treaty (now: Article 81 of the EC Treaty).\(^558\) The case concerned agreements between Volkswagen and its subsidiary, an exclusive Italian importer of Volkswagen, Autogerma. Autogerma forced Italian Volkswagen dealers to sell vehicles only to Italian customers by threatening to terminate their dealer contracts. German customers who wanted to buy Volkswagen vehicles in Italy complained about this practice. The European Commission concluded that the restrictions on the Italian dealers, performed through Autogerma, constituted an infringement of Article 85(1) of the EC Treaty since it implemented a market-partitioning policy. The European Court of First Instance confirmed the view of the European Commission in so far as it found that practices restricting competition and reinforcing the compartmentalization of markets on a national basis would hold up the economic interpenetration that the EC Treaty intended to bring about.\(^559\) In the second case, JCB Service, the European Court of First Instance decided that the effect of exclusive distribution agreements on the Internal Market and on the free movement of services is a consideration that can play a role when assessing the amount of fines to impose for anti-competitive behaviour.\(^560\) The case concerned a UK company that entered into exclusive agreements with its national distributors to establish exclusive territories outside

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557 See section 2.2.4.
559 European Court of First Instance, Judgment of the Court of First Instance (Fourth Chamber) of 6 July 2000, Volkswagen AG v Commission of the European Communities, Case T-62/98, European Court reports 2000, p. II-02707 [hereinafter 'Volkswagen'], paragraph 179.
560 European Court of First Instance, Judgment of the Court of First Instance (First Chamber) of 13 January 2004, JCB Service v Commission of the European Communities, Case T-67/01, European Court reports 2004, p. 0 [hereinafter 'JCB'], paragraph 182.
which authorized distributors were prevented from selling JBC’s products.\textsuperscript{561} The European Court of First Instance confirmed that agreements to partition the Internal Market can be in conflict with Article 81 (1) of the EC Treaty.\textsuperscript{562}

Parallels can be found in agreements between pay-TV platform operators and third-party providers of access-controlled services in which the latter agree that the services they provide via this platform cannot be received by consumers outside a specific geographical territory. The question is if such behaviour constitutes a concerted action and whether it can be proved that the objective is to distort competition within the Internal Market. For example, it could also be a result of the practice of licensing programme rights on a national basis. However, another question is how viable this argument is in a time that technological content control allows to track usage irrespective of the country or residence of the user.\textsuperscript{563}

One could also think of a limitation of the market to the prejudice of consumers according to Articles 82 (b) and (c) of the EC Treaty. Access-controlled service platforms are essentially marketing platforms. Restricting the access of consumers from particular countries on grounds of nationality means that consumers from other Member States are excluded from receiving services that are offered via this particular platform. For example, consumers in Luxembourg, which does not have its own pay-TV platform, could be excluded from digital access-controlled services that are offered in Germany—even if transborder reception were theoretically possible. This conduct might limit markets to the disadvantage of consumers and could amount to unjustified geographical discrimination. Again, no relevant case law is known so far for the pay-TV sector. The European Court of Justice, however, found in other cases that certain practices that distinguish between customers on grounds of their nationality or their location could amount to abusive behaviour in the sense of Articles 82 (b) and (c) of the EC Treaty. Cases concerned, for example, export rebates and the pricing of industrial sugar that were not based on the supply and demand of a Member State’s industrial sugar market, but on the customers’ location;\textsuperscript{564} the pricing of bananas at a selling price that differed according to the Member State in which the customer was established;\textsuperscript{565} and different prices charged for milk-packaging machinery and cartons in different Member States.\textsuperscript{566} Still,

\textsuperscript{561} See also European Commission, decision 2002/190/EC of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP.F.1/35.918 - JCB), 12 March 2002, OJ L 69, p. 1 [hereinafter ‘JCB’].
\textsuperscript{562} European Court of First Instance, JCB, paragraph 103.
\textsuperscript{563} See also European Court of Justice, Coditel II, paragraph 19; European Commission, Report on the Application of the Cable and Satellite Directive, p. 7-8, see also section 2.2.4.
\textsuperscript{564} European Court of First Instance, Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, Irish Sugar plc v Commission of the European Communities, Case T-228/97, European Court reports 1999, p. II-02969 [hereinafter ‘Irish Sugar’], paragraphs 140-141.
\textsuperscript{565} European Court of Justice, 14 February 1978, United Brands, paragraphs 183, 233.
\textsuperscript{566} European Court of First Instance, Judgment of the Court of First Instance of 6 October 1994, Tetra Pak International SA v Commission of the European Communities, Case T-83/91, European Court reports 1994, page II-755 [hereinafter ‘Tetra Pak II’], paragraph 170.
treatin g customers from different countries differently could be justified on the grounds of different market conditions in the different national markets. In the case of pay-TV, again, the way programme rights are licensed on a national basis might be an argument to justify geographical restrictions.

3.4.3. TYING

Other, and within the context of this study, very relevant forms of anti-competitive behaviour are tying practices. Tying means that an undertaking makes the purchase or licensing of one product (the tied product) conditional on the purchase or licence of another product (the tying product). Outside the competition law analysis, the notion of ‘bundling’ is often used interchangeably. It should be noted, however, that from a legal point of view a distinction is made between ‘tying’ and ‘bundling’ (see below). Chapter 1 explained that pay-TV involves a variety of possibilities for bundling, meaning tying, each of which could be a potential case of anti-competitive tying depending on the circumstances. From the range of possible examples, this section will focus, after a more general discussion of tying and the applicability of competition law, on two exemplary cases that were introduced in Chapter 1. These are the tying of the subscription to a pay-TV channel to the purchase of a set top box from the same operator, and channel bundling.

In competition law, tying refers to the practice of linking the supply of services to the acceptance of additional conditions or services that stand in no direct relation to the original object of the contract, the so-called natural link and that are not justified by other objective reasons, including considerations of commercial usage. Tying, thus, can also be seen as a form of qualified refusal of supply, namely when the requester of a service/product is not willing to accept the tied service/product. The challenge for competition authorities and courts is to assess when the joint selling of two products is an anti-competitive strategy to leverage market power from the market for the tying good into the market for the tied good. In order to assess the compatibility of tying strategies with antitrust law, the effects for both the competition and consumers should be considered.

As mentioned in Chapter 1, the effects of tying strategies can be divided into welfare effects for consumers and effects for competition. Among the possible effects for consumers are, on the one hand, reduced transaction costs, benefits in

567 European Court of Justice, United Brands, paragraph 184.
569 See section 1.4.3.
570 See European Court of Justice, Tetra Pak II, paragraph 82. As the Court further stressed, even where tied sales of two products are in accordance with commercial usage or where there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 unless they are objectively justified.
572 See section 1.5.3.
573 See section 1.5.3.
terms of price, value and the compatibility of a particular service. On the other hand, tying can result in contractual lock-in situations in the form of long-term subscription contracts or subscriptions to large bundles. Tying strategies can also lead to technical lock-in situations, for example, in the form of an arrangement that ties the provision of a specific, often subsidized, set top box to the subscription to one particular proprietary pay-TV platform. In this case, the choice for a particular pay-TV platform would also determine in the short term the range of information services consumers are technically able to receive.

As far as the effects of tying or bundling for competition are concerned, they are often difficult to measure precisely and can range from ‘little impact on the ability of rivals to compete’ to ‘total exclusion from competition’. A variety of factors must be considered, such as the height of the production costs for the manufacturer of competing products in the market for the tied good, and if competitors have the ability to offer added value to consumers and thereby make the additional purchase of their competing product attractive. The conditions can be different in one-sided and multi-sided markets. In the latter, competitors have more choices to differentiate their products and offer added value at one or the other side of the market.

Compatibility with Antitrust Law

Tying can be in conflict with Article 81 (1) e and/or 82 (d) of the EC Treaty. If tying is practiced by a dominant enterprise, Article 82 of the EC Treaty applies. Preconditions for the application of Article 82 (d) of the EC Treaty, on which the following analysis will focus, are the finding of a dominant position in the market for the tying product, the finding of two distinct products or services, the finding that these two products or services are offered in a way that leaves customers or consumers no choice to obtain the products/services separately, and, finally, the finding that an anti-competitive effect results from that practice.

Two landmark cases are the Hilti and the Tetra Pak II case. The Hilti case concerned a manufacturer of a range of products used for fastening materials into place, including its nail gun or ‘power-actuated fastening systems’ (‘PAF systems’) and nails that were compatible with the system. Hilti pursued a policy of selling PAFs to end users or distributors only when they were purchased with the necessary complement of nails. Alternatively, Hilti would reduce the discounts when end users or distributors bought nails from competitors. Hilti’s competitors, Eurofix and Bauco, who also produced nails, complained that this behaviour was intended to

575 See the paper by Leveque 2000.
restrict their sale of nails for Hilti PAFs. The European Commission decided that Hilti-compatible PAFs and Hilti-compatible nails\textsuperscript{577} were two separate markets and not, as Hilti claimed, one market. It thereby established that the first condition for the finding of anti-competitive tying, the existence of two separate product markets, was given. The European Commission then found that Hilti left customers with no choice for the source of their nails and, in so doing, abused its dominance in the market for nail guns. Making the sale of Hilti’s nail guns (the tying product) conditional on buying a corresponding complement of nails (the tied product) constituted tying.\textsuperscript{578} The European Commission was herein confirmed by the European Court of First Instance\textsuperscript{579} and the European Court of Justice.\textsuperscript{580}

Similarly, in the Tetra Pak II case, the European Commission decided that Tetra Pak’s refusal to sell machines for the packaging of liquid and semi-liquid milk products separately from the aseptic packaging cartons that Tetra Pak also produced and sold, was a form of anti-competitive tying. In its decision, the European Commission further elaborated on when products are considered distinct, and when the tying of such products is not justified by objective reasons. Again, the decision was confirmed by the European Court of First Instance\textsuperscript{581} and the European Court of Justice.\textsuperscript{582} The European Commission concluded that the cartons and the packaging machines were distinct products and belonged to different product markets.\textsuperscript{583} The effect for competitors was that Tetra Pak’s position in integrated distribution systems was further strengthened and competitors would find themselves in an ‘extremely uncomfortable position’.\textsuperscript{584} The European Commission did not follow Tetra Pak’s argumentation that synergistic effects at the level of research and development and after-sales services would be sufficient to constitute a ‘natural link’ between the machine and the type of packaging it uses. Neither would the European Commission accept that, as Tetra Pak claimed, the system of tied sales was justified because it benefitted users by enabling Tetra Pak to offer consumers a


\textsuperscript{578} European Commission, Hilti, paragraphs 74-75.

\textsuperscript{579} European Court of First Instance, Judgment of the Court of First Instance of 12 December 1991, Hilti AG v Commission of the European Communities, Case T-30/89, European Court reports 1991, p. II-1439 [hereinafter ‘Hilti’].


\textsuperscript{581} European Court of First Instance, Judgment of the Court of First Instance of 6 October 1994, Tetra Pak International SA v Commission of the European Communities, Case T-83/91, European Court reports 1994, p. II-755 [hereinafter ‘Tetra Pak II’].


\textsuperscript{584} European Commission, Tetra Pak II, paragraph 117.
comprehensive performance guarantee. The European Court of Justice followed the tendency of the European Commission to interpret Article 82 (d) strictly:

‘Consequently, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 unless they are objectively justified’.

Closer to the subject matter of this study is the Microsoft Europe case of the European Commission. The case concerned, among other things, Microsoft’s practice of making the availability of its Windows operating system conditional on the simultaneous acquisition of Microsoft’s Windows Media Player, much to the concern of competing producers of media players. The European Commission found that the conditions for a finding of anti-competitive tying according to Article 82 (d) of the EC Treaty were fulfilled: Microsoft was dominant in the market for operating systems (the tying product), a media player (tied product) is a product that is distinct from an operating system, Microsoft did not offer consumers the possibility to buy Windows without the Windows Media Player and this practice negatively affected competition in the market for media players. To remedy what the European Commission found to be an anti-competitive tying practice, it ordered Microsoft to unbundle its products and offer a version of the Windows operating system that did not include the Windows Media Player. The remedy applies to Windows systems that are licensed directly to end users (home users via retail and corporate customers) and licensed to intermediaries.

All three decisions made it quite clear that, in their decision practice, the European Commission and the European Court of Justice/First Instance are quick to consider the joint selling of products or services tying in the sense of Article 82 (d) of the EC Treaty unless it is objectively justified. In the Hilti and Tetra Pak II decisions, the European Commission and the European Court of Justice/First Instance further made it clear that the threshold for the objective justification of a tying practice is very high—commercial practice, compatibility, synergies, safety aspects, and the so-called natural link do not necessarily provide sufficient justification. The rule of proportionality applies, and enterprises must take, where available, recourse to less infringing practices than tying. Moreover, the fact that

585 European Commission, Tetra Pak II, paragraph 118.
586 European Court of Justice, Tetra Pak II, paragraph 37.
587 A media player is a software product that is essentially able to play back such audio and video content, that is to say, to understand that digital content and translate it into instructions for the hardware (for example, loudspeakers or a display), European Commission, Microsoft Europe, paragraph 60.
588 European Commission, Microsoft Europe, paragraphs 799-977.
589 European Commission, Microsoft Europe, paragraph 1011.
590 European Court of First Instance, Hilti, paragraph 118. European Commission, Tetra Pak II, paragraph 119.
591 European Commission, Tetra Pak II, paragraph 119.
two products are closely associated does not, on its own, constitute a ‘natural link’ in the sense of Article 82 (d). As long as alternative manufacturers provide the product or service, an enterprise principally has no right to treat two services or products as integrated services.\textsuperscript{592} In the Microsoft Europe case, the European Commission underlined that the distinctness of products for the purpose of an Article 82 of the EC Treaty analysis has to be assessed with a view to consumer demand. If there was no independent consumer demand for the allegedly tied product, then the products at issue were not distinct and a tying charge would be to no avail.\textsuperscript{593} Hence, the fact that the market provides a product or service separately can be evidence for separate consumer demand.\textsuperscript{594}

Example 1—Joint Selling of Set Top Boxes and Pay-TV subscription

If one transfers these principles to the case of the bundling of set top boxes and pay-TV subscriptions, this could mean that making the subscription of a pay-TV service dependent on the purchase of a particular set top box could constitute anti-competitive tying. For Article 82 (d) of the EC Treaty to apply, the pay-TV provider would have to have a dominant position in the pay-TV market, pay-TV subscriptions and set top boxes would have to be two distinct services/products, they are not offered separately and the joint offer affects competition. Providing dominance is given, and set top boxes and subscriptions are sold jointly, the question is whether the selling of set top boxes and of pay-TV subscriptions are two distinct services. One could try to argue that the set top box and the subscription platform are necessary components of a single wider system or are supplied together by nature of custom. The argument could go along the lines that consumers would not buy a set top box if they didn’t have a subscription to a pay-TV service.\textsuperscript{595} Whether this is a valid claim or not depends on several factors. For example, where more than one pay-TV service is available, there could be demand for set top boxes that is independent of the pay-TV subscription. Moreover, set top boxes are not only used to decrypt content; they are also instruments that transform digital signals into a format that is readable for analogue TV sets. In addition, with increasing sophistication, set top boxes offer more and more functionality than just the decryption of pay-TV programmes, such as the processing of interactive applications, billing services, etc. It follows that any generalization and basic assumption or denial of a ‘natural link’ between two set top boxes is difficult to make, and that it is the circumstances of the concrete case that matter.

The question is then whether there is an objective justification to be found for tying the two services/products together. The fact that the set top box is often necessary to decrypt pay-TV services, that purchasing the set top box and the pay-

\begin{itemize}
  \item \textsuperscript{592} European Commission, Tetra Pak II, paragraph 119.
  \item \textsuperscript{593} European Commission, Microsoft Europe, paragraph 803.
  \item \textsuperscript{594} European Commission, Microsoft Europe, paragraph 804.
  \item \textsuperscript{595} See, for example, the argument of Microsoft in the Microsoft case, European Commission, Microsoft Europe, paragraphs 801, 809.
\end{itemize}
TV subscription from the same operator can guarantee service compatibility or that only then the security of the encryption system is safeguarded, are not factors that—judging from previous decisions—are likely to convince the European Commission or the European Court of Justice.

Selling a subscription and set top box jointly could also affect competition in the set top box market, because making the provision of a set top box dependent on the subscription to the pay-TV platform limits the chances for competing set top box manufacturers to sell set top boxes to the same consumer base. The impact of the tying strategy on competition will depend on how much room is left for competition. There could be room for competition in a situation in which independent set top box manufacturers produce boxes that can process a range of additional services—providing such services exist—and so offer consumers some added value as compared to the set top box of the first platform operator. An interesting question is what the situation would be if pay-TV providers gave set top boxes away for free in order to attract additional subscribers. One could argue, as Microsoft did in the Microsoft Europe case, that there is no anti-competitive effect from tying in such situations.596 The pay-TV provider would not even compete in the set top box market because it was not trying to make a profit in this market. The European Commission held against this that even if a (tied) product were given away for free, the effect could be anti-competitive, notably as far as complementary products to the tying product were concerned. The European Commission found that tying could have ‘spill-over effects’ on the competition of related products, such as DRM solutions, set top boxes or the online delivery of content, as a result of indirect network effects.597 This finding was one of the aspects that Microsoft contested in the Interim proceedings before the European Court of First Instance. Microsoft claimed that the European Commission’s spill-over argument had no basis in economic theory and would fail to reflect market realities.598 The European Court of First Instance was ready to agree that Microsoft’s arguments raised important questions, but felt that the interim measure proceedings were not the place to deal with them.599 If one were to use the argument of the European Commission in the pay-TV example, one ‘spill-over effect’ could concern the contestability of the pay-TV market. Tying the subscription to a pay-TV service and the purchase of a set top box can discourage the entry of new pay-TV providers.600 Whether this is true would also depend on whether the technology used in the set top boxes is a proprietary technology that the first operator refuses to licence to other operators or set top box manufacturers, or whether it can be made compatible. One consequence of this, very broad, interpretation by the European Commission

596 European Commission, Microsoft Europe, paragraph 840. Another question is if there is a case of predatory pricing, see below.  
597 European Commission, Microsoft Europe, paragraphs 842, 897.  
598 European Court of First Instance, Microsoft Europe, paragraphs 329.  
599 European Court of First Instance, Microsoft Europe, paragraphs 394, 404.  
600 See section 1.5.3.
was that the rules on anti-competitive tying could not only be used with regard to competition in the tied product market but, more generally, with regard to the overall competitive structure.

Example 2—Channel Bundling
The second example relates to channel bundling. For example, consumers must subscribe to one niche channel before they can receive a premium channel, so-called buy-through contracts. The question if these services have a natural link might not always be easy to answer. Providing there are separate markets for the provision of premium services (sports, films) and other content, this would be an argument in favour of two distinct services. Both types of services, and most certainly premium services, can probably be offered independently and on a à la carte basis.

Tying channels together can have positive and negative effects on competition and consumer welfare. Instructive is the argumentation of the former British regulatory authority for broadcasting, the Independent Television Commission (ITC), in a tying case concerning the UK pay-TV operator BSkyB. The ITC recognized that there are valid reasons for offering basic and premium channels in one package, such as the ability to guarantee income to programme providers, pass off the risk of investment to the platform operators and in this way stimulate investment in new services (which would again increase consumer choice), and to realize economies of scope. However, as the ITC also noticed, buy-through obligations could (and already did) easily result in a situation where consumers were forced to subscribe to channels they did not want in the first place. According to the ITC, the question was if a wider range of channels would result in increased consumer welfare. And if it did not, were there alternative, better risk-bearing options?

According to the ITC, similar considerations would also apply to basic channel bundling or rather: tying. Having said that, the question whether basic channel tying, meaning the packaging of different basic channels in a larger programme bouquet, would also be considered tying will also depend on the way markets are defined and whether separate demand for the individual channels is given. If the basic channels in question were found to be offered in one and the same market, the typical tying constellation would not be given. Still, it could be a case of 'bundling.'

601 See section 1.5.3.
602 Compare, European Court of Justice, Tetra Pak II, paragraph 36; European Court of First Instance, Hilti, paragraphs 66 and 67; European Commission, Microsoft Europe, paragraph 803: '[t]he distinctness of products for the purposes of an analysis under Article 82 therefore has to be assessed with a view to consumer demand. If there is no independent demand for an allegedly tied product, then the products at issue are not distinct and a tying charge will be to no avail'.
Bundling

Tying is often distinguished from bundling although the notions of bundling and tying are closely related and easy to confuse. The difference between tying and (pure) bundling is that the tied product is available on a stand-alone basis under tying, but not under (pure) bundling. This suggests that at least in the case of pure bundling, the finding of anti-competitive bundling practices seems to be less dependent on the evidence that the components are distinct and offered in different markets. With regard to mixed bundling, the tied product can be offered separately, but the (monopoly) product is sold together with a complementary product at a single price that is less than the sum of the products sold individually. One example of mixed bundling is discounts that are given for the purchase of additional services or products.

Mixed bundling was the subject of another investigation against BSkyB, this time performed by the UK Office of Fair Trade (OFT). A number of BSkyB’s competitors had complained to the Office of Fair Trade that BSkyB was abusing its dominant position with respect to its channel pricing. A subscriber to BSkyB’s premium channels (for example a film channel) could get discounts if he or she also subscribed to BSkyB’s premium sports channels. The OFT found that BSkyB’s action bordered on anti-competitive action but that there was no evidence of abuse. The OFT acknowledged, however, that ‘bundling poses a dilemma’. It recognized that where the fixed costs were high, for example, because of the costs of programme rights, it was ‘neither unnatural nor undesirable for suppliers to offer discounts to consumers taking additional products as the incremental cost of supplying those extra products to consumers is relatively low’. Accordingly, in OFT’s investigation, it was not so much the fact that BSkyB would tie together two services that did not have a ‘natural link’ that played a role—the decisive criterion in the theoretical tying constellation. The fact that concerned the OFT was that a subscriber who subscribed jointly to two BSkyB services would have to pay less than a subscriber who subscribed to these or similar services from different

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603 Larouche 2000, p. 263.
604 See also Larouche 2000, p. 263.
608 Article 82(d) of the EC Treaty reads: ‘making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.
operators separately. As a consequence, a rival supplier of a premium sports channel might be locked out of the market because subscribers to other BSkyB premium channels (for example, premium film channels) got a discount if they also subscribed to, for example, Sky Sports 1.\textsuperscript{609}

The application of the concept of anti-competitive tying to situations in which the distinct-product criterion plays no or a lesser role, considerably extends this concept. In order to prevent the extension from becoming unreasonable, additional criteria are needed to distinguish anti-competitive bundling from acceptable bundling strategies. One interesting suggestion was made by Larouche, who suggested requiring the demonstration that the product is an "essential facility"\textsuperscript{610} in accordance with the criteria developed in Essential Facilities Doctrine cases. According to Larouche, unbundling is a means to "enable competitors of the dominant firm to have access to the broken-down components of services offered by the dominant firm"\textsuperscript{611}. Applicants would have to prove that access to this product is absolutely necessary for rivals to compete. The OFT went a different way and took recourse to the concept of predatory pricing. The OFT asked whether the incremental price of an additional channel in a bundle of channels would be more or less than the incremental cost of supplying the product. Where the incremental price was below the incremental cost, the pricing would be a strong indication of anti-competitive behaviour, especially in the presence of evidence of foreclosure of competitors. In the BSkyB case, however, the OFT had only limited evidence of foreclosure of rival channels resulting from mixed bundling, which is why the OFT did not declare BSkyB's practice anti-competitive.\textsuperscript{612}

Another, similarly difficult question is how to effectively remedy anti-competitive tying and bundling. Unbundling, which is the obligation to offer services separately and at an adequate price, is probably the most obvious answer. However, as the above analysis shows, it is not always the act of tying products or services together that puts functioning competition and/or consumer welfare at risk. Tying or bundling can also be the trigger for anti-competitive pricing strategies, such as in the OFT case, or it is a qualified form of refusal to supply, such as in the Hilti or the Tetra Pak II case. Here, other remedies might be better and lastingly fit to end anti-competitive behaviour, such as imposing access obligations or monitoring the pricing behaviour, as well as initiatives to stimulate competition in the market for the tying product so as to eliminate dominance in this market. For example, in the channel bundling cases, a more effective remedy than unbundling might be the close monitoring of exclusive programme licensing deals so that competitors get a chance to offer attractive premium channels themselves. In the set top box/pay-TV subscription case, possible remedies could be standardization initiatives to stimulate the independent set top box market and/or the production of

\textsuperscript{609} Office of Fair Trade 2002, paragraphs 4.18-4.24
\textsuperscript{610} Larouche 2000, 267pp.
\textsuperscript{611} Larouche 2000, p. 263.
\textsuperscript{612} Office of Fair Trade 2002, paragraphs 4.21-4.23.
set top boxes that are able to process different formats or conditional access technologies. Here, mandating the licensing of proprietary conditional access solutions to competitors and independent set top box manufacturers, or encouraging the implementation of common interfaces to make set top boxes compatible with several systems might be a more promising route to take than simply requiring unbundling.

**Conclusion**

Tying and bundling practices have been examined by competition authorities and courts because of their potentially harmful effects on competition and the consumers’ freedom to choose from a range of different offers. The bundling of one or more products or services is a widespread business practice in pay-TV. Technical and contractual lock-ins or lock-outs of the kind described in Chapter 1 can be the consequence. Section 3.4.3. found that the widespread practice of tying the subscription to a pay-TV platform to the purchase of a set top box as well as the practice of channel bundling can, under certain circumstances, qualify as abuse of market power according to Article 82 (d) of the EC Treaty. Under particular circumstances, they can also conflict with Article 81 (1)e of the EC Treaty. The European Commission and the European Court of Justice have shown a tendency to treat the tying cases they dealt with rather strictly and to ban them unless there is clear objective justification. Difficulties with which competition authorities or judges will be confronted are the need to identify whether a product or service is distinct from the product or service it is tied to, whether the practice must be considered anti-competitive, and whether there are efficiency or similar considerations that may determine that such behaviour is desirable and should not be banned. A final difficulty will consist of finding the appropriate remedy. Unbundling obligations might sometimes be inadequate or too weak to ensure functioning competition. Other remedies, such as mandatory access, price control, standardization or other measures to stimulate competition in the market for the tying product should also be considered as possible remedies.

3.5. Competition Law and Consumer Interests

‘In times of change there can be only one answer to the question how best to protect the consumer: protect competition!’ (original emphasis). According to the former European Commissioner for Competition Policy, Mario Monti, consumer welfare is at the heart of EC competition policy.

When applying general European competition law to pay-TV cases, the European Commission perceives electronic access control primarily as an alternative means of financing electronic services.\(^614\) In this function, electronic

\(^{613}\) M. Monti, Keynote speech at the European Competition Day in Madrid, February 26, 2002.

\(^{614}\) See section 3.2.2.
access control can contribute to improving consumer welfare. This became evident, for example, in the European Commission’s BiB decision. When applying Article 81 (3) of the EC Treaty to the proposed operation, the European Commission found that, as almost all households in the UK possess a TV set, the purchase of a BiB/BSkyB digital set top box would give consumers access to interactive services via television screens. The introduction of a new service of this type was therefore beneficial to consumers. The fact that the services of BiB/BSkyB were encrypted and that consumers first had to purchase a decoder and take out a subscription is not an issue under competition law. Competition law protects competition and not individual consumers’ access to certain products or services. Considerations such as whether prices for access might, from a social welfare or public interest point of view, be too high, conditions unfair or single consumers excluded from access to content of particular importance, lie principally outside the scope of general competition law assessment. They might be an issue under media law. As far as competition law and policy are concerned, consumer interests are best served in markets that are competitive and generate choice from a range of quality services—this is a view that the European Commission repeatedly expressed in its decisions. Protection-worthy interests of consumers might be at stake where consumers are not offered this choice. In the NewsCorp/Telepiù case, the European Commission evoked a ‘fundamental right of consumers to choose’. European competition law focuses on the broader scope of consumer welfare in general. Consumer welfare is the goal, and functioning competition the way to get there. European competition law focuses on the behaviour of enterprises in the market place in order to ensure the goal is reached. Although Articles 81 and 82 of the EC Treaty only apply to enterprises, consumer interests and the reduction of consumer surplus are factors a competition authority considers when judging the compatibility of market behaviour with competition law.

Consumer interests and expectations enter the competition law analysis at different stages. They are taken into account when defining a market in the form of the aspect of demand-side substitutability. For example, in the NewsCorp/Telepiù decision, while in the process of defining the relevant markets, the European Commission asked the Italian consumer associations to assess the relationship between free-TV and pay-TV, and to determine why consumers view both services differently. Harmful consumer interests can trigger the application of competition law, such as in Article 82 (b) of the EC Treaty. The positive effects of market behaviour on consumer welfare can justify or exempt such behaviour, such as in Article 81 (3) of the EC Treaty. Finally, consumers are an important index when monitoring the compatibility of economic activities and competition law and when

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615 European Commission, BiB, paragraph 163.
616 See sections 2.2.1. to 2.2.3.
617 European Commission, Newscorp/Telepiù, paragraph 192
618 Wyatt & Dashwood 2000, p. 544.
619 European Commission, Newscorp/Telepiù, paragraphs 32-33.
detecting cases of non-compliance. In the European Commission’s Notice on the Handling of Complaints by the European Commission under Articles 81 and 82 of the EC Treaty, the European Commission explicitly encourages citizens to report suspected infringements of competition rules and has even created a specific instance for this purpose.\textsuperscript{620} The Consumer Liaison Office in the Directorate General for Competition is responsible for receiving information and requests concerning competition problems faced by consumers. Its’ tasks include alerting consumer groups to competition cases when their input might be useful, and advising them on the way they can provide input and express their views, establishing contacts with National Competition Authorities regarding consumer protection matters and to intensify contacts between the Competition and other Directorates Generals.\textsuperscript{621}

Still ongoing is the question to which extent consumers can be active parties in competition law procedures. According to Article 7(2) of Council Regulation on the Implementation of the Rules on Competition,\textsuperscript{622} ‘natural [...] persons who claim a legitimate interest’ can file an application with the European Commission to examine whether there is an infringement of Articles 81 or 82 of the EC Treaty. In its Notice on the Handling of Complaints by the European Commission under Articles 81 and 82 of the EC Treaty, the European Commission stated that consumer associations could lodge complaints with the European Commission. The European Commission also said that eventually ‘individual consumers whose economic interests are directly and adversely affected in so far as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest’.\textsuperscript{623} In practice, the European Commission occasionally accepted\textsuperscript{624} and even actively encourages complaints that are lodged by individual consumers.\textsuperscript{625} Still, the European Commission is entitled to prioritize its selection of cases and concentrate on cases that have a particular political, economic or legal significance for the Community.

\textsuperscript{620} European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 27 April 2004, OJ C 101, p. 65 [hereinafter ‘Notice on the Handling of Complaints by the European Commission under Articles 81 and 82 of the EC Treaty’].
\textsuperscript{621} For more information visit <europa.eu.int/comm/competition/publications/competition_policy_and_the_citizen/consumer_liason> (last visited on 20 March 2004).
\textsuperscript{623} European Commission, Notice on the Handling of Complaints by the European Commission under Articles 81 and 82 of the EC Treaty, paragraph 37.
\textsuperscript{624} European Commission, Commission decision of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/34466 – Greek Ferries), 27 April 1999, OJ L 109, p. 24 [hereinafter ‘Greek Ferries’], paragraph 1.
3.6. Competition Law and Non-Economic Interests

It would exceed the scope of this study to investigate closer the very controversial discussion of the extent to which general public information policy interests of the kind that were described in Chapter 2 play or can play a role in competition law procedures.\(^626\) This is a discussion that can fill books and on which excellent treatises have already been written.\(^627\) Although the opinions are divided, there seems to be at least some agreement that competition and public information policy may, at times, pursue similar goals. The opinions part when it comes to the question whether it is desirable to instrumentalize general competition law as a tool to realize goals such as freedom of expression, pluralism, diversity, the broad accessibility of information and the availability of information of general public interest.

Goals that play a role both in competition and information policy are the contestability of the information market and functioning economic competition in order to generate a broad and diverse choice of content for consumers at fair and reasonable conditions. Accordingly, it is often argued that general competition law is perfectly sufficient to also realize what can be said to be some of the most important public information policy objective, namely pluralism and diversity. However, a comparison between the long-term goals of the two regimes already shows disparities. Successful competition policy is almost inevitably characterized by a ‘survival of the fittest’ attitude. In contrast, public information policy is determined by the idea of guaranteeing the survival of politically or socially desirable content providers (such as public broadcasters) even if or just because they would most probably not survive the free market reality. This already indicates that information policy often pursues very different, if not contradictory, outcomes/goals of competition policy.\(^628\) The much criticized financing of public broadcasting is just one example, and the granting of favourable access for public broadcasters to pay-TV platforms and EPGs another. The listing of areas in which general competition law and public information policy collide can be easily continued. Internal growth or vertical concentrations can be the result of a functioning competitive selection process or sound economic thinking without necessarily leading to anti-competitive behaviour. Consequently, general competition law does not sanction internal growth. On the other hand, the presence of dominance in a media market and preventing that such dominance is abused to influence journalistic competition is a recurring issue in media regulation. Similarly, it is also possible that even where market behaviour is found to conflict

\(^{626}\) See section 2.2.


\(^{628}\) Herdzina 1999, p. 36; Schmidt 1981, pp. 54-69.
with the objectives of competition law, public policy considerations can be a reason not to ban such practices. For example, in Germany, the US company Liberty Media sought to buy the German cable network from Deutsche Telekom. Although the merger raised considerable concerns about the possible creation of a dominant position in the German cable market, it was nevertheless encouraged by the German authorities in the hope that Liberty Media would invest in Germany’s broadband roll-out.

The previous examples suggest that general competition law could be helpful in realizing public information policy goals in some situations. This could be true at the Member State level. In other situations, it is unlikely that the application of general competition law principles will lead to a satisfactory outcome. As far as the European level is concerned, the European Commission probably does not even have the authority to pursue public information policy goals within the framework of competition law procedures. The crucial and more fundamental question in this context is whether it is actually desirable to use general competition law purposefully as a means to realize further-reaching public policy objectives. The result could be an even stronger politicization of an instrument that is primarily designed to protect competition. Making general competition law a tool for the realization of public information policy interests risks exposing it to rent-seeking, conflicts of authority, and questions that must be solved by parliaments rather than competition law authorities.

3.7. Conclusion

European competition law has its own response to bottleneck control, technical and contractual lock-ins or the information problem. The set of tools that competition law provides can be roughly divided into ex ante merger control and ex post antitrust control.

The European Commission’s merger and concentration policy is one important instrument for shaping markets for access-controlled services and keeping them contestable. Over the course of time, the European Commission has gained valuable experience in handling mergers in the pay-TV sector and in influencing market structures, enabling it to prevent situations in which dominant parties can use their control over technical or content resources to impede market entry and competition. Arguably, merger control can be particularly helpful in the initial phase, meaning at a time in which powerful operators that are already established in older media

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629 European Council, Merger Regulation No. 4064/89, Article 21 (3). Wyatt/Dashwood 2000, p. 673. In some countries, however, the application of general competition law in order to also enforce information political interests might even conflict with the constitutional order, such as in Germany, where competition law falls under the authority of the Federal State, while broadcasting law is a matter of the Länder, KEK 2000, p. 50.

630 See also Larouche 2000, p. 339, with further references.
markets seek to position themselves in these new markets and ensure strong market footholds. On the other hand, and in particular in new markets, it can be difficult to predict the course developments will take.

The European Commission’s merger decisions in this area reach quite far and often even beyond existing sector-specific regulation to minimize anti-competitive influence and monopoly control over conditional access, the EPG and the API, or more generally, control over the consumer base. Within this context, it became clear that the finding of bottleneck situations depends on the economic and technical circumstances of a particular case, and that it is difficult to generalize. The power of the European Commission as a competition authority is not restricted to allowing or banning a certain proposal. In addition, it can influence the behaviour of the parties toward a proposed merger far beyond the point at which the merger is concluded by means of undertakings and conditions. Occasionally, the Commission seems to find it difficult to draw the line between its authority as a competition law authority and possible ambitions as a parallel regulatory authority. Having said that, the European Commission takes its decisions on a case-by-case basis, which is why they do not have a binding effect in other cases. Nevertheless, an analysis of the Commission’s decisions in this sector can provide insight into the dynamics of pay-TV markets and a level playing field for the development and testing of possible solutions to keep those markets competitive.

It is particularly interesting to note that the potential of mandated access, the traditional response to bottleneck problems, for example, in telecommunications law, is critically and realistically viewed by the European Commission. The sole existence of access obligations would not prevent parties from abusing dominant market power in one way or another. Eventually, alternative initiatives directed at stimulating competition and the emergence of inter-platform competition would be the more reliable and lasting safeguards for functioning competition. Within this context, interoperability solutions played a prominent role in the European Commission's pay-TV decisions as did the restrictive licensing practices of programme content and the freedom of consumers to switch between services. To this extent, the decisions are characterized by a certain bottom-up approach. They repeatedly illustrate that the existence of competition ultimately depends on whether consumers are not unnecessarily impeded in their choices between different services. The European Commission, accordingly, did not fail to address the freedom of consumers to choose between services, free from technical, contractual or other lock-ins.

The conclusions regarding the potential of antitrust law to ban ex post anti-competitive practices to monopolize the consumer base are mixed. One finding of Chapter 3 is that the potential of the Essential Facilities Doctrine, the classic competition law instrument used to address bottleneck situations, should not be overestimated. The conditional access system, the API, the EPG, a particular marketing platform or programme rights will probably qualify as ‘essential facilities’ only in very exceptional circumstances. Moreover, the potential of
general competition law to realize further-reaching public policy interests in the accessibility and availability of (selected) content is rather limited. Obliging an enterprise to share its resources with a competitor is a rather far-reaching interference with its economic freedoms. Mandated access should be reserved to cases in which access to a facility is absolutely indispensable for competitors to offer a service. The degree of market power of the controller of that facility, the existence of alternative solutions and the question whether mandated access is the optimal remedy are important aspects in this context.

At least as far as the economic aspects are concerned, the principle of non-discriminatory treatment may offer the greater practical value. Non-discrimination is also the keyword when assessing certain practices that seek to exclude consumers in one country from access to services that are offered in another country.

Contractual or technical lock-ins could fall under the prohibitions on anti-competitive tying. The finding of anti-competitive tying should depend, among others, on whether there is a distinct market for a service or product. No less difficult will be to identify when a practice is anti-competitive and when it is the result of sound economic thinking and innovation, and as such principally desirable and beneficial. Finally, the example of tying also demonstrated how difficult it can be to find effective remedies. Unbundling may only be the optimal remedy to some cases. In other cases, stimulating competition in the market for the tying product might be the preferable route to follow. A second, more theoretical consideration is to which extent ‘old’ measures can or should be applied to the ‘new economy’ where dominance sometimes seems to be almost the logical and inherent course of development as a result of network effects and first mover advantages.

More generally, the analysis has shown that some of the well-known drawbacks of general competition law also apply to in pay-TV sector. Examples are the uncertainties of market definition in a period of development, the formation of new markets and business models, or the difficulties of defining dominant market power and anti-competitive behaviour. In addition, the responsible authorities will face considerable information deficits, not only because of the lack of experience in and of information about new sectors, but also because of the difficulties in gathering the information necessary to define markets and judge individual market behaviour and its effect on competition. The lack of predictability and legal certainty can be a further reason why relying on general competition law might not be appropriate, especially not where freedoms or resources of fundamental importance are concerned, such as the protection of the freedom to property and the freedom of expression.

There is also a time factor. Lengthy proceedings can work in favour of the established party while artificially extending the critical period of market entry. This time aspect can make legal proceedings a virtual race against time. This is particularly true in markets such as those for access-controlled services and conditional access, where a lot has to do with being the first to establish a dominant standard. This is not least a consequence of network effects and lock-in effects that
give many modern information markets their own dynamics. The comment made by Tom Miller, the Attorney General from Iowa on the US Microsoft Judgement, pinpointed the issue: ‘Much of the Microsoft announcement deals with the browser—but the browser war is over. Microsoft has won’.  

By the time a court comes to assess anti-competitive behaviour, business, services and market places are likely to have changed dramatically.

In conclusion, competition law can provide useful tools to address some anti-competitive practices and strategies and to remedy occurrences of anti-competitive bottleneck control or the monopolization of the consumer base. Competition law also goes to some lengths to protect consumer interests. Due to its shortcomings in terms of predictability, scope and (sometimes) efficiency, however, it is not likely that general competition law will replace sector-specific regulation in pay-TV in the short or medium term. Still, general competition law is a fall-back option to address questions sector-specific regulation falls short of addressing in this sector.

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