# 10

# COMPETITION LAW AND TELECOMMUNICATIONS

*Vincent Smith and Lorna Woods*

10.1 Introduction: Applying Competition Law to Electronic Communications 533
10.2 Competition and Regulation 535
10.3 Restrictive Agreements in Electronic Communications 538
10.4 Abuse of Market Power in Electronic Communications 553
10.5 Competition Law and Electronic Content 566
10.6 Competition Law Control of Concentrations 574
10.7 Shaping the Market—Competition Market Investigations 582
10.8 UK Competition Law: Enforcement and Appeals in the Electronic Communications Sector 591
10.9 Conclusions 596

## 10.1 INTRODUCTION: APPLYING COMPETITION LAW TO ELECTRONIC COMMUNICATIONS

Telecommunications regulation was born from the need to police the removal of state-owned telecommunications monopolies in Europe from the 1980s onwards. Indeed, the telecommunications sector is not a market which has developed naturally. Instead it was a response to governmental choices, originally to create a state monopoly and, in the late twentieth century, to move to market provision, ultimately to be controlled by general competition law. This chapter introduces these competition rules and illustrates how they have been applied in the telecommunications context. Since competition law applies across all sectors, the law and practice developed in competition cases from other areas also plays an important role in deciding how competition law applies to telecommunications operators.

Vincent Smith and Lorna Woods, 10 Competition Law and Telecommunications In: Telecommunications Law and Regulation. Fifth Edition. Edited by: Ian Walden, Oxford University Press (2018). © The Contributors 2018 DOI: 10.1093/oso/9780198807414.003.0013

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

The move to a market driven approach has not been entirely successful, with former monopolists continuing to hold substantial market power in some markets, often reflecting how the market was originally formed (whether on the basis of substantial state intervention or not), as well as a trend towards horizontal consolidation. It is too simplistic, however, to suggest a one-way trend, as technological developments (eg development of mobile as a substitute for fixed line services), as well as policy changes (eg the removal of the prohibition on BT operating in the content market) provide opportunities for market entrants who then change the structure or nature of the market.

Whilst competition law may now be the preferred tool to control the behaviour of private actors acting, alone or in concert, to distort competition, regulation remains relevant and our discussion takes place against the background of the regulatory framework for electronic communications.

In contrast to previous editions, this chapter includes material on content provision and competition law. In a text dealing with telecommunications, this may, at first glance, need explanation. Convergence (according to which transmission technology is service neutral, allowing the same service to use different transmission technologies and the same transmission technology to distribute different types of service) may be seen to entrench the divide between transmission (telecommunications) and electronic content (including broadcasting and interactive services such as gaming). This divide, however, was never as clear as policy documents viewed it, and market changes have led to:

> a race towards building up gatekeeper positions at the different levels of trade, both platforms and content, with the danger of the monopolization of large parts of the sector.[1]

Content providers were always aware of the importance of having access to distribution systems: access determines the possibility of access to the audience. Content is similarly important for telecommunications companies. There has been significant vertical integration between content and transmission markets. To take one example,[2] in 2014 Liberty Global (a TV, broadband, and mobile service provider) acquired shares in production company All3media (the UK's largest independent producer), free-to-air broadcaster ITV, De Vijver Media (a Belgian production and free-to-air television company),[3] and Ziggo (a Dutch cable TV

[1] Ungerer, H, 'The Reasons for Intervention through Competition Policy' in Donders, K, Pauwels, C, and Loisen, J, (eds), *The Palgrave Handbook of European Media Policy* (Basingstoke: Palgrave Macmillan, 2014), 405.

[2] Other examples include Telefonica/DTS in Spain, and Vivendi/Telecom Italia.

[3] European Commission, Mergers: Commission clears Liberty Global's acquisition of controlling stake in De Vijver Media, subject to commitments, Press Release, 24 February 2015.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

operator),[4] the year after it acquired Virgin Media.[5] Content now is not just about television, but includes a range of services provided across the internet. The relationship between actors in each of these fields is becoming increasingly intertwined.

The chapter is structured as follows. After identifying the distinction between competition and regulation (Section 10.2), we begin with consideration of the prohibition on restrictive agreements and concerted practices in Article 101 TFEU (and s2 Competition Act 1998 in the UK) (Section 10.3) before considering Article 102 TFEU—unilateral abuse of market dominance (Section 10.4). As well as looking in more detail at how different competition law tools have been applied in telecommunications markets, we will consider how competition rules have been used to control anti-competitive outcomes in the interface between transmission and content provision. Particular competition issues may arise at the interface where regulated transmission services and the provision of ('unregulated') content meet, and these are discussed at Section 10.5. Our merger control section (Section 10.6) focuses on the EU and UK approach to international telecommunications mergers, to avoid infrastructure monopolies being created. We also briefly consider media plurality rules in merger control. Market investigations (Section 10.7), both at EU and UK level, have played an important role in UK telecommunications over the last decade. We conclude with a short section on enforcement and appeals in the 'concurrent' UK competition law enforcement architecture, which sits alongside the regulatory structure for electronic communications (Section 10.8). Although the role of the state has been important in shaping the telecommunications market, this chapter does not cover Article 106 TFEU nor the rules on State aid.[6]

## 10.2 COMPETITION AND REGULATION

Regulatory intervention in the telecommunications sector addresses the question: what do we want electronic communications markets to look like? By contrast, competition law—at least as far as it looks to sanction anti-competitive behaviour—asks the question: what should the market have looked like if the

[4] European Commission, Case COMP/M.7000, *Liberty Global/Ziggo*, OJ [2015] C 145/7; European Commission, Mergers: Commission clears acquisition of Dutch cable TV operator Ziggo by Liberty Global, subject to conditions, Press Release 10 October 2014. The Commission decision was the subject of successful appeal to the General Court for failure to state adequate reasons: Case T-394/15, *KPN v Commission*, judgment 26 October 2017, ECLI:EU:T:2017:756.

[5] European Commission, Case COMP/M.688, *Liberty Global/Virgin*; Mergers: Commission approves acquisition of UK cable operator Virgin Media by Liberty Global of the US, Press Release 15 April 2013.

[6] See further Chapter 4, at Section 4.4, and Chapter 8, at Section 8.5.7. See also Rose, V and Bailey, D, (eds), *Bellamy & Child, European Union Law of Competition* (7th edn, Oxford University Press, 2013), chapters 11 and 17.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

behaviour had not occurred? As a general rule, competition law analysis is retrospective, regulatory analysis is prospective. Competition law addresses business deals or practices which misuse (or threaten to allow the misuse of) market power to restrict or distort competition, ultimately harming consumers of services. The consumer harm can be felt through higher prices than necessary, or lower quality or choice of service—or often a combination of these.

There are four ways in which competition law looks to prevent (or at least minimize) distortion of competition:

- control of restrictive agreements, both between competitors ('horizontal' agreements) as well as between suppliers and resellers or licensors and licensees of services or intellectual property ('vertical' agreements);
- control of abuse of market dominance (by a company acting alone or jointly with others (oligopolies));
- merger control safeguarding the structure of the market; and
- investigations into anti-competitive market structures.

The two competition law controls which do not fit quite so neatly into a framework which sees competition law as a retrospective and behavioural matter—merger control and market investigations—have been used by both EU and UK authorities to prompt desired structure changes in electronic communications markets where regulatory and behavioural competition powers alone may not be sufficient. These structural controls have been particularly used to prevent the formation of 'converged' firms which would be able to leverage market power from content to transmission or vice versa (see Sections 10.5 and 10.6).

### 10.2.1 Competition law in a regulated sector

There is considerable potential for overlap between enforcing competition law in the electronic communications sector and the electronic communications regulatory framework. The two systems can apply in parallel and their rules run side by side. However, they serve different purposes and have different enforcement structures and outcomes.

Privatization and the forced break-up of network monopolies by divestment or opening of access to third party service providers—were (and largely remain) beyond the scope of the 'general' competition enforcement system. Market investigation and (to a lesser extent) merger control have assisted in shaping the market, but the majority of the 'architecture' of telecommunications markets is set using sector specific legislation.

What should happen if competition law and electronic communications regulation apply inconsistently in a particular case? The EU's electronic communications

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

legislation is expressly 'without prejudice' to the application of competition law in an individual case. Further, the Court of Justice of the EU (CJEU) has held that compliance with regulation does not release an operator from the duty to comply with competition law as far as it is able to do so within the regulatory structure.[7]

Competition law is, then, often said to take precedence over sector regulation—although in most cases this statement is too simplistic. It is probably better to view competition law as applying where electronic communications regulation does not directly mandate a particular outcome.

### 10.2.2 National communications regulators and competition law enforcement

Enforcement of competition law in the EU also differs from the way in which EU electronic communications regulation is enforced. National regulatory authorities (NRAs)—whether acting alone or in partnership (through BEREC and other bodies)—are the predominant enforcers of sector regulation. The European Commission sets and supervises the EU electronic communications framework but does not directly enforce electronic communications regulation against operators in Member States. In the UK, Ofcom is the enforcer of electronic communications regulation. In contrast, enforcement of competition law in EU Member States may be carried out by a number of different bodies.

The European Commission's competition Directorate General has its own investigatory and enforcement powers which can be directly used across the EU in any case where the suspected competition case may affect trade between Member States—or for mergers having a 'community dimension'[8]. National competition authorities (the Competition and Markets Authority (CMA) for the UK) may also enforce EU competition law (but not EU merger control) in their Member States. Alongside EU competition law, the CMA also enforces UK competition legislation—primarily contained in the Competition Act 1998 and the Enterprise Act 2002.

Ofcom also has the power to apply both EU and UK competition law—with the exception of merger control—to anti-competitive behaviour in the electronic communications sector. The intention behind this system—known as 'concurrency'—is to allow Ofcom to move away from sector regulation in a phased manner and apply the general competition law regime to the telecommunications industry as it becomes 'normally' competitive. The UK concurrency system therefore fulfils a

[7] Case C-280/08P, *Deutsche Telekom v Commission* [2010] ECR I-9555.

[8] Art 101(1) Treaty on the Functioning of the EU (TFEU); Regulation EC 1/2003 [2003] OJEU 1/1, Art 4; Regulation 139/2004 ('Merger Regulation') [2004] OJEU L24/1, Art 1.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

similar policy function to the EU system of periodic review of 'significant market power' (SMP) under the EU electronic communications Directives. The system aims to ensure that sector regulation is targeted where it is needed, leaving other business practices to be dealt with under general competition rules.

National courts are also important enforcers of both UK and EU competition law. Businesses and (more rarely) consumers are entitled to bring court claims for compensation for harm caused to them by competition law infringements and for court orders requiring anti-competitive behaviour to cease. The EU treaty articles containing the basic competition prohibitions are directly effective in the courts of EU Member States and compliance with the (identically worded) prohibitions in the UK Competition Act 1998 is a statutory duty—breach can give rise to a right of action for damages.[9] The European Commission has had a policy for some years of encouraging competition actions for compensation where EU competition law has been infringed and the level of competition litigation in the English courts has increased substantially in the last decade.

The UK has a specialist competition court—the Competition Appeal Tribunal (CAT). As well as hearing appeals against decisions of the CMA and Ofcom, the CAT has jurisdiction (since 2015) to hear damages claims based on competition infringements and to grant injunctions requiring businesses to cease breaching competition law.[10]

The CAT does not have exclusive jurisdiction over competition claims—the civil courts in the UK (in England, the High Court and the county court) retain jurisdiction—but there are significant advantages to proceeding in the CAT in a competition case. In particular, and unlike the general courts, the CAT is usually composed of a three-person expert panel at least one of whom will normally be an economist. For telecommunications cases, the CAT also has panel members who are specialist in the industry.

## 10.3 RESTRICTIVE AGREEMENTS IN ELECTRONIC COMMUNICATIONS

### 10.3.1 Overview

Competition infringements carried out by two or more businesses in collusion with each other are prohibited under both EU law (Article 101 TFEU) and UK statute (Competition Act 1998, s 2). The prohibitions are (deliberately) identically

[9] Competition Act 1998, s 47A.
[10] Consumer Rights Act 2015, Sch 8, amending the Competition Act 1998.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

worded. EU law will apply where the agreement or collusion may have an appreciable effect on trade between Member States.[11] Where there is no appreciable effect on inter-state trade, but trade within the UK is affected, the Competition Act 1998 will apply to any restrictions in the agreement.[12] UK authorities and courts are obliged to apply *EU* competition law if inter-state trade is appreciably affected[13]—we will look at how the EU and national competition law systems interact in Section 10.7.

Certain 'agreements' are prohibited. To be prohibited, the agreement

- must be between two or more undertakings;
- have as its object or effect;
- the prevention, restriction, or distortion of competition; and
- not satisfy the conditions for exemption.

The parties to the agreement can be fined—either by the European Commission or by the UK CMA. The restrictive parts of the agreement are void and unenforceable and damages may be awarded to those harmed by its effects.

'Agreement' extends to the much broader concept of 'concerted practice'. The agreement can be either express or implied by conduct and acceptance may be merely tacit.[14] What is important is a 'concurrence of wills' to pursue a common aim. Purely unilateral conduct cannot amount to an agreement—even if the conduct appears to follow a market norm.[15] 'Concerted practice' catches an arrangement which falls short of an 'agreement' as defined above, but which

> . . . knowingly substitutes practical co-operation between the undertakings for the risks of competition[16]

So a response to market conditions would not be an infringement, but collusion to influence future market conditions could be. There is a presumption that changes in markets in line with a (prior) agreement or concerted practice are caused by it.

Decisions of associations of undertakings (eg trade associations or standard setting bodies) are also within the scope of the prohibitions if they restrict competition between members or with non-members, for example by recommending prices.[17]

[11] Art 101 Treaty on the Functioning of the EU [2016] OJEU C202/47.

[12] Competition Act 1998, s 2(1)(a). [13] Regulation 1/2003, n 8, Art 3(1).

[14] C-2 and 3 /01P, *BAI and Commission v Bayer* [2004] ECR I-23.

[15] Case 107/82, *AEG Telefunken v Commission* [1983] ECR 3151; C-74/04P, *Commission v VW* [2006] ECR I-6585.

[16] Case 48/69, *ICI v Commission* (Dyestuffs) [1972] ECR 619, para 64.

[17] See *Bellamy & Child*, n 6, paras 2-081–2.084.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

'Agreements' between legal persons forming part of the same economic group (undertaking) will not be caught by competition law—they are considered to be part of the internal workings of a single undertaking.[18] Where, however, 'functional' separation of different parts of the same undertaking is required by an NRA to ensure competition in network markets, it is possible that the agreements between the parent and the functionally separated business could be subject to competition law scrutiny.

An 'undertaking' is any form of business—any 'entity' engaged in an 'economic activity'.[19] This can include companies (groups of companies under common control can be treated as a single undertaking)[20] and partnerships, as well as individuals carrying on business.[21] An economic activity is the offering of goods or services onto a market—it is not necessary that the activity is profit making.[22] But the offering must be on an economic basis, so some kinds of state activities fall wholly or partly outside the scope of the prohibition.[23] In modern electronic communications markets, all network operators will now be undertakings.

The 'object or effect' of the agreement must be to restrict competition. An agreement will have the 'object' of restricting competition if it would reduce the independent action of the parties on the market.[24] A cartel or other resale price fixing agreement is a clear example. The test is objective: it is not necessary to show that the parties actually intended to restrict competition in the particular case.[25] Nor does the anti-competitive object necessarily need to be the only reason for the agreement.[26] Many agreements having legitimate overall aims (eg network interconnection) can nevertheless be infringements if their terms are restrictive (eg they attempt to fix downstream pricing).

If an agreement is restrictive by object, there is no need to demonstrate an actual effect on competition. In all other cases, there must, with a reasonable degree of probability, be an appreciable effect either on actual or on potential competition arising from the agreement. The CJEU has insisted that there is, in each 'effect' case, some definition of the relevant market in which the effects are said to occur.[27]

[18] Case C73/95P, *Viho v Commission* [1996] ECR I-5457.
[19] Case C-41/90, *Hofner and Elser v Macrotron* [1991] ECR I-1979.
[20] *Viho*, n 18.
[21] Case C-309/99, *Wouters* [2002] ECR I-1577—individual members of the Dutch bar were undertakings.
[22] Case 209/78, *Van Landewyck v Commission* [1980] ECR 3125.
[23] *Bellamy & Child*, n 6, paras 2.014–2.016.
[24] Case 56/65, *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235.
[25] Joined cases 56 and 58/64, *Consten and Grundig v Commission* [1966] ECR 299, at 342.
[26] eg Case C-235/97P, *Montecatini v Commission* [1999] ECR I-935, at para 122.
[27] Case C-234/89, *Delimitis v Henninger Brau* [1991] ECR I-935, at paras 15–16.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

The European Commission has published guidelines describing how this exercise should be carried out.[28]

An agreement will have an anti-competitive effect in the market if it causes the pattern of competition to develop differently from undistorted competition in that market.[29] Where related parties enter into a network of similar agreements, the cumulative effect of the restrictions operated by the whole network will need to be considered together—even if a single one of the agreements alone would not have an appreciable market effect.[30]

'Exemption' from the prohibition, for restrictive agreements which nevertheless have countervailing economic benefits, is available (under TFEU, Article 101(3)) where the agreements:

- improve the production or distribution of goods or promote technical or economic progress; and
- allow consumers a fair share of those resulting benefits; and
- do not impose on the undertakings concerned restrictions on competition which are not indispensable to attaining those benefits; nor
- give the possibility of eliminating competition in respect of a substantial part of the products in question.

Exemption can be considered either on an individual basis[31]—after a careful examination of the relevant facts—or by bringing the agreement within the scope of a 'block exemption'. Block exemptions are made by European Commission Regulation and grant an 'automatic' exemption to certain categories of agreements provided they comply with the criteria in the exemption. Although there are no 'block' exemptions specifically for electronic communications markets, several of the more general 'sector neutral' exemption regulations will be relevant to electronic communications related markets. We consider these in more detail below.

Agreements in electronic communications markets will often give rise to economic 'efficiencies' of a kind within the scope of the exemption criteria. The use of non-economic criteria is much more problematic and generally these can only be taken into account in exceptional cases. So, the EU General Court has held that certain restrictions in the statutes of the European Broadcasting Union could not

[28] Commission Notice on the definition of the relevant market, 9 December 1997 [1997] OJEU C 372/5. We consider this in more detail in the discussion of Article 102 (abuse of dominance) at Section 10.4 below.

[29] *Société Technique Minière,* n 24.

[30] *Delimitis*, n 27.

[31] The Commission has produced guidance on how the exemption will be applied in practice: Commission Guidelines on the application of Article 81(3) [now Article 101(3) TFEU], 27 April 2004, [2004] OJEU C101/97.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

be justified solely on the basis of the EBU members' public service broadcasting mission to provide cultural, scientific, and minority programmes.[32]

The term 'consumers' has been widely cast to include all users of the products in question.[33] In general, where the restrictive effect on competition is not large, and the parties to the agreement or their distributors do not have a high degree of market power, there will be an assumption that customers and consumers will ultimately benefit from the efficiency gains.

Restrictions will normally only be considered 'indispensable' where, in the absence of the restriction, the efficiency gain would not occur. If there are feasible alternative arrangements which are less restrictive, the agreement will not benefit from exemption.[34] This requirement applies not only to the strength of the impact on competition but also on its duration.[35] For example, a non-competition covenant between the parents and a new joint venture may be indispensable for the period they each remain shareholders, but not indefinitely.[36] Similarly, if the parents' covenants extend to products which the joint venture is not producing, it is unlikely that the restrictions they accept will be considered indispensable.[37]

Finally, competition should not be 'eliminated' for a substantial part of the market for products supplied under the agreement.[38] This is only likely to be an issue where the market power of the parties to the agreement (their market shares are usually a good indicator) are high. Competition must be eliminated in a substantial part of the market: it is not enough for an isolated third party to complain that he cannot get supply.[39] Even where the parties have market power, if there is the potential for competition from third parties, for example in markets where technological change can 'tip' the competitive balance fairly rapidly, a finding of 'elimination' of competition may be unlikely.[40]

In the remainder of this section we look at how the framework we have just described applies to some common agreements in electronic communications markets.

[32] Case T-528/93, *Metropole Television v Commission* [1996] ECR II-649, paras 116–123. The General Court (formerly the Court of First Instance) is the first-tier court hearing appeals against European Commission competition decisions.

[33] Exemption Guidelines, n 31, para 84. [34] Ibid, para 75. [35] Ibid, para 81.

[36] eg Commission decision M.852 *BASF/Shell*, para 49—a two-year post term restrictive covenant was not justified.

[37] eg Commission decision COMP/39736, *Areva/Siemens*, 18 June 2012: commitments accepted permitting a non-compete clause with a joint venture on condition that it applied only to specified core products made by the joint venture.

[38] Exemption Guidelines, n 31, paras 105–115. [39] Case C-75/84, *Metro II* [1986] ECR 3201, para 64.

[40] See the analysis in the Exemption Notice, n 31, paras 114–115.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

### 10.3.2 Network interconnection agreements

The competition law prohibitions apply fully to network interconnection agreements. However, where a network owner refuses to allow access to the network (or does so only on unreasonable terms) the prohibition on abuse of a position of market dominance (discussed in Section 10.4) will normally be applied instead of the prohibition on restrictive agreements. In general, access agreements, which open networks to use by third parties and so to providing competing services to users, are pro-competitive. But network access and interconnection agreements can also have terms which infringe the prohibition on restrictive agreements.

Most terms in access agreements will be reviewed not by competition authorities but by telecoms NRAs under the Access Directive. In the UK, Ofcom has the power to apply both EU and UK *competition* law in the electronic communications sector.[41] However, it must act within the framework of EU law—both sector regulation and competition law. The Commission's SMP guidelines have some advice as to how best to do this.[42] The 1998 Commission Notice on the application of competition rules to access agreements in the telecommunications sector—although adopted before both the current EU electronic communications Directives and the 'modernized' EU competition procedure in force from 2004—also still has useful pointers on how the competition rules apply to access and interconnection.[43]

So:

- sector regulation and competition law should be applied consistently with each other, but they pursue different aims. Mainstream competition law looks at what has happened, whereas regulation looks towards shaping what might happen in the future;[44]
- EU competition laws apply 'in the normal way' to access agreements which have been approved or authorized by NRAs or to terms which have been approved after inclusion by agreement between the parties.[45] In *Deutsche Telekom* (an abuse of dominance case, see below Section 10.4.3) the CJEU confirmed that the fact that a general 'wholesale' interconnection tariff had been approved by the German NRA did not absolve DT from complying with competition rules to avoid a 'margin squeeze' on competing downstream operators;[46]
- non-exclusive access agreements are 'in principle' unlikely to be restrictive provided that there are proper safeguards (as also required under the EU regulatory

[41] Competition Act 1998, s 54(1)(a) and Sch 10.

[42] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 11 July 2002 [2002] OJEU C165/6 ('SMP guidelines'), paras 22–32.

[43] 'Access guidelines', 22 August 1998, [1998] OJEU C265/02.

[44] SMP guidelines, n 42, para 22.

[45] Access guidelines, n 43, para 60.

[46] *Deutsche Telekom v Commission*, n 7.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

regime) to prevent the misuse of confidential commercial information (on pricing etc.)—supplied by downstream operators to the network owner—so as to prevent distortion of competition;[47]

- however, where the interconnection agreement has an anti-competitive object—for example, where the agreement allows both parties to share markets rather than engage in network competition—a full exemption analysis would be required.[48] But if, for example, network or infrastructure sharing is needed to bring new services to territories where neither party alone could build that infrastructure, it is likely that an exemption would be available—and in certain cases the agreement might not restrict competition at all;[49]
- access agreements which exclude third parties who may wish to use the network—through absolute exclusivity clauses, or through exclusionary pricing methods (eg discount structures)—will also need to be justified on the exemption grounds.[50] For example, in *CEPT*[51] the Commission found that a recommendation from CEPT (an international body for coordination of telecommunications services), that its members impose a 30 per cent surcharge on access charges for interconnecting traffic carried by international leased lines, was a restrictive decision of an association of undertakings likely to be prohibited under EU competition law.

As noted, there is no EU block exemption specifically for telecommunications access agreements—and the guidance in the 1998 Notice on access agreements is now partly out of date. However, and although not absolutely binding on competition authorities, it is likely that NRA regulatory practice in approving access and interconnection agreements will be followed by national competition authorities (NCAs) and the courts except in the most obvious cases of error.

In the UK, under the 'SMP' regulatory regime introduced to implement the EU communications package, Ofcom has progressively withdrawn from detailed regulation of interconnection, and now very few markets have operators in them which are subject to SMP regulation.[52] Non SMP network operators in the UK must comply with the relevant requirements of the General Conditions of Authorisation. The requirement in General Condition 1, to negotiate interconnection with other telecommunications operators within a reasonable time, does not impose any detailed regulatory requirements as to the content of the agreement.

[47] Access guidelines, n 43, paras 132 and 139.
[48] Ibid, paras 136 and 141.
[49] eg *O2 UK/T-Mobile UK (3G)* [2003] OJ L200/59.
[50] Access guidelines, n 43, paras 140 and 143.
[51] European Conference of Postal and Telecommunications Administrations: Commission Press Release IP/90/188 6 March 1990.
[52] See SMP guidelines, n 42.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

Most interconnection is carried out on the main operators' standard terms—for the UK fixed network this is likely to be BT's standard interconnection agreement. Disputes over network access under these agreements, which are often resolved under Ofcom's regulatory powers, may nonetheless include competition related issues.[53] Since Ofcom is required to act consistently with competition law principles when resolving the dispute under its regulatory powers, and since any appeal against its regulatory decisions is made to the UK CAT—the specialist competition tribunal in the UK—in practice the choice of powers by Ofcom (or the complainant) makes little substantive difference to the underlying analysis used. Competition concerns should be adequately addressed in Ofcom's interconnection decision. And a material part of the CAT's caseload is composed of cases in electronic communications appeals—on both competition and regulatory grounds.[54]

### 10.3.3 Infrastructure sharing agreements

From a competition law perspective, infrastructure sharing agreements—for example for mobile communications masts—will be treated in a very similar way to interconnection agreements. Where infrastructure sharing is necessary to allow network operators to provide services to consumers who might not otherwise be reached, and the agreement does not contain restrictive terms which are outside the scope of the network sharing required to do this, it is unlikely to infringe the restrictive agreements prohibition.[55] In contrast, infrastructure sharing agreements between existing competitors, which could effectively lead to one of them withdrawing from a network market, may be prohibited.[56] In some circumstances complex infrastructure sharing arrangements may be treated as 'concentrative' joint ventures and examined under EU merger control (see Section 10.6.2).

NRAs have the power to require network infrastructure sharing in certain circumstances.[57] Where this requirement is imposed, operators should nevertheless ensure that any terms included in the agreement which go beyond what is mandated by the NRA comply with the competition rules.

### 10.3.4 Roaming and similar agreements

Roaming agreements allow customers of one network operator to use the network of another where their 'home' network does not have (full) coverage (eg in

[53] eg the dispute on BT's SIA on charge change terms: CW/01083/01/12.
[54] Of the 23 open cases at the CAT as of 15 August 2017, four were related to electronic communications.
[55] Commission Decision, *O2 UK/T-Mobile UK* (UK Network sharing) [2003] OJEU L200/59.
[56] See eg *T-Mobile Deutschland* (network sharing Germany) [2004] OJEU L75/32.
[57] Framework Directive [2002] OJEU L108/33 Art 12; and Access Directive, [2002] OJEU L108/7, Art 5.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

another country). In a similar way, a mobile service provider (MVNO)—such as Virgin Mobile in the UK—will use a network owned by another operator under a 'virtual network' arrangement. B2B roaming and similar agreements are thus likely to raise comparable competition issues to network interconnection agreements and have been the subject of a number of European Commission competition decisions—notably in the roll-out of 3G mobile networks.

Mobile roaming agreements to allow end users to use their mobile phones in other EU countries are common, and a simple non-exclusive roaming agreement between network operators with no geographic overlap would not infringe the 'restrictive agreements' competition prohibition.[58] The EU 'roaming' Regulation also sets out detailed conditions for mobile roaming provided to consumers across the EU[59] (see Chapter 8).

In the *UK 3G network sharing case*,[60] O2 and T-Mobile UK, two of the four '2G' mobile network operators (MNO) agreed to share each other's networks (in both the UK and Germany). However, both parties retained control of the terms on which they offered their services to downstream customers and the amount of infrastructure sharing was not so great that either of them became completely dependent on the other. After some minor amendments by the parties, the European Commission concluded that the arrangement—designed to accelerate the spread of superior 3G services to both parties' customers—did not infringe the Article 101 prohibition.

In the parallel *German 3G case*[61] on similar facts, however, the Commission took the opposite view. It cleared the physical infrastructure sharing aspects of the arrangement. But it found that, in the circumstances of the German market, the degree of reciprocal roaming provided for each party over the other's network—which had been declared compatible with regulatory requirements by the German NRA—directly limited both networks' ability to compete with each other and also had downstream effects, as the parties were each dependent on the other for the quality of services they would provide. Resale of roaming capacity to third party MVNOs was also partly restricted. Nevertheless, the Commission found that the agreement—which enabled O2 to roll out 3G services in Germany faster than otherwise—was capable of exemption, but only for a limited period of five years.

However, the General Court partly annulled the Commission decision.[62] It found that the Commission had improperly assumed that reciprocal roaming

[58] eg case T-328/03, *O2 Germany v Commission* [2006] ECR II-1231, at para 109.

[59] Council Regulation 531/2012, 13 June 20102, roaming on public mobile communications networks, [2012] OJEU L172/10; Commission Regulation implementing Regulation 531/2012, 14 December 2012, [2012] OJEU L347/1.

[60] n 55. [61] n 56. [62] *O2 Germany* (n 58).

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

agreements restricted competition without considering how competition might have developed in the absence of the agreements.[63] This is particularly necessary in fast-moving markets.[64] Since the Commission had not shown that the agreement could in fact restrict competition against this 'counterfactual', the exemption decision was not well grounded.

It appears from these two cases that EU competition law takes a relatively favourable attitude towards roaming agreements. However, it would be unwise to assume that an agreement which—for example—had the effect of excluding third party operators from using a network, would not need to be examined for competition compliance before it is concluded, particularly in markets (such as mobile voice telephony) which have now matured substantially since these Commission decisions were made.

### 10.3.5 Intellectual property licensing in communications industries

Intellectual property (IP) licences may be required in a wide variety of situations in electronic communications—for example, in agreements for manufacturing smartphones, for using interface protocols with devices or networks, and for the use of content.

Licensing of IP rights normally increases competition as it permits a wider application of technical innovation. A simple (non-exclusive) IP licence will therefore not normally infringe competition law. Even where a licence is granted exclusively—for example for a particular territory or for a certain field of use—it may not fall within the competition prohibition. Again, the question to be addressed is what the position would have been if the licence on those terms had not been granted. If a manufacturing licensee will only take on the risk of a new product under an exclusive licence, then the exclusivity will not restrict competition.[65] Without the exclusivity protection there would be no competition to restrict.

Many interface protocols and other IP used in electronic communications are developed or adopted as standards by relevant international standard setting bodies—in particular ETSI, for EU services. The agreement under which the standard setting body operates to set standards may be capable of restricting competition. Where a standard is adopted which includes information in which there are IP rights, the right owner may be in a position to restrict or prevent others using the standard unless they are able to obtain a licence from him on reasonable terms. The circumstances when this might be a competition law infringement are considered at Section 10.3.6 below.

[63] Ibid, paras 68–69, 109. [64] Ibid, para 72.

[65] Case 258/78, *Nungesser and Eisele v Commission* [1982] ECR 2015.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

Even if a licence could fall within the 'restrictive agreements' prohibition, there are two relevant EU 'block' exemptions—for 'technology transfer' licences[66] and for 'vertical' agreements[67] (which can apply—in particular—to software copyright licences).

The 'technology transfer' block exemption, and Commission guidelines accompanying it, apply to IP licences whose primary purpose is for the licensee to 'produce' a product (including services).[68] IP here also includes recorded confidential technical 'know-how', provided the know-how is substantially valuable in producing the services licensed.[69] In contrast, straightforward licences for the resale of a service—already produced including the rights—fall within the 'vertical' exemption.

Drawing a bright line between these two scenarios in many electronic communications agreements is not straightforward. An agreement where an originating company licences a manufacturer to produce mobile devices for sale to consumers involves 'technology transfer'. An agreement between the same originating company and a retail chain allowing the retailer to sell the same devices under the originator's trademark would be a 'vertical' agreement. But the electronic communications sector has a large number of licences in the 'grey' area between the two exemption regulations. For example, a licence of IP (eg brand rights) for an MVNO to run a new service over a mobile network could be seen as ancillary to the resale of capacity on the network owner's system (a 'vertical' agreement). Or, it could be characterized as necessary to allow the MVNO to produce (new) services for consumers incorporating the software, know-how, branding etc. needed to supply the innovative service (likely to be a 'technology transfer'). In these borderline cases, much will depend on a closer analysis of the agreement, the importance and type of IP included, and other surrounding circumstances.

Both block exemptions only apply to agreements where the parties have a moderate share of relevant product and territorial markets. For the vertical agreements block exemption and those technology transfer agreements where the parties are not already competitors, neither party should have a share of more than 30 per cent in any market.[70] For technology transfers where the parties are competitors, their combined share of any market should not exceed 20 per cent. Beyond these market share thresholds, an individual assessment of the technology licence against the competition rules will be required.

These market share requirements need to be read alongside the Commission's guidance on when agreements are presumed not to restrict competition

[66] Regulation 316/2014, [2014] OJEU L93/17 (technology transfer).
[67] Regulation 330/2010, [2010] OJEU L102/1 (vertical agreements). [68] Art 1(1)(c).
[69] Art 1(1)(i). [70] Regulation 316/2014, n 66, Art 3; Regulation 330/2010, n 67, Art 3.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

appreciably—also based on market share thresholds. Vertical agreements (between non-competitors) are presumed not to have an appreciable effect on competition where no party has a market share of 15 per cent or more: agreements between competitors will have an appreciable effect on competition where the combined market share of the parties reaches 10 per cent.[71] Neither of the exemptions nor the *de minimis* guidance apply, however, if the agreement fixes resale prices charged by any party or restricts output quantities or allows market sharing which would eliminate competition.[72]

A detailed commentary on the technology transfer exemption is outside the scope of this book,[73] but the following points may be of particular relevance to licences in electronic communications markets:

- as an exception to the 'market sharing' ban, licensees may—in most agreements falling within the scope of the Regulations—be prevented from actively promoting services in EU territories which are reserved to the licensor or licensed to other licensees.[74] But a total ban on sales outside their allocated territories in response to an unsolicited request from end-users is prohibited. This can be particularly difficult to apply in markets where electronic sales (eg over the internet) are important: Commission guidance gives some pointers to what is and is not allowed for controlling cross border internet sales;[75]
- licensing a technology for only one 'technical field of use' is permitted.[76] But the Commission is concerned to make sure that this is not used as a means of dividing up customers on territorial grounds. The technical field must be properly described in the agreement and must be based on objective factors unrelated to the nationality or residence of the final customer. Again the Commission guidelines give more detail;
- there should be no restrictions in the agreement on the use licensees may make of rights in their own inventions;[77]
- licensing (or, more correctly, charging royalties) on 'IP' which is not valid or not owned by the licensor is generally prohibited;[78]
- 'no challenge' clauses in IP licences may only bind the licensee not to challenge the validity of the IP during the term of the licence. It must always be open to the licensee to mount a challenge—otherwise dubious IP rights could be maintained

[71] Commission Notice on agreements of minor importance, [2014] OJEU C291/1. [72] Ibid, para 13.

[73] See eg *Bellamy & Child*, n 6, 736–750.

[74] Regulation 316/2014, n 66, Art 4(1)(c)(ii); Guidelines on the application of Article 101 to technology transfer agreements ('TT guidelines'), [2014] OJEU C89/3, paras 105–114.

[75] Commission guidelines on vertical restraints ('Vertical guidelines'), [2010] OJEU C130/1, paras 52–54.

[76] TT guidelines, n 74, paras 113–114, 208–215. [77] Ibid, para 115. [78] Ibid, paras 184–188.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

by contract through signing potential challengers as licensees—but the licensor is allowed to terminate the licence as soon as the challenge is made.[79]

If the main purpose of the licence is not the 'production' of services, so that the IP is a secondary part of a wider resale arrangement, the 'vertical' agreements exemption may be available. This is most likely to be the case for agreements relating to trademarks and some forms of copyright. This exemption only applies to agreements between non-competitors in the 'resale' market, and—as noted above—only where the reseller has less than a 30 per cent share of that market.

The prohibitions in the 'vertical' exemption Regulation on resale price maintenance and on absolute territorial protection for distributors—mirroring the technology transfer exemption—apply to products incorporating the IP used for marketing them.[80] Again the Commission has produced detailed guidelines on how the 'vertical' block exemption should be applied which also guides firms whose distribution arrangements may be a close, but not exact, match for the terms of the exemption.[81]

Although the main purpose of a vertical agreement is the distribution of products, the use of IP rights in connection with the distribution is also exempted on the same terms—for example, where a franchisee uses the trademarks of his supplier in a retail context.[82] The IP licence must be directly related to the resale of the goods or services—if it is not necessary for this purpose then it will not be automatically exempted and an individual assessment of competition compliance will be required.[83]

Licences of software—in Europe, protected by copyright—may pose particular competition compliance issues. If the software licence is a secondary aspect of an overall 'vertical' agreement or technology transfer licence, the relevant 'block exemption' will apply. However, 'pure' or self-standing software licences do not have their own competition block exemption and may not come within either the 'vertical' or 'technology transfer' block exemptions—the technology transfer block exemption focuses on licences of patents and know-how. Many software agreements may need individual assessment for compliance with the competition rules.[84]

EU legislation goes some way to harmonizing the scope of protection for IP in software so as to underpin competitive markets. In particular, the Directive on copyright protection for software—given on the same basis as a literary work—does not apply to the part of the program which interfaces with other programs

[79] Ibid, paras 133–134, 242–243. [80] Vertical guidelines, n 75, paras 31–38.
[81] Ibid, esp. at paras 60–64. [82] Ibid, paras 43–45. [83] Ibid, para 31(d).
[84] Commission Guidelines on technology transfer agreements, 28 March 2014 [2014] OJEU C89/3, paras 62–63. However, the Commission here appears to imply that most software licensing can fit within one of the two block exemptions.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

so as to operate properly with them.[85] These interface protocols must be freely available to third parties who wish to develop compatible (but not copy) programs and a licence agreement which attempted to prevent this would infringe EU software copyright law.[86] Competition law principles would also apply to strike down a term of the licence which attempted to restrict interoperability with competing programs, as seeking to eliminate competition. In practice, these issues are most likely to arise where the licensor is in a position of market dominance—the leading case is *Microsoft*, discussed in Section 10.4.3.

### 10.3.6 Standard setting agreements

Standards for communications networks and related services are often set by groups of operators—sometimes including actual competitors in markets related to those where the standards will be used. But—particularly in telecommunications—standards are vital for networks to function at all, and cooperation to improve standards is necessary to ensure improved services to customers. Without standards, networks could not work.

How then does competition law seek to draw the line between what could easily be characterized as a cartel on the one hand, and what is a vital industry function on the other?

Firstly—and rather obviously—compliance with standards mandated by national or EU legislation is not a breach of EU competition law.[87] A distinction needs to be made between the mandatory standards and state recommended standards (where competition compliance may still be an issue).

Where standards are set by a standards body made up of industry participants, the association's decision to adopt a standard may need to comply with EU competition principles. However, far from all standards body recommendations restrict competition—these are not competition infringements 'by object' (see Section 10.3.1)—so, an actual or potential effect on competition arising from the decision of the standards body will need to be shown.[88] Commission guidance[89] indicates that the 'restrictive agreements' prohibition will not be relevant where:

- there are no restrictions on who may take part (in some capacity) in the standard setting process;

[85] Directive 2009/24 legal protection of computer programs, [2009] OJEU L111/16, Art 1(1).
[86] Ibid, Art 6(1).
[87] On the competition law consequences of State compulsion, see *Bellamy & Child*, n 6, paras 11.004–11.008.
[88] Ibid, paras 6.084–6.086.
[89] Commission guidelines on horizontal co-operation agreements, [2011] OJEU C11/1, paras 280–283.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

- the standard setting process is transparent—so that anybody with an interest in the outcome may comment;
- there is no obligation (whether legal or in fact) to comply with the standard; and
- access to the standard is available to all on fair, reasonable, and non-discriminatory (FRAND) terms.

Where a standards body's procedures do not meet these criteria, exemption may nevertheless be available. However, where the standard can in fact only be used by a closed group of major industry operators, or where alternative standards cannot be developed (ie there is a degree of exclusivity in the standards process), exemption is not likely. This is particularly true if a standard is adopted in these circumstances which becomes the 'norm', so that effective market entry cannot take place without it. FRAND access to standards is an important principle of competition compliance.[90]

This insistence on the FRAND requirement causes particular issues where IP rights (often patents) overlap with the specification of a standard. This can mean that the standard cannot (continue to) be used by third parties unless royalties are paid to the IP owner. If the existence of the IP right is not known to the standard setting body at the time the standard is made, and only becomes apparent after the standard has been widely adopted, the assertion by the IP owner of his right can seriously impede competition in the (new) market(s) which depend on the use of the standard.

The Commission has insisted in the past that standard setting bodies take steps to reduce this risk of 'patent ambush'. ETSI agreed to amend its procedures to strengthen the requirement on ETSI members to disclose as early as possible any IP rights which might read onto a telecommunications standard being considered by ETSI. This could then mean, in particular, that ETSI could decide whether to adapt the proposed standard to avoid the infringement or to negotiate FRAND royalty terms in advance of adoption with the right holder(s).[91] Although the position of the Commission would appear to cover all kinds of standard setting procedures, it is worth noting that ETSI is designated as the institute responsible for telecommunications standards harmonization in the EU, which perhaps explains the Commission's particular concern that it should take steps to avoid 'patent ambushes'.[92]

Where a standard is adopted which incorporates one or more IP rights and use of the standard then becomes essential for competitors on one or more downstream markets, the Commission has taken the view that the owner of such 'standard

[90] *Bellamy & Child*, n 6, para 6.087. [91] Commission Press Release IP/05/1565.
[92] Directive 2002/21 Electronic Communications Framework Directive, n 57, Art 17(1).

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

essential patents' (SEPs) automatically has a dominant position on the downstream markets in question.[93] We will consider the Commission's mobile telecommunications abuse of dominance cases against Samsung and Motorola, brought on the basis of their IP position in a standard mobile network protocol technology, in the next section.

## 10.4 ABUSE OF MARKET POWER IN ELECTRONIC COMMUNICATIONS

An agreement or concerted practice is not the only means through which competition may be restricted and competition law infringed. Unilateral behaviour can also restrict competition—either by excluding competitors from the market[94] or by exploiting market power to raise prices or reduce service levels to customers.[95]

This kind of behaviour by one operator is only likely to be successful in restricting competition where the undertaking carrying it out has a significant degree of market power. This is essentially why the EU's e-communications regulatory regime—in large part—now only applies to operators having 'significant market power' (SMP). EU competition law similarly only prohibits unilateral behaviour where it is carried on by a dominant undertaking in a market.[96]

Although there is a great deal of similarity between the two concepts of SMP for regulatory purposes and for competition law dominance—the wording in the Framework Directive adopts the language of Article 102[97]—they may be applied differently. Telecommunications regulation seeks to prevent the most serious restrictions in electronic communications markets before they happen, whereas the prohibition on abuse of dominance only applies (at the earliest) where an individual undertaking behaves in a way which may fairly imminently restrict competition.[98] We will consider the enforcement issues this creates below.

The prohibition in Article 102 TFEU on abuse of dominance requires a three-step analysis:

- what is the relevant market?
- is the undertaking dominant in that market?
- has it behaved to abuse that dominance in the market or a neighbouring one?

[93] Commission Communication, Setting out the EU approach to Standard Essential Patents, COM(2017) 712 final, 29 November 2017.

[94] Art 102 TFEU, paras (c) and (d) in particular. [95] Ibid, para (a). [96] Ibid, first para.

[97] Framework Directive, n 57, Art 14(2)—'... if ... it [the operator] enjoys a position equivalent to dominance ...'

[98] See, eg, case C-280/08P *Deutsche Telekom* [2010] ECR I-9555; case C-52/09 *Telia Sonera Sverige* [2011] ECR I-527; see also *Bellamy & Child*, n 6, at 10.059.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

Just as possessing SMP is not unlawful, simply being dominant does not infringe competition law: for infringement of the prohibition, the dominant undertaking must abuse that dominance.[99] We will look later in this section at abusive practices which are particularly relevant in telecommunications but first we consider the definitions of the relevant market and of dominance (contrasting them with SMP).

The European Commission has issued two important Notices relevant to abuse of dominance: its Market Definition Notice[100] and the Notice on its Enforcement Priorities for Article 102 cases,[101] both of which give substantial guidance on how the Article 102 prohibition will apply in practice.

### 10.4.1 Defining the relevant market

A 'market' in the (economic) sense used in EU competition law has two main dimensions: the products or services in it and the territory over which it extends.[102] The market definition must capture all services which are regarded as substitutes by customers—either in terms of their product characteristics or of the area where they are available—and which therefore compete with one another for the same customer needs.

The Commission's market definition Notice covers market definition for abuse cases, merger control, and other competition law purposes in the same way.[103] Market definition for SMP in telecommunications markets is dealt with in a different set of Commission guidance[104] but essentially follows the same principles.

Commission practice uses the so-called 'hypothetical monopolist' (or SSNIP) test to define a market[105]—in common with most competition enforcement agencies worldwide. The analysis starts with the service under consideration (A) and the area in which it is sold (tA). The likely reaction of a customer for A in tA to a 'small but significant, non-transitory increase in price' (SSNIP) for service A is considered. If the customer would switch to service B or to buying service A from territory tB then B (or tB) are considered as part of the relevant market with A (or tA). The experiment is continued until the customer is found no longer to switch to alternative services or territories, at which point the limits of the relevant market are reached. The 'non-transitory' price increment used for this experiment is usually in the range 5–10 per cent.

It is also important to bear in mind the threat that potential competitors—particularly in neighbouring service markets—will also enter in response to a

[99] Case C-322/81, *Michelin v Commission* [1983] ECR 3461, para 57. [100] [1997] OJEU C372/5.
[101] [2009] OJEU C45/7. [102] Market Definition Notice, n 28, para 9. [103] Ibid, para 1.
[104] [2002] OJEU C165/6. The European Commission is currently (mid 2017) consulting on revising these guidelines.
[105] Market Definition Notice, n 28, para 11.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

sustained price increase, even where it is small. This is likely to be a particular feature of telecommunications markets where innovation by competitors regularly changes the type, price, or quality of services available to consumers, as can be seen in the entry of mobile data services (discussed in Section 10.4.2). Potential market entry ('supply-side substitution') will tend to reduce the market power of incumbents. But the possibility of potential (future) competition is not normally used as a factor in defining the relevant market.[106] Rather, it can be an important factor in assessing market power once the market has been defined.

This market definition process is the same as that used for identifying markets for sector regulation of telecommunications networks by national regulatory authorities.[107] However, because the purpose of the market definition analysis is different under the two regimes, any market definition for regulatory purposes is 'without prejudice' to a different view being taken in any individual competition case.[108] In addition, the Commission has recommended that certain markets be particularly carefully considered by NRAs.[109] NRAs are required to review at regular intervals which operators in their countries might possess SMP—at least in the markets identified by the Commission.[110]

### 10.4.2 Dominance

The definition of the relevant market sets the background for the next step in the analysis—whether the undertaking under investigation is dominant. A dominant position will exist where the undertaking has:

> ... a position of economic strength ... which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.[111]

As a proxy for this test, the (sustained) market share of the undertaking in the relevant market is often used. The CJEU has held that there is a presumption of dominance where the undertaking has a persistent market share of 50 per cent or more.[112] Persistent market shares of 40 per cent or above are generally taken as being a strong indicator of dominance.[113]

[106] Ibid, para 24. [107] SMP guidelines, n 42, paras 40–43.

[108] Framework Directive, n 57, Art 15(1); SMP guidelines, n 42, paras 26–27.

[109] Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector, OJ L 295/79, 11 October 2014.

[110] See Chapter 4, at Section 4.6. [111] *Michelin,* n 99, para 30.

[112] Case C-62/86, *AKZO v Commission* [1991] ECR I-3359, para 61.

[113] Although not conclusively; see Case 27/76, *United Brands v Commission* [1978] ECR 207, paras 108–112.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

If the market, defined using the SSNIP test, is a narrow one, it is quite likely that there will be high market shares. The question of supply substitution will then become very relevant—who else can enter the market in the short to medium term?

For telecommunications markets, where technology often rapidly changes the method of supplying a service to a market, a strong position in the market can be quickly eroded by such innovation. 'Voice-over internet' services have, for example, become substitutes—for many consumer services at least—to using fixed voice telephony infrastructure. Previous regulatory monopolies—reserving certain telecommunications services to state-controlled enterprises—have also now been removed as a consequence of national and EU regulation.[114]

Although only sustained high market power leads to a finding of dominance, there is no firm rule as to how long the allegedly dominant undertaking must have held that position. But, where a high market share has been held for less than about three years—even in the electronic communications sector, characterized by a high degree of dynamic innovation—that is unlikely alone to demonstrate dominance. In contrast, a high and stable market share sustained over a longer period (eg five years) would normally be sufficient to prove dominance.[115]

Market shares and other 'traditional' methods of measuring market power may be a poor method of assessing dominance in markets characterized by bidding for a limited number of large value contracts for inputs needed to supply downstream services.[116] This issue arises particularly in content markets where rights owners—for example to sporting events—regularly invite tenders for longer term licences of rights. We consider the particular issues raised by 'convergence' between telecommunications (transmission) markets and content provision in Section 10.5.

Some telecommunications markets show little prospect of competitive entry even after more than two decades of liberalization. A prominent example is in supplying fixed 'local loop' infrastructure connecting domestic premises to the core fixed communications network. The former incumbent telecommunications operators—who by and large own this infrastructure element—may not face any realistic short-term threat of competition in supplying local loops. The cost of installing a parallel fixed loop from the local exchange to a consumer's home is high and unlikely to be recouped in the short to medium term from the revenues for services using it. For this reason there was a concerted effort in the 2000s

[114] See Chapter 4, at Section 4.4.

[115] See discussion in *Bellamy & Child*, n 6, para 10.026.

[116] Ibid, para 10.027.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

to open up this market by allowing competing operators to connect to the consumer at the exchange and then use the incumbent's local loop for the 'last mile' of infrastructure—a process called 'local loop unbundling' (LLU). Although some LLU abuse of dominance cases were brought against incumbents,[117] the issue was finally addressed by regulatory means, through the EU LLU Regulation.[118]

Even in cases of dominance apparently as clear cut as this, technical change may mean that a former monopoly becomes redundant over time. For local loops, mobile voice calls have largely replaced fixed voice calls as the main way of having a conversation—bypassing the fixed local loop. So the dominant position in local loops should no longer be determinative for findings of abuse in downstream voice communications markets. Local loops are, however, still the most important way of transmitting data to and from homes: so the local loop 'bottleneck' (dominance) still affects downstream (fixed) *data* service providers.

Dominance also features as a concept in the telecommunications regulatory regime. SMP is defined[119] as a 'position equivalent to dominance' in any market, held by an operator either alone or jointly with others. But this does not in itself mean that an SMP designation (by a national regulatory authority) in respect of a market results in the undertaking holding a dominant position in that market when the competition rules are being applied to it—by a national *competition* authority (or the Commission)—in an individual case.[120] The competition enforcer must consider the question of dominance in each case before an infringement of Article 102 (or national equivalents) can be found.

### 10.4.3 Abuse of a dominant position

We have noted that holding a dominant position in a market is not contrary to competition law.[121] Dominance may arise through superior innovation—possibly turned into IP rights—which competition law and policy should encourage. Only if the undertaking holding the dominant position abuses it, does its commercial behaviour become unlawful.

There is no legislative definition of abuse, and the CJEU has held that the types of behaviour which may be an abuse can never be limited.[122] The best 'definition' available is that abusive behaviour is conduct which would not be possible in an effectively competitive market:[123] the dominant undertaking has a

[117] *Deutsche Telekom*, n 7.

[118] Originally provided in Regulation 2887/2000, [2000] OJEU L336/4, now replaced by Directive 2002/19 'Access' Directive, [2002] OJEU L108/7, Art 12(1)(a).

[119] Framework Directive, n 57, Art 14(2).

[120] SMP guidelines, n 42, para 30.

[121] *Michelin*, n 99.

[122] Case 85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, para 91.

[123] Ibid.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

'special responsibility' not to further impair effective competition in the relevant market.[124] This is not, however, helpful in practice since a market with a dominant undertaking in it will never be effectively competitive.

This section therefore considers three aspects of abuse in telecommunications markets. First we look at pricing abuses—both those which simply exploit customers (eg by overcharging) and those which attempt to exclude competitors. Secondly, we look at the related issue of how abuse of dominance and sector regulation of pricing interact. Finally we consider the issue of access to 'essential' infrastructure and when refusal to allow access may be an abuse of a dominant position.

#### 10.4.3.1 *Price abuses in telecommunications*

The distinction between exploitative pricing and exclusionary pricing noted in the previous paragraph may be more theoretical than practical. In practice, competition authority cases are largely aimed at exclusionary pricing practices, with simple exploitation infringements being rare. The main reason for this is that the test for exploitative pricing is a fairly high one. Pricing will only be an exploitative abuse—that is, unlawful in cases where there is no evidence that competitors will be excluded from a relevant market—if the price charged to customers bears no reasonable relationship to the dominant firm's costs.

For example, in *ITT Promedia*,[125] Belgacom unlawfully exploited its dominant position in the supply of telephone subscriber data in Belgium. ITT Promedia wished to provide a telephone directory in Belgium which competed with Belgacom's own (revamped) directory service. Belgacom was the only source of the raw data needed to compile a comprehensive directory. Instead of charging a (non-discriminatory) cost based amount for access to the subscriber data, Belgacom instead charged according to expected revenues from ITT's directory service. The Commission had no difficulty in finding this was an exploitative pricing abuse—the amounts payable for the data inputs bore no relationship to Belgacom's cost of providing them.[126]

Pricing to exclude competitors can be done in one of two ways. A dominant firm can price below its own costs for a while—long enough to drive out a competitor—and then raise prices to customers to recoup the lost revenues (price predation). Or, where the dominant firm supplies an input to a downstream customer and also competes in the same downstream market—a common situation in telecommunication services markets—it can favour its own downstream business by charging

[124] Case C-202/07P, *France Télécom v Commission* [2009] ECR I-2369, para 105.

[125] Case T-111/96, *ITT Promedia* [1998] ECR II-2937, esp at para 26.

[126] Commission Press Release, 11 April 1997, IP/97/292.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

an input price to the competitor which (implicitly) advantages its own business by not allowing the competitor a reasonable margin on sales ('margin squeeze').

In *France Télécom/Wanadoo*,[127] the European Commission found that Wanadoo (a subsidiary of France Télécom—now Orange) had priced its ADSL services at below cost from 1999 to 2002. From 1999 to 2001, the Commission found that the service had been provided at below Wanadoo's variable cost of supplying the ADSL service. From 2001 to 2002, the price covered Wanadoo's variable costs, but not its total cost of supplying the ADSL service. On appeal—and relying on earlier case law[128]—the CJEU upheld the General Court decision,[129] which found that supplying a service below the variable cost of producing it—as Wanadoo had done in the earlier period—is automatically an abuse of dominance.[130] Where the price is above the variable cost but below the total (unit) cost, the price can be abusive if it is shown to be part of a plan to exclude competitors from the market (predation).

Controversially, the CJEU upheld previous case law that it is not necessary for the Commission to show a reasonable prospect that the dominant undertaking could recoup the losses incurred during the period of predation by increasing its prices afterwards.[131] EU case law is thus out of step both with US anti-trust case law (which has such a requirement) and with general economic thinking in this area. Also, the use of variable cost measures for the predation test may be difficult in telecommunications markets where the variable cost of producing many services is very low. For this reason, the use of 'long-run incremental cost' (LRIC) is preferred by NRAs for measuring unfair pricing[132] and should also be considered when applying competition law to allegations of abusive predation in the telecommunications sector.

In *Wanadoo*, the Commission found that, for the later period (2001–2002), Wanadoo had priced below average *total* cost—not including an appropriately allocated amount for fixed costs—as part of a strategy to exclude competing suppliers of ADSL services from the market. The CJEU confirmed that this was also an exclusionary abuse of dominance.

A margin squeeze will arise where a dominant firm 'leverages' its dominance into a neighbouring market—in contrast to predation, where the pricing practice relates to the market in which the undertaking is already dominant. For margin squeeze, where the difference in price charged for the input services and the (downstream) retail price for the consumer services supplied using the input are

[127] Commission Decision, Case COMP/38.233—*Wanadoo Interactive* [2005] 5 CMLR 5.
[128] Set out in *AKZO*, n 112.
[129] Case T-340/03, *France Télécom SA v Commission of the European Communities* [2007] ECR I-117.
[130] [2009] 4 CMLR 25. [131] Case C-202/07P, para 37.
[132] eg Ofcom, 'Consultation on LLU and wholesale line rental charge controls', 20 April 2013.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

either negative or not sufficient to cover the costs which the downstream competitor has to incur to provide a competing consumer service (its variable or LRIC costs for that service), an abuse will occur.[133] This may in particular happen where the undertaking which is dominant in the upstream market also competes in the downstream (consumer) market.

Clearly the issues around pricing abuses may be closely linked to the regulatory regime in place for price controls. As regulatory price control has been drawn back, use of competition law to prevent distortions of competition in telecommunications markets becomes more likely. The interplay between pricing abuses under competition law and regulation is well illustrated by the *Deutsche Telekom* margin squeeze case, which we consider in the next section.

#### 10.4.3.2 *Regulatory price controls and abuse of dominance*

The interplay between competition enforcement in a particular case and regulatory price controls is particularly well illustrated in *Deutsche Telekom*.[134] In May 2003 the Commission found that Deutsche Telekom (DT) was dominant in both the provision of wholesale local loop access and in the corresponding downstream markets for the provision of most retail telecommunications services to end customers.[135] DT therefore competed in the downstream retail markets with those operators who purchased DT's local loop services on wholesale terms to provide retail services to their own customers.

DT was charging new downstream market entrants higher prices for wholesale access to the local loop than the price DT was charging its own retail subscribers to be connected to DT's network. This resulted in DT's downstream (retail) competitors not being able to make a margin—they could not effectively compete with DT. DT was subsidizing its downstream retail activities through revenues made in the upstream (wholesale) market.

DT argued that its conduct was not an abuse contrary to Article 102 because its wholesale prices were subject to sectoral regulation by the German telecoms regulator, RegTP—the wholesale prices had been set by a decision of RegTP. The Commission disagreed and imposed a fine (albeit lenient) of €12.6 million. On appeal, the General Court upheld the Commission's decision that regulatory obligations are in addition to, not instead of, competition law obligations.[136]

DT further appealed to the CJEU: the Court rejected the appeal.[137] It found that DT had effective scope to change its retail prices for services over local loops. The

[133] *Telia Sonera Sverige*, n 98. [134] n 7.

[135] Commission Decision relating to a proceeding under Art 82 of the EC Treaty, case COMP/C-1/37.451, 37.578, 37.579—*Deutsche Telecom AG*, OJ L 263/9, 14 October 2003.

[136] Case T-27/03, *Deutsche Telekom AG v Commission* [2008] ECR-II 477. [137] n 7.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

fact that RegTP had set the wholesale price for unbundled local loops at or near DT's retail prices for telecommunications services did not relieve DT of the obligation to ensure that the margin between the wholesale price and its retail prices was sufficient to allow an equally efficient competitor to enter and remain in downstream retail markets. Although in practice this might mean that DT's retail prices to its own end consumers would increase in the short term, the CJEU decided that, in the longer term, consumers' interests were best protected by a competitive market for unbundled services provided by a number of retail suppliers.

#### 10.4.3.3 *Access to essential facilities: objective justification*

Pricing which exploits customers or excludes competitors is one of the main forms of abuse of a dominant position. However, non-price abuses cover various other types of behaviour usually also aimed at disadvantaging or excluding actual or potential competitors.

Where a dominant undertaking controls network elements necessary to supply downstream services, refusing access to them is capable of being an abuse of dominance.[138] Although most physical infrastructure 'bottlenecks' are dealt with by regulation, non-regulated services may be affected by refusals to supply access to content or IP rights.[139] However, often the services or rights, to which access is said to be required, are the result of substantial innovation by the (now dominant) undertaking which owns them. As one of the main aims of competition law is to support innovation, it follows that (even where innovation has conferred a dominant position) refusal to allow access to use the innovative product will not necessarily be an abuse of dominance. It is difficult to draw the line between ensuring enough access to allow others to innovate, while permitting existing innovators to earn the reward for their ingenuity through charging for use of IP—by licensing it, for example.

EU competition law has developed a number of techniques for carrying out this balancing exercise. The starting point is that an abuse of dominance is conduct which is not 'competition on the merits'—that is, it would not be possible in an effectively competitive market.[140] So, requiring a reasonable royalty for the use of IP, (usually) limiting the applications for which it may be used, and revoking licences where royalties are not paid or for other legitimate credit control reasons, are all outside the scope of the 'abuse'.

A second competition law technique—particularly where access to an IP right is in play—is to consider whether in fact the access is 'essential' to supplying

[138] Case C-7/97, *Bronner v Mediaprint* [1998] ECR I-7791.

[139] eg copyright in Case C-481/01, *IMS Health v Commission* [2004] ECR I-5039.

[140] *Hoffmann-La Roche*, n 122.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

the downstream service. Although the CJEU has insisted that there is only one standard for assessing dominance, in practice a type of 'super-dominance' has been developed.[141] Businesses which control an essential facility—and so can be said to be 'superdominant'—may be *required* to allow access to that facility under Article 102 TFEU under certain circumstances. If the access is not 'essential'—we will consider what this means in a moment—then a refusal to grant access can never be an abuse. Effectively this limited 'essential facilities' theory should stop market entrants taking a free ride on the innovative (but dominant) firm's IP rights simply to introduce 'me too' services.

The issue of 'essential facilities' can arise in a number of ways. Among the most common is the requirement for access to operating system software interfaces for potential entrants to make sure that their own new services can work together with the dominant firm's operating system—the issue in the leading case *Microsoft*, discussed below.[142]

As noted at 10.3.6, standards play an important role in telecommunications markets. As well as ensuring that the agreements forming the standard setting body do not infringe the Article 101 prohibition,[143] unilateral behaviour by members of the body may also be abusive contrary to Article 102. Where a standard setting body is creating a new standard, it may not be fully aware of all of the IP in the field—particularly if it is not put in the public domain. Thus the new standard may inadvertently require users of the standard to adopt infrastructure or use software which infringes the IP rights of the dominant undertaking—and they will have to pay a royalty for this (a 'patent ambush').[144] Access to such 'standard essential patents' (SEPs) may thus be required for a particular set of services: and refusal to allow access to them on FRAND terms may be an abuse.

The decisions of both the European Commission and the General Court in *Microsoft*[145] illustrate how the 'essential facilities' doctrine applies in innovative technology markets. Among other behaviour, Microsoft—which at the time had over a 90 per cent share of all installed PC operating system software (when PCs were the main method of accessing online information etc)—refused to allow access to the full set of interface information needed for rival programmers to create new products for use on PCs using Microsoft operating software.

The General Court upheld the Commission's infringement decision, finding that this was an abuse, and confirmed that—although refusal to license an IP right is not normally abusive for a dominant undertaking—unlawful abuse will nevertheless arise from a refusal to license if the following conditions are met:

[141] eg in *Bronner*, n 131.
[142] Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601.
[143] See Section 10.3.
[144] As in Commission decision COMP/386.36, *Rambus*, 9 December 2009.
[145] n 142; Commission decision of 24 March 2004 COMP/C3/37.792, [2007] OJEU L 32/23 (summary).

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

- the use of the right must be *indispensable* to market entry in the neighbouring (downstream) market;
- the refusal to license excludes *any* effective competition in the downstream market;
- the refusal prevents the emergence of a *new* product or service; and
- there is a clear consumer demand for that product or service.

Given Microsoft's market position in operating systems, and the fact that it was itself offering downstream competing programs and services, the Court had no difficulty in upholding the Commission's findings that these criteria had been met. The Court rejected Microsoft's argument that forcing it to license its IP—even in these limited circumstances—would effectively remove all value from its IP by allowing any entrant a 'free ride' on its rights.

The Court also noted that there was no need for the Commission to show that competitors had been already excluded from the market— *potential* exclusion of competitors wishing to supply a new product was sufficient.

Microsoft's market position at the time was unusual—but not unique in telecommunications markets—as its PC operating system was in effect the industry standard. A similar set of issues arises in the 'traditional' standard setting context if IP rights are indispensable for the use of a standard and (if the standard is widely used) 'essential' for potential competitors.

The *Rambus* case illustrates the way in which IP right owners can use the standard setting process to 'ambush' competitors and thus to charge abusively high (exclusionary) royalties on their SEPs.[146] The Commission reached a provisional finding that Rambus had intentionally concealed the existence of various patents or patent applications during the process for setting the standard for DRAM micro-processors. The case did not proceed to an infringement decision since Rambus gave binding legal commitments to the Commission to offer a bundled worldwide licence for each of its SEPs to potential users on FRAND terms and setting a maximum royalty rate for these licences.

### 10.4.4 Remedies for abuse of dominance

What are the consequences of abusing a dominant position? As with Article 101 TFEU infringements, the main outcome of infringement proceedings by the European Commission is a fine for the infringer. For example, in the 2009 Intel

[146] Case COMP/38.636, *Rambus*, 9 December 2009 discussed Schellingerhout, R and Cavicchi, P, 'Patent Ambush in Standard-setting: the Commission Accepts Commitments from Rambus to Lower Memory Chip Royalty Rates' (2010) 1 Competition Policy Newsletter 32.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

case, the Commission imposed a fine of €1 billion on Intel for abuse in the CPU market. It had used concealed payments to customers to exclude competitors.[147] The Commission will also normally require abusive conduct to cease if this has not already happened.

However, other remedies are also used—particularly in cases of non-pricing abuse. Remedies can be imposed both following an administrative competition investigation by the Commission (or a national competition authority) or by a national court in litigation of a competition dispute involving an abuse of dominance.

#### 10.4.4.1 *FRAND licensing of essential IP*

Both the European Commission and national courts have had difficulties with the setting of terms (including royalty rates) for licences which have been subject to a FRAND licensing remedy under the 'essential facilities' principle. The *Rambus* case concluded simply with a set of commitments offered by Rambus to cease its allegedly abusive licensing behaviour. In *Qualcomm*, the European Commission opened formal proceedings against Qualcomm after a number of complaints by device manufacturers that Qualcomm's licensing terms for SEPs it allegedly possessed in 3G mobile network standards were not on FRAND terms. After two years of investigation, the Commission similarly closed its case without a formal finding, on the basis that its resources were better used elsewhere and that the complaints had been withdrawn.[148] The Commission therefore reached no formal conclusion on the FRAND issues arising in either case.

In *Huawei v ZTE*,[149] the CJEU considered what is meant by FRAND. Huawei, the owner of SEPs which had been incorporated into the 2G and 3G ETSI mobile telecommunications standards, brought proceedings in the German courts. It claimed that ZTE should pay it royalties for use of the SEPs said to be infringed by ZTE's marketing in Germany of devices using the ETSI standards. Huawei had given ETSI an irrevocable undertaking to license the SEPs to all comers on FRAND terms.

The CJEU noted the high degree of protection given to intellectual property in EU law (including in the EU Charter of Fundamental Rights) and noted that the existence of the undertaking to license on FRAND terms could not remove those

[147] Commission Decision 13 May 2009, *Intel* [2009] OJEU C 227/13; Case T-286/09, *Intel Corp v Commission* [2014] 5 CMLR 9; Case C-413/14 P, [2017] 5 CMLR 18, which set aside the judgment in T-286/09 and remitted the case to the General Court.

[148] Commission Memo 09/516, 24 November 2009. However, Qualcomm was again notified in 2015 of a Commission investigation into its pricing practices for chipsets made using the SEPs—Commission Press Release, 8 December 2015, IP/15/6271.

[149] Case C-170-13, *Huawei Technologies v Commission* [2015] 5 CMLR 14.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

rights. However, it did impose certain obligations on Huawei in its negotiations of a reasonable royalty rate for its SEPs:

- to make a specific written offer to the applicant on request;
- to take account when doing so of the licensing terms it had already granted to other users of the SEP; and
- to accept independent determination of the FRAND terms if they cannot be agreed with the proposed licensee.

In practice, national courts may be better placed to apply these principles than a competition authority. They are often called on to resolve IP disputes, including as to royalty and other terms, and generally have greater expertise in doing so.

The CJEU *Huawei* principles were applied in the English courts in the parallel case of *Unwired Planet v Huawei*.[150] The Patent Court gave some guidance on how FRAND terms should be reached. It noted that the FRAND undertaking is an independent obligation to offer terms under French law (the governing law of ETSI) and does not depend solely on the possible existence of a competition law infringement. This obligation does not mean that the court can compel a contract on FRAND terms. If no agreement is reached, IP remedies are available: if the patent owner refuses to agree FRAND terms, the court should refuse to enforce his patent against the market entrant. If the entrant refuses to accept FRAND terms offered, and operates without a licence, then normal patent infringement remedies are available to the patent holder—assuming of course that the patent in question is in fact infringed by the new entrant.

As to the method of reaching FRAND terms, the court held that the starting point should be a licence which would be negotiated between a willing licensor and licensee in the absence of the FRAND undertaking. In order to reach that point, benchmarking against comparable licences or use of decisions of other courts in setting terms would be useful. In a later hearing, the court granted a final injunction requiring Huawei to enter a FRAND agreement, although the injunction could (unusually) be varied if circumstances changed significantly.[151]

#### 10.4.4.2 *Injunctions against infringers of IP rights*

The right of an IP owner to prevent unlawful use of his right is a fundamental part of the protection given to his innovation.[152] In principle it cannot be prevented by competition law. However, where the IP is an SEP, competition law may nevertheless restrain the IP owner from obtaining an injunction—at least for the time while *bona fide* FRAND negotiations are continuing.

[150] [2017] EWHC 711 (Pat), 5 April 2017.
[151] [2017] EWHC 1304 (Pat), 7 June 2017.
[152] *Huawei*, n 149.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

In *Motorola Mobility*,[153] the European Commission found that Motorola had abused its dominant position by seeking injunctions to enforce its SEPs in the ETSI GSM and GPRS standards. The injunction applications were made even though the users of the standard had indicated their willingness to take licences from Motorola on FRAND terms. However, since there was at that time no case practice of the Commission or the CJEU on this point, exceptionally no fine was imposed on Motorola in this case.

The (later) *Huawei* decision of the CJEU[154] did expressly address this question. In response to a question from the German referring court, the CJEU held

> … the proprietor of an SEP which considers that that SEP is the subject of an infringement cannot, without infringing Article 102 TFEU, bring an action for a prohibitory injunction or for the recall of products against the alleged infringer without notice or prior consultation with the alleged infringer, even if the SEP has already been used by the alleged infringer.[155]

This position appears sensible on its face. It may, nevertheless, put an SEP owner in a difficult position in deciding when the negotiations on FRAND terms for access to the 'standard essential' IP right have broken down, so that an application for an injunction by the right owner becomes permissible.

## 10.5 COMPETITION LAW AND ELECTRONIC CONTENT

### 10.5.1 Introduction

We have noted the impact of convergence in Section 10.1, which illustrates the difficulty of seeing telecommunications as entirely separate from content. Actors in one sector may affect the other sector. Bottlenecks may also occur where telecommunications providers offer content. Internet intermediaries may act as bottlenecks too; they are also now providing content, again blurring the boundaries between content provider and intermediary. The boundary between telecommunications operator and intermediary is also unclear: some social media platforms offer messaging services and 'voice chat' (eg Steam). As noted, there is considerable vertical integration. A consequent concern relates to triple play bundles—usually comprising fixed telephony, TV and (broadband) internet[156] which have

[153] Decision, 29 April 2014, press release IP/14/489, [2014] OJEU C344/6.
[154] n 149.
[155] Ibid, para 60.
[156] OECD, 'Broadband bundling: Trends and Policy Implications' Digital Economy Paper No. 175, (OECD Publishing: Paris, 2011), <http://dx.doi.org/10.1787/5kghtc8znnbx-en>, at 5.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

almost entirely replaced the retail offers for individual retail services in electronic communications—and now quad play (usually triple play plus mobile).[157]

### 10.5.2. Definition of markets

The definitions of telecommunications markets are assessed in the same way as they would be for any other sector.[158] The definition of media markets, however, gives rise to particular difficulties. First, media markets are seen as double-sided markets—customers generate revenue both through direct payment for the service provided, but also through being an audience for advertising. It has been suggested that the position is even more complex as regards internet-based services such as search tools and social media.[159] Secondly, some of the tools for defining individual markets, notably the SSNIP test,[160] do not work well in a market in which there is a mix of provision between public service providers and commercial operators, free-to-air, and subscription services. Thirdly, the idea of substitutability of service, which underpins the SSNIP test (Section 10.4.1), is difficult to apply in the context of very different genres of content.[161] Fourthly, in the context of social media platforms, not only are the services provided without financial payment at point of end-use, but a significant factor for would-be users in choosing a platform will be the question of who else has joined that platform—a form of network effect. Finally, both national intellectual property licensing and different content language versions may affect an assessment of geographic markets, in a way that might not arise in relation to telephony and other transmission services.

A discussion of content markets themselves lies outside this chapter.[162] Some content market definitions, however, are affected by the underlying transmission technology.[163] With rapid changes in services and technologies, the precise position as regards delivery mechanisms has not been fully settled. The earlier case law was not clear-cut, but the Commission accepted that the different broadcasting

[157] Generally see, OECD, 'Triple and quadruple-play bundles of services', 18 June 2015, <http://www.oecd-ilibrary.org/content/workingpaper/5js04dp2q1jc-en>.

[158] The SSNIP test is very similar to that used in relation to defining markets within the Telecommunications Framework—see Section 10.4.

[159] Torsten Körber, 'Common Errors Regarding Search Engine Regulation–and How to Avoid them', (2015) ECL Rev 239, 241.

[160] Commission, Notice on the definition of relevant market, n 28.

[161] Harrison, J, and Woods, L, *European Broadcasting Law and Policy* (Cambridge: Cambridge University Press, 2007), 147–151.

[162] See further Chapters 14 and 15.

[163] See eg Cases COMP/JV 37, *BSkyB/Kirch Pay TV*, decision of 21 March 2000, OJ C 110, 15 April 2000, at 45; IV/M.993, *Bertelsmann/Kirch/Première*, decision of 27 May 1998, OJ L 53, 27.2.1999, at 1; *COMP/M.2211 Universal Studio Networks/De Facto 829 (NTL) Studio Channel Ltd*, decision of 20 December 2000, OJ C 363, 19. December 2001, at 31; COMP/JV 57 TPS, decision of 30 April 2002, OJ C 137, 8 June 2001, at 23.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

platforms (or transmission technologies) were not interchangeable. There were significant switching costs between the different set-top boxes, for example.[164] These costs probably remain, at least in relation to some platforms—smart TVs, mobile devices, and IPTV notwithstanding. Internet and mobile content distribution were viewed as probably constituting separate markets.[165] Nonetheless, in a number of more recent cases, the Commission has taken the view that different delivery technologies do not create separate content markets[166] and that price and content quality are more important attributes.[167] However, delivery of some services may only be possible with certain transmission capabilities, or be especially suited to a particular technology: for example, mobile services will tend to favour 'clip' (highlights) services. Some services may be affected by the pricing models of the transmission systems (notably mobile devices with data caps). IP licensing practice now recognizes the difference between service delivery platforms, as the treatment of sports rights shows (see Section 10.5.3).

In addition to the distinction between the production of content and its aggregation into packages, the Commission has recognized that there are differences between certain types of content. Sporting events—which may be important in driving subscription to certain services—may constitute a very narrow market due to the high 'brand loyalty' of the dedicated fan (leading to tolerance of high prices) and the lack of substitutability of one team for another.[168] They are able to achieve high viewing figures and also reach an identifiable audience, which is especially targeted by certain advertisers, and are therefore generally viewed as being 'premium' content. Consequently, sports rights are able to act as a developer of a brand image of a channel,[169] or a type of service. Whilst perhaps less extreme than (football) sporting rights, other premium content (such as the first broadcast of Hollywood films) may be similarly broken down into separate markets.

With the development of technology influencing consumer preferences, the demand for and supply of services may mean market definitions also have to change. For example, the question yet to be addressed is whether triple or quad play packages should be treated as a distinct market or as bundles of the constituent services. Even in the relatively recent merger decisions of *Vodafone/Kabel Deutschland* and

[164] Commission Decision, Case IV/M.469, *MSG Media Service*, 94/922/EC OJ [1994] L364/1.

[165] Commission Decision COMP/M.2876, *Newscorp/Telepiu*.

[166] Commission Decision 18 July 2007 Case M.4504, *SFR/Télé 2 France*, para 46; Commission Decision 21 December 2010 Case M.5932, *News Corp/BSkyB*, paras 103–105; and Commission Decision 15 April 2013 Case M.6880, *Liberty Global/Virgin Media*, para 44.

[167] *Liberty Global/Virgin Media*, ibid, para 47.

[168] See eg Commission Decision COMP/M.4066, *CVC/SLEC* 20 March 2006.

[169] European Commission Case COMP/37.398, *UEFA Champions League*, Decision 2003/778/EC [2003] OJ L291/25; Canal+/RTL/GICD/JV.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

*Liberty Global/Ziggo*, the Commission left the question open. A similar reluctance to engage with this issue can be seen in the UK.[170] As noted at Section 10.4, the definition of a market may have significance for the issue of dominance (for Article 102 TFEU purposes, or even in the context of a merger).

### 10.5.3 Anticompetitive agreements and premium content

A significant example of possible anti-competitive practice can arise on the sale of the rights to broadcast certain sporting events. Demand for sporting events is such that the provision of this content can be used to drive up the subscription to other services, a fact recognized by large media conglomerates, as well as telecommunications operators moving into the content sector. Packages of rights to sporting events for distribution to viewers are offered by the relevant sporting bodies. The precise content of the package and its duration are designed to maximize revenues: ie to create a bidding war. The ability to compete in consumer markets will be determined by success in the relevant rights auction—and the ability to compete may affect the underpinning telecommunications service. Effectively this is a winner takes all situation (see Section 10.4.2).

The competition concern is clearly illustrated in the case of football rights. In the UK, Sky and BT fought over the Premier League rights in 2017. The result of this bidding war was that the price paid by bidders for the Premier League rights resulted in a significant increase on the equivalent price for the previous period. New opportunities for distribution arise with the development of new platforms, not just internet but mobile devices such as tablets and smart phones.[171] In view of the value of the rights and because of their relative scarcity and lack of substitutability,[172] access to premium content may become a bottleneck in which larger players with deeper pockets may have an advantage. This has led to enforcement action focussed on the joint selling of the broadcast rights by the relevant sports associations. The joint-selling arrangement brings the matter within Article 101 TFEU,[173] or the equivalent provision in the Competition Act.

[170] Anticipated acquisition by BSkyB Broadband Services Limited of Easynet group plc, decision 30 December 2005 (published on 13 January 2006); OFT, Anticipated Merger of NTL Incorporated and Telewest Global Inc, decision 30 December 2005 (published 10 January 2006), para 17. For an analysis on quad play, see CMA report on the proposed BT/EE merger, 15 January 2016.

[171] Inquiry into e-Commerce, at <http://ec.europa.eu/competition/antitrust/sector_inquiries.html>, para 17.

[172] See eg Commission Decision IV/36.888, *Football World Cup* [2000] OJ L5/55.

[173] European Commission, Guidelines on the effect on trade concept in Articles 81 and 82 of the Treaty, [2004] OJ C101/81, para 19; see also European Commission *ABC/Général des Eaux/Canal+/WHSmith* (Case IV/M.110) [1991] OJ C244 on the transnational nature of sports broadcasting.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

The current position[174] on whether joint selling arrangements are compatible with the Treaty is found in the *UEFA Champions League* decision.[175] The Commission found that the joint selling agreements formulated through UEFA resulted in there being no competition between the clubs as to the price and conditions on which the right to broadcast a European match was sold.[176] Significantly, the matches were sold in a single bundle on an exclusive basis to one broadcaster per Member State for a period of several years, which created risks of market foreclosure. Only bigger broadcasters were able to afford the rights, excluding competitors in neighbouring markets. Finally, a number of rights (notably IPTV and mobile rights) were not exploited by the deal. The Commission was thus concerned with both the upstream market for acquisition of rights, but also the impact in downstream markets with the exploitation of those rights.

Nonetheless, the Commission noted that joint selling could be acceptable in some circumstances. It accepted that a single point of sale of media rights was an efficient trading method and that joint selling could also be an efficient way to promote a brand such as the Champions League. Following the Commission's intervention, the broadcast rights were split into fourteen packages and the licensing agreements were limited to three years so that multiple broadcasters could, in theory, acquire the rights—although entities that could afford the packages would still be restricted to those with significant resources. The agreement was then exempted under Article 101(3) TFEU.

Despite experience from the football rights cases, long content licensing agreements continue to be common,[177] with even longer ongoing relations between the contractual partners, a fact which the Commission views as making it more difficult for new competitors to enter the market.[178] The payment structures used, especially in respect of premium content (advance payments, minimum guarantees and fixed fees per product irrespective of the number of users) also favour established players rather than market entrants.[179] These advantages are likely to continue as 5G mobile services are rolled out—on the back of sports' fans addiction to this content.[180]

[174] For earlier approaches see Commission Decision, Case IV/32.524, Screensport/EBU [1991] OJ L63; Commission Decision Case IV/32.150, EBU/Eurovision [1993] OJ L 179, overturned on appeal in Case T-528, 542-3 and 546/93, *Metropole television SA (M6) v Commission* [2002] ECR II-3805.

[175] European Commission Case COMP/37.398, *UEFA Champions League*, Decision 2003/778/EC, [2003] OJ L291/25.

[176] On the feasibility of clubs selling separately, see Toft, T, *Sport and Competition Law* (Comp/C.2/TT/hvds D(2005)), 5.

[177] *Film Distribution on Pay TV* (Case AT.40023, Cross border access to pay TV) (C(2016) 4740 final), 26 July 2016.

[178] Inquiry into e-Commerce, n 171, para 69.

[179] Ibid, paras 70–71.

[180] eg Intel's work on virtual reality to give a more 'immersive' experience.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

### 10.5.4 Abuse of a dominant position

There have been a number of cases concerning tying, which occurs where a seller links the provision of secondary goods or services to the acquisition of another product or service for which there is stronger demand (the 'tying product'). Tying is identified as problematic in Article 102 TFEU.[181] Although it may lead to lower production costs, where a supplier has a dominant position on the market for the tying product, it may cause harm by excluding competitors from a neighbouring market, contrary to the dominant undertaking's 'special responsibility'. Neither intent to harm nor actual harm is necessary to show abusive behaviour.[182]

Tying has been a recurrent problem in the technology sector where software is tied to a particular device. Currently, the Commission is investigating Google (and its parent company, Alphabet) in relation to Android, its mobile operating system. The question is whether Google abused its dominant position in the field of operating systems, applications and services for smart mobile devices by tying or bundling certain Google applications and services to the operating system. Notably, it is a condition of the Google Play Store app licence that Google Search and the Chrome mobile browser are pre-installed. Consequently, Google Search is set as the default, or exclusive, search service on most Android mobile devices sold in Europe, entrenching Google's dominant position in this market. The European Commission has put forward a case that competition harm is caused as these practices affect the ability of other mobile browsers to compete with Google Chrome—using the argument first set out in *Microsoft*.

*Microsoft* concerned the bundling of Microsoft's operating system (WO/S) with the Windows Media Player (WMP), a streaming media player. The Commission argued that even though WMP was supplied at no extra cost, other media player suppliers would be at a competitive disadvantage as linking WMP to WO/S made WMP ubiquitous and the maintenance of an effective competitive market would be put at risk due to the network effects arising from WMP's ubiquity. The Commission's approach was supported by the General Court.[183]

A second concern raised by the Commission in the Android investigation is that Google requires device manufacturers of mobile devices to sign an 'Anti-Fragmentation Agreement' prohibiting the sale of mobile devices running on 'Android forks' (ie an operating system based on open-source Android but different from the Google version). This prohibition hinders the development of operating systems based on the 'non-Google' versions of the Android open-source code and reduces the opportunities alternative operating systems would offer for the development

[181] Art 102(d) TFEU.
[182] Case C-95/04P, *British Airways* EU:C:2006:133, paras 70–71. See also Section 10.4.
[183] *Microsoft*, n 142.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

of new apps and services. Here, the underlying concern is the threat to innovation. The Commission reached a preliminary conclusion that Google abused its dominant position. This reflects its approach to tying and pre-installation in *Microsoft* where both the Commission and the Court noted the impact of the need to use WO/S standards on innovation and consumer choice.[184]

There are more subtle forms of exclusion, exemplified by the bundles offered to consumers: triple play and quad play. While such deals may benefit the consumer in the short-term, particularly through lower prices, there are concerns that the tendency to bundling favours the larger players—which can offer the range of services—rather than smaller operators and new entrants to the market. Within this sector, as with *Microsoft*, there is the question about how sophisticated we expect a consumer to be. Is it reasonable for consumers to be expected to know about and to access alternative products which compete with individual elements of the bundle?[185]

Refusal to supply (as opposed to conditional dealing or tying) is another concern arising from a vertically integrated market, especially where certain types of content have been seen as a significant factor in successful market entry, as noted in Section 10.5.3. Can the essential facilities doctrine (discussed in Section 10.4.3) apply here, either as regards a telecommunications operator's access to content or a content provider's right to a distribution network? As regards access to content, the resulting new 'product' (as required by the CJEU jurisprudence) need only be something that is not a duplicate.[186] As regards the requirement for customer demand, only potential consumer demand needs to be shown to satisfy the test.[187] The answer to both of these questions might depend on whether the Commission and the Court would look at the specific content (ie the match, film, or series) or rather the genre or type of content (romantic comedies, documentaries) to assess the question of duplication. It seems likely that the latter approach would be taken, meaning that a content offering with the same *type* of content would not be new. It is more likely that showing the content in a new way—for example a novel presentation of mobile clips of highlights of sporting matches—would be considered 'new'.[188] It seems hard to argue, however, that premium content is

[184] See generally, Ibáñez Colomo, P, 'Restrictions on Innovation in EU Competition Law', (2016) EL Rev 201. As at 1 January 2018, the Commission had yet to reach a final decision on these objections: see Case COM40099, *Google Android* at <ec.europa.eu/competition/antitrust/cases/index.html>.

[185] For discussion of consumers see eg Tušek, I, 'EU Competition Law Policy versus Intellectual Property Rights: A Study of the Microsoft Case', [2010] CYELP 103, 121.

[186] Case C-418/01, *IMS Health v NDC Health* [2004] ECR I-5039.

[187] Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* ('*Magill*') [1995] ECR I-743.

[188] *Magill* ibid—the listings were already available within newspapers—what was new was the weekly guide.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

'indispensible', as other (even if not quite as attractive[189]) content may be readily available.

As regards access to networks, in the *Bronner*[190] case—which concerned access to Mediaprint's newspaper home delivery network—the CJEU suggested that 'indispensability' addresses whether it is economically vital to create a different network to be able to compete at all. If so, the existing network will be essential. Given that Bronner could distribute via other mechanisms, such as kiosks and shops, even if at significantly greater cost, access to Mediaprint's network was not indispensable. In telecommunications markets, while some distribution channels may be preferred, it is not the case—especially with the availability of the internet—that they cannot be replaced.

Access to some networks—particularly the internet—may depend on dealing with an intermediary (a search engine or social media platform) rather than a network operator itself. Since 2010, the European Commission has expressed concerns about various aspects of Google's business practices in the field of providing internet search. The initial investigation raised a number of types of concern: in particular that on its web search results, Google displayed its own specialized search services more prominently than services of competitors offering comparable products. In 2015, the Commission sent a Statement of Objections to Google in respect of its comparison shopping service reflecting this issue, resulting in a fine being imposed in 2017.[191] The Commission's concern was that Google systematically favoured its own comparison shopping product (now 'Google Shopping') over others. The abusive behaviour was that Google leveraged its market dominance in general internet search into a separate market, that of comparison shopping.[192] By artificially diverting traffic from rival comparison shopping services, Google hindered the ability of those other services to compete to the detriment of consumers, because users were not necessarily seeing the most relevant results. The fact that Google was not competing on the merits of its service would stifle innovation. It seems that the Commission did not argue that competitors would be excluded from the market, which had typically been its previous concern. Rather,

[189] See *IMS Health*, n 186, para 28, though note that *Microsoft* accepts indispensability for competition *within* the market—see para 377 and note discussion by Ibáñez Colomo, n 184, at 213.

[190] *Bronner*, n 138.

[191] European Commission, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service—Factsheet (MEMO/17/1785), 27 June 2017, <http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm>.

[192] Contrast Vesterdorf, B, 'Theories of Self-Preferencing and Duty to Deal—Two Sides of the Same Coin?', (2015) 1(1) Competition Law & Policy Debate 4, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561355>; and Petit, N, 'Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf' (29 April 2015), <http://dx.doi.org/10.2139/ssrn.2592253>.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

the focus has shifted to a concern about the impact on innovation and the harm to competition as a consequence.[193]

This reasoning may be contrasted with the approach of the English courts in a case handed down before the Google decision: *Streetmap v Google*.[194] Streetmap argued that Google bundled Googlemaps with Google Search. By using a display at the top of its search results of a clickable image from Google Maps, and no other mapping provider (including Streetmap), following geographic queries, Google was abusing its dominant position in the market for online search and online search advertising. In essence, this is a discrimination argument that Google was using its dominant position with the intent or effect of undermining competitors' ability effectively to compete,[195] by leveraging Google's dominance in 'search' into a market (geographical services) other than that in which Google was dominant.[196] In making its claim, Streetmap relied heavily on the reasoning in *Microsoft*.

The English High Court disagreed with this approach. It held this case did not involve bundling in the sense of *Microsoft* because, although Google would provide the links to Google Maps, the user was under no obligation to click on those links. In *Microsoft*, although users could obtain alternative Windows Players, there were several barriers in their way to doing so. The Court also suggested that, following *Microsoft*, there should be a reasonable likelihood that harm would ensue.[197] In the view of the Court, since the concern related to a neighbouring market rather than the market on which Google was dominant and where the market structure was already undermined, harm could not be assumed.[198] The High Court accepted that it was Google's intention to improve its search engine and increase user convenience rather than to damage competition. The impact on Streetmap was therefore a 'by-product' rather than attributable to Google.[199]

## 10.6 COMPETITION LAW CONTROL OF CONCENTRATIONS

### 10.6.1 Overview—control of changes to market structure through merger

The competition law considered so far in this chapter—in Articles 101 and 102 TFEU and national equivalents—looks at market *behaviour* which has already taken place. But competition law also has methods of controlling the anti-competitive

[193] Ibáñez Colomo, n 184, 212. [194] *Streetmap EU v Google Inc & Ors* [2016] EWHC 253 (Ch).
[195] Ibid, para 63. [196] Ibid, paras 59–60. [197] Ibid, para 88.
[198] In coming to this conclusion, the Court referred to Whish and Bailey, *Competition Law* (8th edn, Oxford University Press, 2015), 212; Faull and Nikpay, *The EU Law of Competition* (3rd edn, Oxford University Press, 2014), para 4.929.
[199] Case C-23/14, *Post-Danmark II*, ECLI:EU:C:2015:651, para 47.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

effects of future changes to the *structure* of markets. Where a merger (or the creation of a new 'independent' joint venture) may lessen competition by weakening the number or relative strength of remaining competitors, national or EU merger controls may apply.

As well as being different from behavioural competition law by looking (primarily) at market structure, merger control is necessarily also forward looking: in most cases the merger will not yet have taken place. It shares this characteristic with most of the electronic communications sector regulation applied by NRAs. Competition principles are applied to the authorities' prediction of the likely market changes the proposed merger will cause. These two significant differences in approach between merger control and behavioural competition enforcement mean that merger control in electronic telecommunications markets has been applied rather differently from behavioural competition law examined previously.

'Merger' control (the 'control of concentrations' in EU law) operates both under EU law and under national merger control regimes, with the European Commission having the sole right to examine the largest mergers. The test which the Commission applies in deciding whether to block or approve a merger is whether it would lead to a significant impediment to (lessening of) effective competition in the EU.[200] In practice this means that, wherever there is a potential overlap in the parties' activities and one undertaking has a market share of about 20 per cent or more, the parties should start looking carefully to see if the merger proposed has an adverse effect in its own or in related markets.

Where national merger control applies, national competition authorities use their own rules. In practice these are very similar—in most countries—to those in the EU Merger Regulation. For example, in the UK the CMA also applies a substantive test modelled on that in the Regulation.[201] Where there are differences between national and EU practice, these tend to be primarily procedural—for example, under UK merger control law, Ofcom may be required to report to the Secretary of State on media plurality issues before the CMA makes a decision on some 'mixed' mergers in the electronic communications sector.[202] There is no EU law requirement that national merger control procedures (including clearance timetables) are harmonized with those of the European Commission. There is of course significant cooperation between the Commission and national competition authorities in merger control matters, as there is with behavioural competition law enforcement.

[200] Regulation 139/2004 [2004] OJEU L24/1, Art 2(2).
[201] Enterprise Act 2002, s 22(1)(b).
[202] Ibid, s 44A.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

A detailed explanation of the scope of the EU Merger Regulation, and its procedures, is outside the scope of this work.[203] For our purposes, it is sufficient to bear in mind that:

- The Merger Regulation only applies to the largest mergers in the EU—where the combined turnover of all the parties involved in the concentration, in their last financial year, exceeds €5 billion.
- The Regulation does not apply to mergers whose economic effects are likely to be felt in just one Member State. Even if the combined turnover of the undertakings concerned exceeds €5 billion, the Regulation does not apply where at least two-thirds of the combined turnover of the parties within the EU (so, disregarding turnover elsewhere in the world) is earned in one and the same Member State. In that case only the merger control procedures of that Member State apply.[204] The BT/EE merger was dealt with by the CMA rather than the Commission as a result of the 'two thirds' rule.
- To avoid the need for multiple merger clearances in several Member States the Regulation will also apply where the turnover in at least three Member States of at least two of the undertakings concerned in the merger is above certain thresholds, *and* the combined worldwide turnover of all the undertakings concerned exceeds €2.5 billion.[205]
- Member States may not apply their national *competition* rules to a merger falling under the Regulation—so including national behavioural rules.[206] They may, however, take measures under non-competition legislation to protect their other 'legitimate interests' as a result of a merger.[207] These interests include 'public security', 'plurality of the media', and 'prudential rules'. The second interest is particularly important for Member States wishing to ensure a wide variety of choice in broadcasting and newspapers.[208] This exception to the otherwise clear division of responsibility between Brussels and the Member States has had a significant impact on the approach to mergers in the broader electronic communications sector, with a number of mergers being subject to national intervention on media plurality grounds.[209]

[203] See Faull and Nikpay, and Whish, n 198.
[204] Art 21.2 and 21.3 Merger Regulation, n 8.
[205] Art 1.1 Merger Regulation, n 8.
[206] Art 21.3 Merger Regulation, n 8.
[207] Art 21.4 Merger Regulation, n 8.
[208] As for example in the (subsequently abandoned) proposed acquisition of BSkyB by News Corporation—see the Secretary of State's statement in June 2011 at <http://www.culture.gov.uk/news/news_stories/8259.aspx>.
[209] eg *Twenty-First Century Fox/Sky plc*: European Commission clearance decision M8354, 7 April 2017, [2017] OJEU C238; UK intervention notice, 16 March 2017 but contrast the Liberty Global/Ziggo (2014) merger where the request for national jurisdiction was turned down. European Commission Press Release IP-16-271, 3 August 2016.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

- So-called 'concentrative' or 'full function' joint ventures (where the parties give up independent activity in the field of the joint venture) are normally dealt with under the Merger Regulation. In contract, where the parties both remain as independent suppliers in the same or related markets as the new joint venture, approval of the terms of the joint venture restricting the activities of the parents is dealt with under the Article 101 criteria.[210]

Articles 4(4) and 9(2) of the Merger Regulation permit the transfer of the merger investigation back to a national competition authority if the concentration threatens to affect competition significantly in a market within that Member State, which presents all the characteristics of a distinct market. In a number of mergers involving the mobile telephony sector, the national competition authorities have requested jurisdiction on this basis, but the European Commission has rejected the applications.[211] This approach in the telecoms sector seems to go against the trend in relation to requests under Article 9 more generally. It may be that the political significance of the sector, as well as the likely complexity of the cases, are factors. Moreover, this does not mean that the national competition authority or regulators are excluded entirely: the Commission has noted in its final decisions the close degree of co-operation between it and the relevant national body.[212]

The Commission has generally approved mergers in the telecommunications sector provided that access to network infrastructure for third parties is not unreasonably restricted.[213] The dynamic nature of most telecommunications markets, and the regulatory regime requiring operators with SMP to allow infrastructure access on regulated terms, will often mean that a transaction can be cleared—possibly with some changes to address any specific European Commission or regulator concerns.[214] Many mergers which are not between competing communications services providers do not give rise to substantial competition concerns.[215]

[210] eg Commission Decisions 96/546/EC [1996] OJEU L 239/23 (IV/35.337—Atlas), and 96/547 [1996] OJEU L239/57 (IV/35.617—Phoenix/GlobalOne).

[211] See eg Hutchison 3G Austria/Orange Austria (2012); Telefonica Deutschland/E-Plus (2014); Hutchison 3G UK/Telefonica UK (2016).

[212] See eg letter from CMA to European Commission of 11 April 2016 in Hutchinson 3G UK/Telefonica merger, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515405/CMA_letter_to_Commissioner_Margrethe_Vestager.pdf>.

[213] An early case where a 'pure' telecommunications merger was, nevertheless, prohibited, is Case M.1741, *MCI/Worldcom/Sprint*, [2003] OJEU L300/1.

[214] See commentary in *Bellamy & Child*, n 6, para 12.066.

[215] See eg the *BT/EE* decision by the UK CMA, 15 January 2016, clearing the acquisition by BT (the UK's largest fixed communications services provider) and EE (the largest mobile provider), at <https://assets.publishing.service.gov.uk/media/56992242ed915d4747000026/BT_EE_final_report.pdf>.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

For example, the merger of BT and EE was approved in 2016 despite concerns, expressed by competitors and others, that the combination would increase BT's market power. BT and EE operated in largely separate segments of the telecommunications market—fixed line and mobile respectively—and there was very little overlap in their respective businesses at the time of merger. Other concerns about the increase in BT's power in telecommunications generally were not thought to be specific to the merger: the CMA noted that they could be addressed in Ofcom's wider review of the UK telecommunications market.[216]

In contrast, the European Commission blocked the merger of two of the four main UK mobile networks—Three and O2—in 2016. It found that the merger would leave only three MNOs in the UK, which significantly reduced competition in the market and which would likely have resulted in higher prices for mobile services in the UK and less choice for consumers than without the deal.[217] This merger illustrates that the Commission seems to have a preference for structural (divestment) remedies in MNO-to-MNO merger cases, so as to introduce a replacement entrant in the market. Thus in Wind/H3G, the Commission accepted the merger between two out of the four MNOs operating in Italy because the parties offered remedies involving the divestment of certain assets necessary to enable a new competitor, the French operator Iliad, to enter the Italian market as a fourth MNO.

The contrast between the approach in Three/O2 and BT/EE also reiterates the point that, as yet, while triple or quad play issues may be raised in merger procedures, they have yet to be a decisive factor. In BT/EE they were not considered separately. The market is changing rapidly and it has been suggested that the Commission's approach is developing to take into account the potential foreclosure effect of convergent mergers.[218] Commissioner Vestager suggested that, if anything, quad play is beneficial because it can operate to lower prices to customers.[219] In the cases that have come before the Commission there has been no evidence that quad play would squeeze standalone companies out of the market.

Concerns have also been raised in other recent mobile-mobile mergers that the number of competing MNOs in some EU Member States is falling below the level

[216] 15 January 2016, n 215. See CMA press release in particular.

[217] M.7612, *Hutchison 3G UK/Telefonica UK*, 11 May 2015, [2015] OJEU C357/15.

[218] Manigrassi, L, Ocello, E, and Staykov, V, 'Recent Developments in Telecoms Mergers', (2016) 3 Competition Merger Brief 1, 6–7.

[219] Vestager, M, 'Competition and investment in telecoms', Speech to CERRE Dinner Debate, 28 November 2016, <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-investment-telecoms_en>; see also Curwen, P and Whalley, J, *Mobile Telecommunications Networks: Restructuring as a Response to a Challenging Environment* (Cheltenham: Edward Elgar, 2014), 208–209.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

needed to ensure effective competition—creating a potential 'substantial impediment to effective competition'.[220] The Commission's decisions clearing mobile network mergers in Austria, Germany, and Ireland all imposed remedies on the merged entity designed to ensure an adequate choice of retail offerings to consumers in these countries.[221] In each case, the European Commission required the merged firm to offer capacity on its network to third party MVNO operators either as a reference offer or at a fixed capacity and price.[222]

### 10.6.2 Full function joint ventures

A 'joint venture' is not defined in EU merger control legislation,[223] but European Commission guidance gives significant detail on the meaning of 'full function joint venture'.[224] In particular, a joint venture may be a concentration (merger) even where the business is not being carried on by a separate legal person—purely contractual joint ventures may also be within EU merger control. A joint venture will be full function—in brief—where it has the resources and operational independence necessary to act autonomously from both parents and is not wholly dependent on its parents for inputs or customers.[225]

In electronic communications markets, the treatment of joint ventures has been particularly important in the competition assessment of (mobile) virtual network agreements and similar types of cooperation between infrastructure providers. Deciding if a network sharing or similar MVNO arrangement is a 'concentration' will have significant consequences both for the competition test to be applied to approving the formation of the joint venture and to the procedure used. Concentrations with a community dimension may not be implemented without prior approval from the European Commission—which must be given within strict deadlines after compulsory notification.[226] In contrast, joint ventures assessed solely under the Article 101 regime cannot be notified but may be implemented immediately—although the parents would be at risk of enforcement action if the terms of the joint venture restrict competition contrary to Article 101 and cannot be exempted.

[220] Mergers which create an SIEC must be prohibited under the Merger Regulation, n 8, Art 2.3.

[221] M.6497, *Hutchison 3G Austria*, 12 December 2012, [2013] OJEU C224; M.6992, *Hutchison/Telefonica Ireland*, 28 May 2014, [2014] OJEU C264; M7018, *Telefonica Deutschland*, 2 July 2014, [2015] OJEU C86.

[222] See the discussion of these cases in European Commission *Competition merger brief 1/2104,* 10 at <http://ec.europa.eu/competition/publications/cmb/2014/CMB2014-01.pdf>.

[223] Art3(4) Merger Regulation, n 8, simply stipulates that a joint venture may be a concentration: it does not define 'joint venture'.

[224] Commission Notice 16 April 2008, [2008] OJEU C95/1 (jurisdiction Notice), paras 91–109.

[225] Ibid, paras 98–101.

[226] Merger Regulation, n 8, Art 4.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

The European Commission will be particularly concerned to make sure that, where the parents of a joint venture remain active in the same or related markets as the joint venture itself, they do not use its creation as a pretext to coordinate the market behaviour of their remaining businesses. The likelihood and impact of these 'spill-over' effects will be assessed using the 'appreciable restriction of competition' test under Article 101 rather than the 'SIEC' test under the Merger Regulation.[227] The SIEC test will only be applied to restrictions of competition on the parents of the joint venture which are directly related to and necessary for the implementation of the joint venture itself.[228]

An illustration of the difference in Commission decisional outcomes for commercially similar network sharing agreements (joint ventures)—here analysed under the Article 101 tests—is given by the Commission's decision in the T-Mobile UK and Germany network sharing cases.[229] In the UK, the Commission found that each parent retained independent control over its own mobile network, since the amount of network sharing would not prevent each of them from providing differentiated downstream services. There was also no widespread exclusion of third parties from infrastructure sites (masts etc.) since there were alternative sites in most locations, and if necessary site sharing could be mandated by Ofcom.[230] Certain changes were needed to the original agreement to remove Commission concerns over discriminatory pricing. On this basis the Commission decided that the UK network sharing agreement did not restrict competition—that is, it did not fall within Article 101 at all.

In contrast, in the German network sharing case, the Commission found that the more comprehensive extent of the MVN/roaming arrangements envisaged in Germany *did* limit each of the parties' ability to compete downstream. The parties were more dependent on each other's networks for adequate coverage and the transmission needed to provide the advanced services intended. The arrangements as a whole therefore fell under Article 101—although the Commission did exempt much of the joint venture under the Article 101(3) criteria. On appeal, however, the General Court partially quashed these findings. The Commission had failed properly to consider what alternatives were available to O2 to enter the German market on a viable scale. It appeared to the court that these might be rather limited and the possibility that competition might not be restricted, as compared with the 'counterfactual', could not be excluded.[231]

[227] Ibid, Art 2(4).

[228] Commission Notice, 5 March 2005, [2005] OJEU C56/24 ('ancillary restraints'), paras 31–41.

[229] *O2 UK/T-Mobile* [2003] OJEU L200/59 and *T-Mobile Deutschland* [2004] OJEU L7532—on appeal Case T-328/03, *O2 (Germany) v Commission* [2006] ECR II-1231.

[230] See further Chapter 8.

[231] T-328/03, n 229, para 109.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

The competition assessment of joint ventures is highly fact specific.[232] But it is clear that, if a joint venture could be used as a focus for its parents to coordinate their activities where they should be competing with each other, or if one parent becomes too dependent on the other for an important part of its business, the Commission may intervene.

Issues of dependence and leveraging of market power also feature strongly in many cases where telecommunications and media content businesses merge.

### 10.6.3 Media plurality

The economic analysis of mergers between telecommunications operators and media businesses is in principle the same as for other kinds of mergers. The Commission will often consider that, where the merging parties are not actual or potential competitors with each other, no merger control issues arises. In *Nokia/Navteq*,[233] Nokia acquired one of two providers of digital mapping databases in the EU and the Commission investigated to see whether a SIEC could arise from the combination of the database with Nokia's (then) strong position in the EU mobile handset market. The concern was that Nokia could foreclose competing mobile handset suppliers from access to the Navteq mapping database. The merger was cleared after an in-depth investigation: competing handset makers would be able to obtain mapping information from the other EU provider and Nokia had no economic incentive to refuse to supply to third parties after the merger. A loss of revenues from mapping data would not be offset by an increase in sales of Nokia handsets.

This concern in 'vertical' mergers—between suppliers of inputs (eg content) and communications infrastructure or service providers—to ensure open access for competitors, mirrors the similar concerns in enforcing behavioural competition law and electronic communications regulation. The reasons for this are not only economic, however. Merger control may also take account of the democratic public interest in ensuring a diversity of media outlets—so looking to block mergers by which media plurality is substantially reduced.

However, this control is not exercised through the European Commission. Member States are entitled to take 'appropriate measures' to protect the public interest in plurality of the media.[234] In the UK, this control is exercised by the

[232] eg in Hutchison/VimpelCom (Wind)—the merger was only approved when commitments were offered by the parties to set up effectively a new mobile network in Italy, run by the French operator Iliad, to ensure sufficient competition on the Italian market: M7758, *Hutchison Italy 3G/Wind*, 1 September 2016, [2016] OJEU C391/7.

[233] M.4942, decision of 2 July 2008, [2009] OJEU C13/8.

[234] Merger Regulation, n 8, Art 21(4).

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

Secretary of State on the advice of Ofcom.[235] This regime does not target vertical integration—mergers involving media companies and telecommunications companies—but includes other kinds of media mergers.

Ofcom and the DTI (then responsible for media mergers, now DCMS) have published guidance on the factors to be taken into account when the Secretary of State is considering intervening in a merger on media plurality grounds.[236] This applies whether the merger falls within EU or purely UK merger control. There are three measures for media plurality—availability, consumption, and impact.[237] These are assessed on a case-by-case basis. Separately from the merger control process—but often linked closely to it—the Secretary of State may also consider if the acquirer is fit and proper to own the media outlet in question.[238]

The CMA reports both on any competition concerns arising from the merger and on the public interest (media plurality) concerns identified.[239] However, unlike purely 'economic' mergers, it is for the Secretary of State to decide if any enforcement action will be taken in case of an adverse CMA report.[240]

## 10.7 SHAPING THE MARKET—COMPETITION MARKET INVESTIGATIONS

### 10.7.1 General

There are powers for the competition authorities to carry out investigations or inquiries into an economic sector at both national and EU level. While Article 101 and 102 (and the corresponding provisions of the Competition Act) look at anti-competitive agreements or abuses of dominance by individual businesses, a market investigation aims to determine whether the process of competition is working effectively in markets as a whole. Market investigations tend to be used when the provisions regarding anti-competitive agreements and those regarding abuse would be (or have been) ineffective. They may be appropriate, for example, in the case of non-coordinated parallel conduct. The European telecommunications

[235] Enterprise Act 2002, s 42.

[236] DTI, 'Enterprise Act 2002: Public Interest intervention in Media Mergers', May 2004, <http://webarchive.nationalarchives.gov.uk/20100512170615/http://www.bis.gov.uk/files/file14331.pdf>. Ofcom, 'Measuring media plurality', 19 June 2012, <https://www.ofcom.org.uk/__data/assets/pdf_file/0031/57694/measuring-media-plurality.pdf>.

[237] Measuring media plurality, ibid, para 1.5.

[238] eg 21st Century Fox's acquisition of control over Sky News, referred to the CMA for public interest review, 12 September 2017, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644186/DCMS_letter_to_Sky_Fox_12_Sep_2017__1_.pdf>.

[239] Enterprise Act 2002, s 47.

[240] Ibid, s 54.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

sector inquiry (discussed at Section 10.7.2 below) was noteworthy because until that point the Commission had not used its sector inquiry powers, perhaps because the powers under Regulation 17/62 were focused on individual firms' behaviour rather than the state of the market. The inquiry marked an increase in interest in use of this tool, even before Regulation 1/2003 was enacted (and EU sector enquiries given a proper legal basis[241]), in sectors where market structures were such that effective competition would be hard to sustain. The overarching objective is to allow the relevant body (national competition authority, telecoms regulator, or the European Commission) to understand a sector in which the market does not appear to be functioning effectively, and to identify the reasons why.

The outcomes of such inquiries and investigations may vary considerably. The information gained may subsequently be used in competition enforcement against individual undertakings. It may also prove useful in other contexts, such as defining markets in the context of a merger. Therefore, market investigations and inquiries should properly be considered as forming part of the EU competition law enforcement tool-kit.

### 10.7.2 The Commission and sector inquiries

The European Commission has powers to carry out sector inquiries when it believes that a market is not working as well as it should, and also believes that breaches of the competition rules might be a contributory factor. Article 17 Regulation 1/2003[242] specifies the circumstances:

> [w]here the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors.

Since such an investigation would not change an individual undertaking's legal position, it would not seem that a decision to undertake a sector inquiry is open to direct judicial review.[243] The Commission is empowered to ask for information from market participants in accordance with Articles 18–21 Regulation 1/2003. These provisions confer wide investigative powers on the Commission which, in general, reflect those used in cartel proceedings. In particular, and as became apparent in the pharmaceuticals sector inquiry, the Commission may use its powers of inspection in this context as well as in under Article 101 and 102 TFEU.[244] The significance of these powers is that undertakings are obliged to

[241] Regulation 1/2003, n 8, Art 17. [242] Formerly, Art 12 Regulation 17/62.
[243] Case 60/81, *IBM v Commission* [1981] ECR 2639. [244] Regulation 1/2003, n 8, Art 20.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

answer questions on documentation, although they cannot be required directly to incriminate themselves.[245] The inquiry may result in public hearings, and the Commission may publish a report of its findings.

The Commission has carried out a number of inquiries that are related to telecommunications: roaming (2001), leased lines (1999) and local loop (1999) together constituting a three phase inquiry into the telecommunications sector, and more recently 3G (2005), and the e-commerce inquiry (less central to telecommunications) in 2015.[246] The first three of these inquiries pre-dated the formal introduction of the formal market investigation powers dating from 2004 in Regulation 1/2003.

The leased line sector was important in terms of the development of the information society because leased lines were used by new entrants to the fixed telephony market as well as mobile telecom operators, internet service providers, and large business users. The inquiry ran for just over two years. At a public hearing, it was claimed that the incumbent operators had charged their competitors excessive prices for the provision of leased lines and were deliberately delaying the delivery of leased lines to their competitors—presumably in order to drive them out of the market. The inquiry resulted in a number of investigations into excessive prices in short distance leased lines (although these cases were passed on to NRAs for action under the ONP Leased Line Directive[247]). The Commission also opened cases in relation to pricing on international leased lines: these cases were closed because the undertakings concerned then significantly reduced their prices. The 2001 roaming inquiry also led to a number of possible instances of excessive prices.

It became clear, however, that competition tools were inadequate for cases dealing with the 'local loop' bottleneck with the result that regulation was introduced setting maximum prices. The inquiry into access to the local loop ran at the same time as the regulation on the unbundling of the local loop was enacted.[248] The Commission was concerned that the *de facto* monopoly of incumbent operators over the last mile of the public telecommunications network would impede the commercial take-up of DSL services, specifically because of above-cost pricing and discriminatory behaviour as a consequence of the vertically integrated nature of incumbent operators' businesses. The inquiry resulted in cases being opened against France Télécom's subsidiary Wanadoo, for an alleged predatory pricing strategy in relation to high speed internet access, and against Deutsche Telekom, for an alleged margin squeeze in local access resulting from the German

[245] See eg Case 374/87, *Orkem v Commission* [1989] ECR 3283; Case T-112/98, *Mannesmannröhrenwerke v Commission* [2001] ECR II-729; legally privileged information is subject to an exception here too.

[246] <http://ec.europa.eu/competition/antitrust/sector_inquiries.html>.

[247] Directive 92/44 on the application of open network provision to leased lines, [1992] OJ L 165/27, as amended by Directive 97/51.

[248] See further Chapter 8, at Section 8.3.4.4.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

incumbent's failure to rebalance line rental tariffs with their underlying costs (both cases discussed at Section 10.3).

At the time of the 3G inquiry, the 2G mobile market was considered to be highly competitive. The 3G market—which allowed the transfer of all kinds of data at high speeds by mobile networks—was not equally so. The 3G market contained a number of problematic features, notably:

- high sunk costs due to the cost of spectrum licences and costs associated with network roll-out;
- barriers to entry because of the limited amount of spectrum available;
- strong incumbent operators including former 2G operators as well as fixed telephony operators;
- oligopolistic market structure (in most Member States, there were between three and five network operators); and
- economies of scale and network externalities.

One of the key issues here was market definition. The Commission concluded that mobile and fixed platforms for content were distinct markets, as there was limited substitutability, especially given the physical characteristics of mobile handsets, costs of usage, and inability to watch as a group. Further, a driver for the uptake of 3G mobile was the availability of (audiovisual) content and the rights to the most desirable content were in the hands of a few key (media) operators.[249] The inquiry identified four areas of particular concern: cross-platform bundling of rights, excessively restrictive conditions on exploiting rights (ie in terms of transmission length and timing), joint selling, and exclusivity. As discussed above, the Commission has taken action in relation to long, exclusive sports rights packages. The inquiry noted that there were substantial costs involved in developing these new services and so some security of return was needed.

The most recent inquiry was that into the e-Commerce sector, which has led to a range of initiatives including some legislative proposals, as well as some enforcement action under Articles 101 and 102 TFEU.

### 10.7.3 The CMA, market investigations, and market studies

In the UK, the Enterprise Act 2002 (as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA)) provides for the CMA to make a reference for the carrying out of market investigations.[250] The ERRA removed the two-body referral process

[249] Commission's Press Release IP/04/134, 30 January 2004.

[250] Enterprise Act 2002, s 131 (replacing the earlier provisions under the Fair Trading Act 1973 (FTA)); see generally OFT Market investigation references (OFT511) and Competition Commission, Guidelines for market investigations (CC3 (revised)), both as amended by CMA Market Studies and Market

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

in place under the Enterprise Act, replacing it with a single body—the CMA. Prior to the ERRA, the initial consideration of the matter was carried out by the Office of Fair Trading (OFT), which could choose to refer a matter to the Competition Commission (CC) to carry out the market investigation independently. Despite the change to a single body, the terminology from the old system remains—so the CMA makes a reference to itself (which is carried out by a specially constituted board drawn from a pool of possible members). The ERRA also amended the provisions relating to public interest interventions and introduced a new category of cross-market references.

The CMA may also carry out market studies[251] under its general powers in section 5 of the Enterprise Act. These are examinations into the causes of why particular markets may not be working well but are separate from a market investigation. Where a market study gives rise to reasonable grounds for suspecting that a feature restricts or distorts competition, and a market investigation reference appears to be an appropriate and proportionate response, the CMA may make a reference. Carrying out a market study is not a prerequisite to a market investigation, though a market study may allow the CMA to access information central to carrying out its market investigation.

A recent example of a market study in the digital sector is that into digital comparison tools (DCT) (such as price comparison websites). The CMA published a report at the end of the study. In its final report it put forward a number of recommendations (including the need for legislative action) and stated that it will continue to keep some practices under review (eg non brand-bidding, negative matching, and non-resolicitation agreements). It opened an investigation into the behaviour of one comparison website under the UK Chapter 1 prohibition as well as Article 101 TFEU.[252]

In addition to the CMA, other public sector enforcers may be involved in triggering a market investigation. Ministers may, under section 132 of the Enterprise Act, make references for a market investigation. In addition to the criteria to which the CMA must have regard, a minister must either be 'not satisfied' with a CMA decision not to make a reference or, having brought information to the attention of the CMA, the CMA has not made a decision on whether to make a reference in a period that the minister considers to be reasonable.

Investigations: Supplemental Guidance on the CMA's Approach, (CMA3) January 2014 (revised July 2017); for overview see eg Coscelli, A and Horrocks, A, 'Making Markets Work Well: The U.K. Market Investigations Regime', (2014) 10 Competition Policy International 24.

[251] See generally, OFT Market studies: Guidance on the OFT approach (OFT519), as amended by CMA Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach, (CMA3) January 2014 (revised July 2017).

[252] <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

Of more relevance in telecommunications is the role of certain sectoral regulators, including Ofcom. They may undertake market studies, and make market investigation references to the CMA for the constitution of a CMA group to carry out the market investigation. For example, Ofcom initiated the Pay TV investigation (discussed below) and has undertaken substantial work in relation to BT Openreach.[253]

The Openreach investigations work started in 2005 when Ofcom carried out a Strategic Review of the telecommunications market, which was complementary to the annual market power reviews carried out under the EU communications package. As a result of this review, the vertically integrated nature of BT was seen as problematic and Ofcom considered making a market investigation reference to the (then) Competition Commission. To avoid this, BT gave undertakings under the Enterprise Act to set up a separate division—called Openreach—to deal with BT's physical infrastructure. As a part of the undertakings, BT agreed to a 'functional separation'. Although Openreach remained in the BT Group and reported to BT, it was obliged to treat all its customers (including other BT businesses) on a non-discriminatory basis.

The telecommunications market may have distinctive features in this context, because of Ofcom's role as NRA under the EU Communications Package. Ofcom, in deciding whether to make a market investigation reference, considers whether it would be more appropriate to deal with the matters under sectoral regulation or under competition law. The fact that Ofcom may have dealt with a number of issues under the programme of market reviews derived from the EU regulatory framework may mean that a reference to the CMA is not appropriate, as this would lead to duplication. For example, although in 2005 BT gave commitments to Ofcom in respect of Openreach to avoid the market investigation reference, a different approach was taken when OfCom returned to the question in 2015.[254]

In its initial conclusions, Ofcom expressed the concern that the vertically integrated structure of BT inherently affects the way in which BT makes strategic decisions, and that functional separation had not worked. Openreach needed greater independence—specifically as regards governance—from the rest of the BT group. BT's competitors (such as Sky and Talk Talk) called for a market investigation reference to be made to the CMA but Ofcom envisaged a different approach,

[253] See also Chapter 3, at Section 3.3.8.

[254] Ofcom, 'Strategic Review of Digital Communications: Terms of reference, competition and investment in converged communications infrastructure', 12 March 2015, <https://www.ofcom.org.uk/__data/assets/pdf_file/0029/78626/dcr_terms_of_reference_12_march_2015.pdf>; Ofcom, 'Strategic Review of Digital Communications, discussion document', July 2015; Ofcom, 'Initial Conclusions from the Strategic Review of Digital Communications', February 2016; Ofcom, 'Strengthening Openreach's strategic and operational independence Proposal for comment'.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

using regulatory powers.[255] Finally, BT agreed to give commitments under s 89(3) Communications Act[256] to turn Openreach into a separate company. This made Ofcom's market investigation proposals unnecessary—though Ofcom has announced it will establish a dedicated Openreach Monitoring Unit, to monitor whether the new arrangements are implemented successfully.[257]

Market investigation references are more likely to be appropriate when issues affect more than one market. References may also be more appropriate in content markets—which fall outside the EU telecommunications regulatory regime. Indeed, one explanation for Ofcom's intervention in pay TV (discussed below) is that access to premium content (with the possible exception of premium sports rights) falls outside the regulatory regime[258] and access complaints are unlikely to succeed under competition law.[259] A market investigation may fill this gap.

A market investigation will take place when there is a risk of adverse effects on competition (AEC) caused by a feature of the market being considered: that is, the feature 'prevents, restricts or distorts competition'[260] . The 'relevant market' is determined by the terms of the reference.[261] It need not be the same as the 'product market', which may be used as part of the assessment of the functioning of competition and uses techniques similar to that in relation to prohibitions cases (Articles 101/102 TFEU). Section 131(2) of the Enterprise Act states that a feature of a market is to be construed as a reference to:

- the structure of the market concerned or any aspect of that structure;
- any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
- any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.

According to section 131(3), 'conduct' includes any failure to act (whether intentional or not) and any other unintentional conduct. The boundary between 'structure' and 'conduct' may not always be clear-cut. In practice the approach has been to identify the relevant 'feature', rather than worry about how to categorise that

[255] <https://www.ofcom.org.uk/consultations-and-statements/category-1/strengthening-openreachs-independence> relying on ss 89A and 89B Communications Act which follows the requirements set out in Article 13a of Directive 2002/19/EC ('Access Directive'), as amended; see notification, <https://www.ofcom.org.uk/__data/assets/pdf_file/0026/94940/Final-signed-letter-to-the-European-Commission-281116.pdf>.

[256] < https://www.btplc.com/UKDigitalFuture/Agreed/index.htm>.

[257] <https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/openreach-statement>.

[258] See Ofcom's imposition of WMO obligation on Sky: Ofcom, 'Review of the pay tv wholesale must-offer obligation', 19 November 2015, <https://www.ofcom.org.uk/__data/assets/pdf_file/0022/76081/Review-of-the-pay-TV-wholesale-must-offer-obligation-.pdf>.

[259] See discussion on essential facilities in Section 10.4.

[260] Enterprise Act 2002, s 134(1).

[261] Enterprise Act 2002, s 134.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

feature.[262] A market reference is not automatic where the criteria appear to be met: rather, the authority has discretion whether to act or not. Should a problem be found after investigation, the CMA may impose a wide range of legally enforceable remedies.

In making its assessment, the CMA considers the market structure (including market shares of participants) and often considers:

- the nature and characteristics of the relevant products or services and of any potential substitutes for these products;
- the nature of the customer base—whether customers are businesses or final consumers, the extent of customer segmentation in a market, the demographic profile of the customer base, or the extent to which customers are informed about the products;
- any applicable legal and regulatory framework;
- industry practices;
- the history of the market, such as recent examples of entry, expansion or exit or any anticipated significant changes; and[263]
- market outcomes—that is prices, profitability, and innovation—to understand any resulting harms.

The CMA has a range of remedies which it can use if it finds an AEC as a result of a market investigation. In this respect, market investigations are different from both a market study and the Commission's sector inquiry powers. They rely for remedies on using competition law mechanisms or on a call for new legislation. A market investigation may, however, also include recommendations to others, eg to change existing legislation. In this comparative sense, the market investigation provisions under the Enterprise Act can be said to have teeth. According to section 134 of the Enterprise Act, the CMA has to decide what action to take to remedy an AEC: it should have regard to the need to achieve as comprehensive an outcome as is practicable. In particular, the CMA can order divestment (structural remedies) or behavioural remedies, such as price undertakings. Its preference is to adopt structural remedies rather than behavioural remedies, so as to avoid the difficulties of monitoring ongoing compliance with any undertakings given. It has, however, no power to fine companies under its market investigation powers.

Prior to the ERRA, the CMA could make a market investigation reference under the Enterprise Act in relation to a single market ('ordinary references'). ERRA added a second category which concern specific features or combinations of features that exist in more than one market,[264] though this is limited to 'conduct' not

[262] CC3 (revised), n 250, para 155. [263] Ibid, para 102.
[264] Enterprise Act 2002, s 131(2A) and (6).

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

'structure'.[265] The Secretary of State may also make a reference in cases that raise defined public interest issues. Under the Enterprise Act, the CMA would investigate competition issues, while the Secretary of State would have responsibility for investigating the public interest issues (now referred to as a 'restricted public interest reference'). Under ERRA, there is a new type of reference which requires the CMA to investigate certain public interest issues together with the competition issues ('full public interest reference').

National security is currently the only specified public interest consideration in relation to the markets regime, but the Secretary of State may introduce new public interest considerations. In contrast to the merger regime, media plurality is not listed.

The most significant recent CMA market investigation relating to telecommunications is on the pay TV market. After receiving representations from a number of competing market participants, including telecommunications operators as well as consumer groups, Ofcom started an investigation into the pay TV market in 2007 (ie under the original Enterprise Act regime).[266] Ofcom defined the pay TV market broadly, to include subscription and video-on-demand television services on all platforms. It took the initial view that distinct narrow economic markets existed for pay TV subscription channels containing premium sports content and movies, at both the wholesale and retail level. Sky was found to have market power in these markets. Ofcom argued that bundling efficiencies (eg phone services with audiovisual content) would mean that these markets may be prone to 'tipping' towards one retailer, particularly where a retailer on a particular platform has exclusive control over a core of premium content. Competition from other platforms would only be a viable constraint if providers on those platforms had access to comparable content. Ofcom referred the supply and acquisition of subscription pay TV movie rights and the wholesale supply and acquisition of packages which include core premium movies channels to the Competition Commission.[267] In the end, the Commission found that there was no AEC.

The pay TV market investigation is significant for a number of reasons. It is an example of competitors involving themselves in the regulatory and competition law process to try to effect an outcome of benefit to them. Concerns raised were partly related to the increasingly integrated nature of the telecommunications and

[265] Ibid, s 131(1) and 131(2A).

[266] Ofcom, 'Pay TV market investigation', <https://www.ofcom.org.uk/consultations-and-statements/category-1/market_invest_paytv>.

[267] Sports rights were dealt with under Ofcom's sectoral powers in Communications Act 2003, s 316 to impose a wholesale 'must offer' obligation on Sky, an obligation which was successfully challenged before the courts, see Harrison and Woods, n 161.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

content sectors, and the impact that access to premium content, as well as bundling of other services, might have. It is also an example of an investigation where the Competition Commission came to a different conclusion from the sector regulator, albeit quite late in the process.

In its provisional report, the analysis of the Competition Commission had been similar to that of Ofcom. The change in its view may have been in part because of market changes, specifically the establishment of 'over-the-top' (OTT) services (delivered over the internet, eg Lovefilm; Netflix) providing similar content to that of Sky, as well as changes to Sky's own service. Significantly, to use OTT services, consumers did not have to buy new hardware—a fact facilitating rapid uptake of these services. This highlights the difficulty of assessing market power and behaviours going forward—and consequently whether there is a need for intervention—in a context where technology and the market are changing swiftly. Indeed, in its pay TV Statement, Ofcom acknowledged that its investigation came at a time of 'disruptive change' in the way in which content was distributed, but while Ofcom expressed concern about the future of these services, the CC's report, coming some time later, found a different landscape—different even from that which existed at the time of its provisional report.

## 10.8 UK COMPETITION LAW: ENFORCEMENT AND APPEALS IN THE ELECTRONIC COMMUNICATIONS SECTOR

### 10.8.1 Overview

From a public policy standpoint, telecommunications regulation and competition law enforcement may fill the same purpose—ensuring that as far as possible markets are open so that consumers get services at the best possible choice, quality, and price. In most EU Member States, despite this overlap in purpose, competition enforcement and communications regulation are separately enforced by different bodies. This can lead to difficulties in coherent regulation of electronic communications services. This was exemplified in the *Deutsche Telekom* case[268] where the regulator set a wholesale price above some of DT's retail prices, allowing DT to claim—albeit unsuccessfully—that it was forced into the anti-competitive margin squeeze.

In order to reduce the possibility of this kind of incoherence in UK markets, the Competition Act 1998 introduced powers for some sector regulators, including the telecommunications sector regulator, to apply mainstream competition rules in

[268] n 7. The German telecommunications regulator, RegTP had set a regulated interconnection price which moved at or above Deutsche Telekom's own retail prices for some equivalent services.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

their respective sectors alongside their regulatory powers. In practice, the majority of administrative competition enforcement in the electronic communications sector in the UK—with the exception of merger control—has been done by Ofcom using this 'concurrent' competition power.

### 10.8.2 Scope and process for exercising competition powers concurrently

Ofcom can use the domestic competition powers under the Competition Act concurrently with the CMA. Ofcom does not participate in the 'parallel' enforcement of EU competition law in the UK under Regulation 1/2003 and the European Competition Network arrangements which give effect to it.[269] However, where the case does not have an effect on trade between Member States—or even where it does, if the European Commission is not taking action—Ofcom has the same powers to enforce behavioural EU competition law (under Articles 101 and 102) in UK markets as the CMA would in the same circumstances.

For competition enforcement in relation to changes in market structure, Ofcom's remit is more limited. As we have noted, the formal role of Ofcom in merger control is primarily limited to those mergers which may raise media plurality issues. However, Ofcom often makes representations on mergers in the electronic communications sector, which are usually made public.[270] In contrast, Ofcom *does* have the power to refer markets for investigation to the CMA under the market investigation provisions in the Enterprise Act[271] where it believes that there are features of a market which may restrict competition.[272] We have discussed this power in Section 10.6 above—its use has been seriously considered by Ofcom on several occasions, and a reference of the market for premium pay TV movies was made in 2010.[273]

Despite looking similar, market investigations under the Enterprise Act are not the same as market reviews under the EU electronic communications framework. In particular, the UK CMA has no power to make a finding on whether a communications operator has significant market power in any regulated market. Ofcom has therefore used the possibility of a market investigation reference to address issues which fall outside the scope of its behavioural regulatory powers—for example

[269] Competition Act 1998, s 54(2). [270] eg Three/O2, 1 February 2016.

[271] Enterprise Act 2002, 131 and Communications Act 2003, s 370. [272] Enterprise Act 2002, s 131.

[273] 4 August 2010, at <https://www.ofcom.org.uk/__data/assets/pdf_file/0017/72008/pay-tv-movies-decision.pdf>. The Competition Commission subsequently found that there was no appreciable adverse effect on competition in any pay TV market: report of 2 August 2012 (at 15), <http://webarchive.nationalarchives.gov.uk/20140402201316/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf>.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

market issues in content provision (eg pay TV)[274]—or structural issues in a market which arise outside a merger context.[275]

Where anti-competitive market behaviour is suspected in UK electronic communications markets, three enforcement choices need to be addressed. First, does EU competition law apply to the question? If so, then it must be used[276] and any outcome from parallel use of domestic powers must be consistent with it. Second, are regulatory requirements under the electronic communications legislation relevant—for example, is the behaviour a breach of an interconnection agreement? And third, can UK competition law also apply to the behaviour? These choices overlap with the question of which authority should consider the issues. For example, where EU competition law applies, the European Commission may enforce the law directly—and if it does so, then no national authority may act.[277]

In the majority of cases where anti-competitive behaviour is suspected in UK markets, either Ofcom or the CMA will be able to act. How is this choice made? From 2013 the procedure was improved.[278] There is now a statutory duty on Ofcom to consider if using its competition powers would be more appropriate in each case before it takes action under its regulatory (Communications Act) powers.[279] In principle, Ofcom should use its concurrent competition powers before considering sector regulation. This new duty is backed up by a new power for the government to remove all concurrent competition powers from Ofcom if the Competition Act enforcement tools are not used sufficiently.[280]

Agreeing which of the CMA and Ofcom should act is likely to be straightforward. There are well developed communication channels to coordinate on these issues and where the competition issue is wholly within the scope of Ofcom's other powers—electronic communications, broadcasting (TV and radio), and postal services—it is probable that Ofcom will take the investigation. The CMA and Ofcom have published a memorandum giving more detail on how they will allocate competition cases between them.[281] The factors taken into account when allocating a case include relevant sector knowledge, effect of the market behaviour

[274] See Section 10.5.

[275] See Section 10.6. In particular, Ofcom has used the possibility of a market investigation to prompt an offer of undertakings in lieu of a reference for BT to separate its wholesale business (Openreach) from its retail offerings, <https://www.ofcom.org.uk/__data/assets/pdf_file/0023/47075/consolidated_undertakings24.pdf>.

[276] Regulation 1/2003, n 8, Art 3(1).

[277] Ibid, Art 11(6).

[278] Enterprise and Regulatory Reform Act (ERRA) 2013, ss 51–52 and Sch 14.

[279] Communications Act 2003, ss 94 and 96A, as amended by ERRA 2013, Sch 14 paras 17–18; for the broadcasting sector see s 317.

[280] ERRA 2013, s 52.

[281] 17 June 2014, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502645/Ofcom_MoU.pdf>.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

on the electronic communications sector and previous experience dealing with either the undertakings involved or issues similar to those being investigated.[282] If the case is allocated to Ofcom, it will investigate as the CMA would, although the memorandum notes that staff secondments and other support may be needed in some cases. Ofcom has produced guidance on how it will investigate cases under the Competition Act and there is also further guidance on how competition law in the UK dovetails with sector regulators' other responsibilities.[283]

In addition to the initial allocation of cases, the ERRA formalized arrangements for ongoing co-ordination of competition enforcement in the UK between the CMA and the regulators. The UK Competition Network (UKCN) was set up under the guidance of the CMA with all the UK concurrent competition regulators as members to allow a forum for dialogue and co-ordination of policy and strategy.[284] Although individual cases are investigated and enforcement action taken by a single authority (either the CMA or Ofcom in the case of telecommunications), information may be exchanged on case priorities and on whether a particular case should be treated under regulatory or competition powers.

### 10.8.3 Competition appeals in telecommunications

The method and procedures for appealing competition decisions varies according to whether the decision was made by the European Commission or a UK authority. There is no 'harmonized' appeal procedure across the EU.

Appeals against European Commission competition decisions (under Articles 101 and 102 TFEU) are made to the General Court of the EU.[285] The powers of the General Court are those of an administrative court—so it may wholly or partly quash a decision and remit it to the Commission, or it may vary the amount of penalty imposed (even where the decision is allowed to stand).[286] General Court judgments may be appealed on a point of law to the Court of Justice of the EU.[287]

In contrast, UK competition decisions are subject to appeal as set out in UK legislation. Even in cases where Ofcom is applying EU competition law, there is no appeal from its decision to the General Court (though the CAT, hearing a challenge

[282] Ibid, para 30.

[283] Regulated industries: Guidance on concurrent application of competition law to regulated industries, CMA 10, March 2014; Ofcom's guidelines for the handling of competition complains and complaints concerning regulatory rules, July 2012.

[284] United Kingdom Competition Network (UKCN) Statement of Intent (December 2013).

[285] TFEU, n 11, Art 256.

[286] Regulation (EC) 1/2003 [2003] OJEU L1/1, Art 31. For a more detailed description of the power of the General Court, see *Bellamy & Child*, n 6; Faull and Nikpay, n 198, paras 5.1125–5.1200; Kerse, C and Kahn, N, *EU Anti-trust Procedure* (6th edn, Oxford University Press, 2012).

[287] TFEU, n 11, Art 256(3).

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

to Ofcom's decision, could make a reference to the CJEU). As Ofcom and the CMA exercise the same powers in competition cases, the appeals regime for each of their decisions under the Competition Act is the same. There is an appeal on the merits (both fact and law) to the CAT and, with leave, a further appeal to the Court of Appeal (or Court of Session for Scottish cases)[288] and ultimately to the UK Supreme Court.

Since the CAT also hears appeals from Ofcom regulatory decisions under the Communications Act,[289] as well as appeals against CMA and other concurrent regulators' decisions under the Competition Act, the CAT acts as the formal point of final decision of fact for both the Competition Act and Communications Act enforcement systems in the UK. The CAT sits as a panel of three—a judge or legally qualified chairman and two others—and the Tribunal's members include several with experience in electronic communications markets.

The procedure followed by the CAT when hearing appeals is different from the civil procedure rules used in general litigation. The CAT Rules in particular require more information to be provided at the beginning of an appeal against an Ofcom decision than is usual in judicial review proceedings in the High Court.[290] However, although the CAT rules differ from the general English civil procedure rules, the CAT has produced a Guide to Proceedings which gives detail on how the Rules will be applied in practice, which have the same force as a Practice Direction made under the general civil procedure rules.[291]

Since the CAT has the power to rehear a competition case on the merits, its order making powers also go beyond those of the Administrative Division of the High Court in England.[292] As well as the power to remit the matter to Ofcom (or the CMA as the case may be), it also has the wide power under the Competition Act to make any decision which the CMA (and therefore Ofcom) could have made in the same case—that is, it may overturn the regulator's decision and substitute its own.[293] Even if the CAT agrees with the operative parts of the decision, it may nevertheless quash any of the findings of fact in it.[294]

CAT decisions are enforceable in the same way as a judgment of the High Court in England.

[288] Competition Act 1998, ss 46, 49 and Sch 8.

[289] Note that the standard of review for appeals under the Communications Act 2003 has recently been amended by the Digital Economy Act 2017. See further Chapter 3, at Section 3.3.7.4.

[290] Competition Appeal Tribunal Rules 2015, SI 2015/1648, esp. rules 4 and 6.

[291] Competition Appeal Tribunal Guide to Proceedings (2015) at <http://www.catribunal.org.uk/files/Guide_to_proceedings_2015.pdf>.

[292] Competition Act 1998, Sch 8, para 3(2). [293] Ibid, para 3(2)(e). [294] Ibid, para 3(4).

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023

## 10.9 CONCLUSIONS

Competition law investigation and enforcement powers form an important part of the complex framework of regulation in the telecommunications sector. In particular, the use of competition law tools and techniques can be important for issues which arise on the periphery of the telecommunications industry, where sector regulation may not have the necessary reach to remedy the issue identified. The differing methods of investigating anti-competitive behaviour in the regulated sectors leaves substantial discretion to the regulators—primarily Ofcom for telecommunications markets in the UK.

The history of telecommunications regulation since the Competition Act came into force in 2000 and gave modern competition powers to the sector regulators for the first time, has shown that using 'mainstream' competition law in telecommunications is both vital—particularly to address 'convergence' issues—and difficult, given the continued pace of technology change driving consumer demand for ever more developed and higher quality services. Competition enforcement techniques sometimes have difficulty in keeping pace with this change—difficulties with market definition being a main example.

Continued technological change is not the only challenge facing Ofcom. The impetus given to competition enforcement in all sectors by the ERRA—reinforcing the requirement on Ofcom to consider competition enforcement before using its sector powers—as well as the withdrawal of regulation from many telecommunications markets as operators in them cease to have SMP, will mean that competition law is set to play a substantial role in the supervision of UK telecommunications market for many years to come.

Downloaded from https://academic.oup.com/book/41315/chapter/352234448 by Queen Mary University of London user on 11 September 2023