# TELECOMMUNICATIONS MERGERS UNDER THE EC COMPETITION LAW AND US ANTITRUST LAW: SUBSTANTIVE ASSESSMENT AND PROCEDURAL COOPERATION

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## Abstract

While the telecommunications industry is subject to both general competition and industry-specific regulations and control, the correlation between the two might sometimes appear problematic. The area of merger control is a lucrative field for examination of these often overlapping regulatory regimes. This paper is an attempt to review and summarise the existing practice of the assessment of transnational mergers by antitrust authorities in the EU and US. Focused on the analysis of the several key telecom mergers jointly investigated by the European and American antitrust authorities, the paper compares regulatory approaches on both sides of the Atlantic and evaluates the impact of the specific features of the telecom industry on merger assessment. Cooperation between the enforcement authorities of the EU and US is discussed in order to evaluate the existing procedural cooperation arrangements as well as the convergence of the substantive laws of the EU and US.


## I. Introduction

The EU and US telecommunications sectors have experienced an evolution from a highly regulated industry towards liberalisation and regulation by virtue of competition law rules. The main objective of the EU Regulatory Framework1 and 1996 US Telecommunications Act2 was to ease the regulatory burden on the sector and continuously move towards increased competition on the various telecom markets. The economic features of the telecommunications sector as well as the regulatory devices that remained in force after this move towards liberalisation had to some degree predetermined the behaviour of undertakings. Both incumbents and new entrants realised the importance of the network facilities necessary for the provision of various telecom services. Moreover, dynamic technological developments in the sector fostered by increased competition and constant innovation has brought forward numerous new kinds of services that could be provided using the same network facilities. For example, Internet services could be supplied to the final customer using the traditional local telephony network (dial-up)

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[1] Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, L 108/33-50, available online at <http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf.>.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified throughout Title 47 of the United States Code (47 U.S.C.).

or cable network (high speed or broadband). Thus, to be able to compete effectively, a telecom services provider needs to have access to network facilities, to provide customers with a bundle of services and to have a significant customer base, which will realise positive network externalities. One of the strategic responses to these market realities was a wave of concentrations in the sector following the deregulation reforms on both sides of the Atlantic in 1996-2001.3

In the US, the wave of concentrations was a response to the liberalising provisions of the 1996 Telecommunications Act which removed ownership caps and allowed the incumbents and network holders to re-establish their dominant position on the market.[4] US mergers were primarily within the same platform and between companies providing similar services: for example, local telephony companies merged together, as did long distance carriers.[5] In the EU, telecom mergers were more diversified and had a cross-platform character, which corresponded to the initial objective of the Commission to establish pan-European providers that would be active in several Member States. Because of their cross-platform and cross-border nature, the Commission was usually in favour of the proposed concentrations.[6] These differences, however, do not affect the problems common to merger assessment that competition authorities have to tackle during the investigation process. These problems relate to the specifics of the telecommunications sector: the historical dominance of incumbents, the traditional high degree of concentration, the development of emerging markets, the rapid pace of technological development, and, finally the integrated nature of telecom services and network effects.

The objective of this article is to compare the assessment of telecom mergers in the EU and US in order to identify the methods that competition authorities use to detect and mitigate any potential anticompetitive effects of the proposed mergers. This comparative analysis will focus on the following principal elements: (i) the specifics of the telecommunications markets that influence merger assessment; and (ii) the design of appropriate remedies to address potential anticompetitive concerns. This article will also discuss the degree, efficiency and outcome of bilateral inter-agency cooperation involving the competition authorities on both sides of the Atlantic.

The comparative analysis will be structured around several key mergers investigated jointly by the EU and US competition authorities during the merger wave at the end of the 1990s: *AT&T/MediaOne* (1999), *Vodafone/AirTouch* (1999), *WorldCom/MCI* (1997), *MCI WorldCom/Sprint* (1999) and *AOL/Time Warner* (2000). Each case will be discussed in detail in order to compare the approaches and methods of EU and US competition authorities, to observe the evolution of various competition law

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[3] The increased amount of merger transactions can be explained by economic and legal factors. Economic factors include technological advances and innovation, high and stable stock prices that lower the cost of acquisitions, increased competition from abroad or from adjacent markets, etc. One of the most significant legal factors is the deregulation that occurred both in the EU and the US. See L. R. Fullerton, "Challenges of the Current Merger Wave", address before the Business Development Associates, Antitrust 1996 Conference, 25 October 1995, available online at <http://www.usdoj.gov/atr/public/speeches/0455.htm>.

[4] See J. I. Klein, Statement before the House Committee on the Judiciary concerning Concentration in the Telecommunications Industry, 24 June 1998, available online at <http://www.usdoj.gov/atr/public/testimony/1806.htm>.

[5] G. Le Blanc and H. Shelanski, "Merger Control and Remedies Policy in Telecommunications Mergers in the EU and US", Preliminary Draft (August 2002), available online at <http://www.cerna.ensmp.fr/Documents/GLB-TelecomMergerRemedies.pdf>.

[6] Statistical data demonstrates that the majority of the proposed transactions were cleared with conditions. See G. Le Blanc and H. Shelanski, "Merger Control and Remedies Policy in Telecommunications Mergers in the EU and US", presentation at TPRC 30th Research Conference, Alexandria, 29 September 2002, p. 5, available online at <http://www.cerna.ensmp.fr/Documents/GLB-TPRC-September02.pdf>.

concepts, and to highlight problematic issues raised by the specifics of the telecommunications sector. Special attention will be given to the procedural cooperation between competition authorities during the merger investigation and post-merger stage of monitoring the compliance with remedies imposed on merging undertakings. Due to the differences in the merger control regimes of the two jurisdictions there is a potential for conflicting outcomes that might result from the parallel investigations carried out on both sides of the Atlantic. In the absence of an international multilateral mechanism for resolving the conflicts of the extraterritorial application of national competition rules, which is the case in the matter of merger control, bilateral inter-agency cooperation might yield immediate results in providing a basis for dialogue between competition authorities from different jurisdictions. As the EU and the US represent the most developed merger control regimes in the world, the case for EU-US cooperation in merger control is worthy of special attention.[7] Finally, a set of conclusions will be derived from the comparison of the EU and US experiences dealing with telecom mergers in order to identify the degree of harmonisation of merger assessment on both sides of the Atlantic.

## II. Comparative Review of the Merger Control Regimes in the EU and the US

Analysing the application of substantive tests in merger control as regards the telecommunications sector and as well as cooperation between EU and US competition authorities could be problematic without addressing the key features of each merger control system in order to identify the main challenges of the cooperation process, particularly the differences in the structure of two systems and extraterritorial application of their merger control laws, and divergences in the substantive and procedural aspects of the merger control regulations. The following summary is designed to familiarise the reader with the general conceptual framework of the merger control system that will be used throughout this paper.

The EC merger control regime is based on the 'one stop shop' principle, which implies that once the Commission's powers to investigate and authorise the proposed merger have been triggered, national competition authorities are precluded from applying their own national merger control laws.[8] The most recent reform of the EC merger control regime was effectuated in 2004 with the adoption of the new EC Merger Regulation (hereafter 'ECMR'),[9] which has modified the wording of the substantive test that European Commission and Community Courts should apply in the process of determining whether a particular concentration is compatible with the Common Market. Under the old test, 'dominance' was the necessary indicator, without which the Commission could not block the merger. Thus, attention was concentrated on the structural analysis of the market, and more specifically on the identification of the market shares and market power of the merging undertakings, which would assist in determination of the dominant position. The newly introduced 'significant impediment of effective competition' (hereafter 'SIEC') test[10] directs the focus of the Commission's analysis from the determination of dominance, *i.e.*

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7 See generally A. Svetlicinii, "Cooperation between Merger Control Authorities of the EU and the U.S.: a Viable Solution for Transatlantic Mergers" (2006) 7 UC Davis Bus.L.J. 4.

8 Articles 1 and 4 of the new EC Merger Regulation provide the scope of the application of the regulation (the so-called "Community dimension") and regulate the referral system between the Commission and national competition authorities. Thresholds of annual turnover of 5 billion euro world-wide and 250 million euro EC-wide were established to determine the Commission's jurisdiction.

9 Council Regulation 139/2004 on the control of concentrations between undertakings, 20.01.2004, O.J. 29.01.2004.

10 ECMR, Article 2(2): "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of creation or strengthening of a dominant position, shall be declared compatible

acquisition by the merged entity of market power, to the consideration of how this market power affects the relevant market and of what its effects would be on the existing level of competition and on other market players – competitors (actual and potential) and consumers.[11] For the purpose of clarity it should be emphasised that all merger cases discussed here were decided under the old 'dominance' test.

As to the extraterritorial application of the ECMR, it should be noted that both the Commission and the Community Courts have assumed jurisdiction over cases which might have an adverse anticompetitive impact on the common market, even if the agreement or action have been undertaken outside of the EU. The ECMR applies to all concentrations which have a "Community dimension" (*i.e.* which meet the quantitative turnover thresholds). Because the turnover thresholds are based on geographic turnover and not on the location or registered office of the parties, even foreign-to-foreign transactions essentially involving non-EC groups can be caught.

In the US mergers are reviewed under section 7 of the Clayton Act,[12] which prohibits the acquisition of stock or assets where, in "any line of commerce", in "any section of the country", the effect of such acquisition "may be substantially to lessen competition". The "line of commerce" and "section of the country" requirements are equivalent to the product and geographic market concepts. Two federal agencies – the Antitrust Division of the Department of Justice (hereafter 'DoJ') and the Federal Trade Commission (hereafter 'FTC') - share the responsibility of reviewing merger transactions. The apparent overlap in their jurisdiction is mitigated by informal interagency agreements and consultations that allow one of the agencies to take leading positions in the mergers in certain industry sectors. Traditionally the US antitrust authorities applied a more economics-based approach in the assessment of the proposed concentrations than their European counterpart.

To summarise, in the EU the Commission is a 'one stop shop' institution where the future of the proposed merger will be decided. This provides for a more comprehensive scrutiny and requires much more information than in the US, where both the FTC and the DoJ have to bring the case to the federal courts in order to receive an injunction prohibiting the parties from consummating the transaction. This difference could be best exemplified by the analysis of the forms that the merging undertakings should submit to the antitrust authorities: it will be seen that the required Form CO requests from the parties more comprehensive information than the Notification Form in the US, which is intended only to provide general information for first phase investigations that often allows antitrust authorities to clear the merger without going into a more comprehensive investigation.[13]

The two merger control systems vary also in their approach to thresholds. Under the ECMR the 'Community dimension' is calculated according to the EU-wide and world-wide turnover of the merging undertakings. As a result, much more transactions that might not have any significant impact

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with the common market."

[11] Nevertheless, post-reform merger control enforcement would suggest that the SIEC test will not change the Commission's assessment in a radical way and that it will continue to focus on the findings of dominance and that the new wording of the substantive test and the guidelines issued to clarify its application would only make a difference in a handful of cases. See L. Roeller, "The Impact of the Substantive Test in European Merger Control" in P. Marsden, M. Hutchings and P. Whelan (eds.), *Current Competition Law V* (BIICL, 2007), pp. 24-44.

[12] Clayton Act of 1914, 15 U.S.C. para. 12-27.

[13] Compare Form CO Relating to the Notification of a Concentration Pursuant to Regulation EC No 139/2004 available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF> (Annex I) (accessed on 14 April 2008) and Notification and Report Form for Certain Mergers and Acquisitions, available online at <http://www.ftc.gov/bc/hsr/Stale-Filings-Form%20.pdf>.

on the Common Market will be caught. In the US, a more balanced approach is taken as a basis of the calculation: assets and sales in the US are considered.

The EU and US merger control systems also differ regarding the triggering effects that indicate the moment when the transaction should be reported and when the empowered agencies can start the assessment process. Article 4(1) of the ECMR indicates a definite agreement to merge as a triggering event, while in the US the clearance procedure might be invoked by the merging parties at any stage of the negotiations regarding the prospective merger, which allows them to consider possible restraints on the proposed transaction at an earlier stage.

All of the above differences might create significant challenges when a transnational merger is notified on the both sides of the Atlantic and American and European competition authorities are conducting parallel assessment of the notified concentration which might potentially lead to the conflicting outcomes, *i.e.* one of the authorities clears the merger while the other decides to prohibit it. That is why the issue of the convergence of the two merger control regimes is accorded special importance in this paper.

## III. *AT&T/MediaOne*: Different Markets, Different Outcomes

The acquisition by AT&T, the largest US long distance calls, fixed and wireless telephony company, of MediaOne, another US corporation active in a variety of telecom markets, presents a relatively uncontroversial case for the purposes of the analysis of EU-US merger control cooperation. As becomes obvious from the analysis of the facts of the case, the proposed merger has raised different, but non-conflicting, anticompetitive concerns on European and American markets. Therefore, the present analysis will focus on the telecom-related problems encountered by the competition authorities in their assessment of the proposed merger.

Since the transaction involving both companies on the European telecom markets resulted in a concentration with a "Community dimension",[14] the Commission opened a Phase I investigation procedure to examine the suspected threat of a strengthening of a dominant position on telecom markets in several Member States. As a result of the assessment of market shares and potential anticompetitive effects, the proposed merger was cleared.[15]

One of the concerns of the Commission was related to the fixed telephony and Internet services markets in UK. In addition to the previous conditionally approved joint venture with British Telecommunications,[16] AT&T had a stake in Telewest, a UK company active on the fixed telephony market and Internet services market. MediaOne also had an interest in Telewest, thus having a say in the company's operations on the cable and telecom services markets. However, the calculation of the market share of the proposed merger was about 15% of the analysed market, and the merging entities undertook a commitment to dispose of the MediaOne share in Telewest. These two facts led the Commission to close the investigation.

Another market analysed by the European competition authority was the mobile telephony market in UK. Both merger participants had shares in One2One and BT Cellnet, two UK mobile telephony

[14] As defined in Article 1 of the ECMR.

[15] Case No. IV/M.1551 *AT&T/MediaOne,* Commission Decision, 23.07.1999, CELEX 399M1551.

[16] Case No. COMP/M.1510 *BT/AT&T/Japan Telecom*, Commission Decision, 19.07.1999, CELEX 399M1510.

providers. However, their cumulative market share did not rise to the level necessary for the finding of a dominant position or even an oligopoly. The Commission noted that mobile telephony is a dynamic market that, at that time, experienced rapid growth and was characterised by constant entry of new competitors, some of which, like Vodafone and Orange, presented a strong competitive challenge to the merging companies.

Finally, the Commission analysed the impact of the proposed merger on the Internet services markets in Belgium and the Netherlands. It acknowledged the existence of separate markets for dial-up Internet, Internet advertising and paid-for content provision. While the merging companies had interest shares in several small local providers, the cumulative market share did not raise dominance concerns, although the Commission noted that, theoretically, in situations like this there could be leverage effects among the above mentioned Internet services markets. Unfortunately, the Commission did not develop this assumption any further, which could be an important step in the discussion of the anti-competitive effects of vertical mergers.

In the US, the situation was more serious because of the much larger market shares that the merging companies possessed on the broadband content market. AT&T, the largest telecom in the country, held over 50% in Excite@Home, the largest provider of residential broadband Internet services. MediaOne was the owner of 34% interest in ServiceCo, which through its Road Runner system was the second-largest broadband provider in the country. The economic rationale of the merger was predetermined by the specifics of the market. In order to establish a strong position on the market for broadband content, the merging entity would combine both access and Internet Service Provider (ISP) services (content) under one company, which would eliminate competition in the broadband lines.[17] The merger prompted much heated discussion among scholars and practitioners, who advocated open access obligations as a remedy against the attempt by cable companies to concentrate and dominate the Internet services market.[18] From the other side, there were arguments about the general pro-competitive nature of vertical mergers and efficiencies which would ultimately lead to an increase in consumer welfare.[19]

The DoJ, which was investigating the proposed merger, noted that this acquisition would lead to a significant lessening of competition on the market for "aggregation, promotion and distribution of residential broadband content". Like the Commission, it held dial-up (low speed Internet) and broadband (high speed Internet) services to be separate markets due to differences in the substance and substitutability of services. As a result of the merger, AT&T would acquire a controlling interest in Road Runner, which would eventually diminish the level of competition between the two largest broadband providers and could lead to an increase in prices. The DoJ also noted that, while 70% of broadband services are transmitted via cable and both companies have long-term agreements with major cable

[17] *In the Matter of the AT&T/MediaOne*, *Ex parte* submission to FCC, by M. A. Lemiley and L. Lessig, paras. 51-53, available online at <http://cyber.law.harvard.edu/works/lessig/lem-lesd.pdf>.

[18] See J. H. Saltzer, "Open Access is Just the Tip of the Iceberg", 22 October 1999, available online at <http://mit.edu/Saltzer/www/publications/openaccess.html>.

[19] Generally, the concept of consumer welfare is related to the measurement of economic efficiencies. Under the total welfare model all efficiencies are taken into account, including the cost savings by the undertakings. The consumer welfare standard implies that only efficiencies that have a direct effect on consumers, for example reduction in prices or improvement in the quality of a product, should be taken into account. For the review of theoretical foundations of efficiencies and consumer welfare see I.L.O. Schmidt, "The Suitability of the More Economic Approach for Competition Policy: Dynamic vs. Static Efficiency" (2007) 28 E.C.L.R. 408-411. See also J. L. Bast, "For the Sake of Consumers, Allow *AT&T/MediaOne* Merger to Proceed at Once", Heartland Perspectives, 09 March 2000, available online at <http://www.heartland.org/Article.cfm?artId=497>.

providers and a significant number of subscribers, the proposed merger would diminish the overall level of competition on the market by creating obstacles for potential entrants and existing competitors.[20]

The litigation in the federal courts against AT&T and MediaOne resulted in a final judgment, with the court ordering both companies to divest themselves of their interest in ServiceCo (Road Runner) before allowing the merger to be consummated.[21] The stake was to be sold to Time Warner, one of the existing shareholders. Part of the judgment provided for an injunction prohibiting AT&T from contracting with Time Warner regarding the joint offer and provision of broadband residential services or any agreement that might prevent any of the companies from marketing their services independently. The injunction aimed at the avoidance of any potential anticompetitive effects that might appear if AT&T entered any agreements with the company controlling the Road Runner.

To make the case review complete, it should be noted that the Federal Communications Commission (FCC) was also involved in the clearance of the transaction, although this was from the regulatory point of view, enforcing the provisions of the 1996 Telecommunications Act, namely the 30% cap of subscribers nationwide. While the agency did not made any objections regarding the adverse public interest effects of the merger itself, it issued an order to AT&T to make certain divestures in order to bring the percentage of the multi-channel video programming distribution subscribers that the merged company was serving from 41.8% down to the required 30%.[22]

## IV. *Vodafone/Airtouch*: Testing The Principles of Market Definition and Effective Control

As in the case of *AT&T/MediaOne*, this merger, although notified on both sides of Atlantic, was investigated by one of the cooperating authorities - the European Commission – primarily because of the anticompetitive concerns that it raised on the Common Market.[23] The Vodafone Group, a UK company with a range of subsidiaries, interest holdings and investments in Europe, wanted to expand by acquiring AirTouch Communications, an American company which provided a variety of wireless services, including mobile communications, cellular paging, and global satellite communications. Both Vodafone and AirTouch had investments in Europe in the areas of mobile telecommunications, data network operation, radio paging and several other value-added services closely linked to mobile networks.[24] The proposed merger was notified in 1999 when the Commission had not yet provided any detailed recommendations or guidelines for determining product markets in the telecommunications sector.[25] That is why this case was one of the first experiments in determining relevant markets in the rapidly developing telecom sector. The main problem concerned the narrow definition of a product

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[20] *US v. AT&T Corp., and MediaOne Group, Inc.*, Amended Complaint, Case Number: 1: 00CV01176 (RCL), available online at <http://www.usdoj.gov/atr/cases/f4800/4840.htm>.

[21] *US v. AT&T Corp., and MediaOne Group, Inc.*, Final Judgment, Civil Action No.: 1: 00CV01176 (RCL), available online at <http://www.usdoj.gov/atr/cases/f6600/6622.htm>.

[22] AT&T Media One Merger Page available at FCC web-site: <http://www.fcc.gov/mb/att_m1.html>.

[23] In the US, the FCC reviewed the proposed merger and found no anticompetitive concerns because Vodafone and AirTouch do not compete against each other on any US market. The FCC has also approved the transfer of licenses from AirTouch to Vodafone. See Wireless Telecommunications Bureau Approves *Vodafone/AirTouch* Merger, Press Release, 22 June 1999, available online at <http://www.fcc.gov/Bureaus/Wireless/News_Releases/1999/nrwl9026.html>.

[24] Case No IV/M.1430 *Vodafone/AirTouch*, Commission Decision 21.05.1999, CELEX 399M1430.

[25] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002/C 165/03.

market for mobile services. While both GSM and analogous services were present in all EU Member States at that time, the Commission had to justify the exclusion of analogous services from the mobile services market using the fact that the former encountered for a minimal number of subscribers and were continuously disappearing under the pressure of developing GSM technologies.

Another question that technological development posed in the definition of the relevant product market was whether GSM 900 and DCS 1800 standards should be viewed as two separate markets. After an analysis of the business practices, where telecom companies were treating the standards identically in their marketing and accounting practices and taking into account the availability of dual hand-sets that allowed the use of both standards, the Commission came to the conclusion that standards were already substitutable and should be included in the same product market. The last area of confusion that the Commission had to solve before identifying a single product market for mobile telecommunication was that of the difference between business and private users. The Commission found it difficult to distinguish the subscribers using this criterion because many consumers make business and private calls using the same package. Additionally, using pre-paid packages, it is possible for the consumer to avoid disclosing his/her personal identity, which makes it impossible to determine the purpose of the purchase.

The definition of the relevant geographic market also reflected the specifics of the telecommunications sector, namely its technological complexity and dynamic growth. The Commission had to decide whether the geographical dimension should be narrowed down to the national one or defined more broadly at regional or even Community level. This attempt is understandable taking into account the Commission's objective of creating pan-European telecom operators that would emerge after the liberalisation of the entire sector. In an attempt to identify a regional market for mobile communications the Commission considered the availability of roaming services, since these allow subscribers to use the services of any provider, even if the latter is located outside national borders. The respondents, however, produced empirical data on the pricing of roaming services by the providers. This study demonstrated that roaming charges were much higher than regular ones and that consumers would be charged at the international rate when they made calls within their own country. Wide differences in the charges ensured that national services and roaming services offered from abroad were two different products.[26] This factor, combined with national regulatory regimes, led the Commission to conclude that "regional geographic markets which are wider than national do not currently exist".[27]

Another important exercise for the purposes of dealing with the specifics of the telecom sector under the ECMR was the definition of "effective control".[28] The Commission found that AirTouch had a significant interest (25%-35%) in the Mannesmann's subsidiary D2, one of the leading German mobile services providers and that Vodafone was holding 17% in E-Plus, another German provider that accounted for 35%-45% of the German market. While 17% might appear insufficient to acknowledge the existence of effective control, especially when two other shareholders held 60% and 22% respectively, the Commission has found the opposite to be the case. As is common in the corporate world, any

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[26] Since then, separate treatment of roaming services has evolved into a Commission-led initiative to address the high roaming charges by introducing a proposal for a regulation to introduce caps on roaming charges. See: "Commission proposes to cap the high cost of using mobiles when traveling within the EU", Press Release IP/06/978, 12 July 2006.

[27] Para. [16] of the Decision.

[28] See Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings 98/C 66/02, O.J. 02.03.1998.

increase in the share capital requires the consent of all shareholders, since the minority shareholders may be hurt by the dilution of their shares. The Commission noted that due to the specificity of the telecom sector, where the acquisition and operation of new licenses and frequencies require large capital investments, the consent of Vodafone amounted to the exercise of a decisive influence for the purposes of the ECMR.

As a result, because the merged company would control 50%-60% of the German mobile services market, the proposed merger could not be approved without divestitures. To consummate the transaction, Vodafone had to agree to the divestiture of its stake in E-Plus.

## V. WorldCom + MCI + Sprint: Problems of the Non-Structural Remedies

In 1997 WorldCom, a US-incorporated global provider of telecommunications services, announced its intention to acquire MCI, the second-largest telecom company in the US. Both companies had significant investments abroad and the transaction was found to have a "Community dimension" for the purposes of the ECMR. The competition authorities on both sides of the Atlantic initiated parallel but independent investigations which ultimately reached compatible results regarding the conditional approval of the proposed merger.[29] Both the Commission and the DoJ have been concerned with the anticompetitive effects of the merger on the market for universal Internet services. Since the analysis of the cooperating parties was carried out along the same lines, there follows brief discussion of the Commission's assessment, since this was more detailed and explanatory for the purposes of understanding the specifics of Internet markets.

In its decision, the Commission goes into a long discourse addressing the technological foundations of the Internet and their impact on the definition of the relevant product and geographic markets.[30] The Commission distinguishes between two types of ISPs: (i) top-level ISPs, which thanks to the payment-free peering agreements among them are able to provide universal connectivity to any Internet resources available; and (ii) lower-level ISPs, which had peering agreements between themselves or only with some of the top-level ISPs, and which have to purchase transit services to ensure the interconnection of their networks. The distinguishing feature – universal connectivity – was provided only by the top-level ISPs with lower-level ISPs dependant on them for interconnection purposes. There were four major top level ISPs, all based in the United States: WorldCom, MCI, Sprint and GTE. By merging into one economic entity, the two major universal connectivity providers would further increase the concentration of the top-level market.

The merging parties argued that the relevant product market should also include the lower-level ISPs, because all of them can conclude peering agreements and assure the interconnection independent of top-level ISPs. The Commission found this option very costly and unrealistic. The 'SSNIP' test[31], commonly used in market power assessment on both sides of the Atlantic, led the competition authority

[29] "Commission clears WorldCom and MCI merger subject to conditions", Press Release IP/98/639, Brussels, 8 July 1998.

[30] Case No IV/M.1069 *WorldCom/MCI*, Commission Decision, 08.07.98.

[31] The test of "Small but Significant and Non-transitory Increase in Price" (SSNIP) is used to define the relevant market in a consistent way. The SSNIP test seeks to identify the smallest relevant market within which a hypothetical monopolist or cartel could impose a profitable significant increase in price. The SSNIP test can be applied by estimating empirically the critical elasticity of demand. If the pre-merger elasticity of demand exceeds the critical elasticity then the decline in sales arising from the price increase will be sufficiently large to render the price increase unprofitable and the products concerned do not constitute the relevant market. See <http://www.tcd.ie/Economics/staff/masseyp/term1lecture4.htm>.

to conclude that a 5%-10% non-transitory increase in price would not make the primary consumers of the top-level market – low-level ISPs – to switch to substitutable products, because there are none: universal connectivity can be supplied only by top-level ISPs.

However, in order to proceed to the calculation of the market shares of the merging companies and to establish their dominant position, the product market had to be defined more precisely. It is noticeable that the Commission used a variety of calculation methods in order to give the respondent companies more flexibility and also to establish a precedent for future analyses. One of the problems that the Commission had to resolve was the identification of top-level ISPs. This was done by applying the interconnection test, identifying only those ISPs that had peering agreements with all four major top-level ISPs.

While this method might appear arbitrary, as acknowledged by the Commission, other options were also examined. Thus, to calculate the market shares of the merging companies the Commission assessed both the revenue and traffic flows, where it encountered a significant lack of information. For this reason it was not possible to assess the market power based on the number of subscribers either. The Commission produced a set of numbers, which generally attributed to the proposed merger a market share of 45%-55%. Given that the next competitor amounted to less than half this amount, the Commission found that the merging parties would have a dominant position in the market. It should be noted that the above-mentioned methods of calculation, which are imperfect and imprecise, were applied by the Commission in the absence of any other reliable alternatives proposed by the Respondents. The American antitrust authority applied the traffic and revenue flow calculations, revealing similar conclusions.

Anticompetitive threats were realised on both sides of the Atlantic. By acquiring a market share of about 50%, *WorldCom/MCI* would be able to raise prices and affect the quality of services independently of its competitors, which would be dependant on the company for interconnection services.[32] As previous practice demonstrated, WorldCom and MCI had attempted to terminate existing peering agreements and to impose transit agreements on lower ISPs. The prospective concentration would discourage any potential entry to the market because newcomers would probably find that their peering proposals would be rejected. Consumers in their turn would be reluctant to switch to other providers because they would get lower quality services by the ISPs dependant on the *WorldCom/MCI*. While the EU authorities showed more concern for competitors and the situation on the market and their US colleagues were more concerned with the negative effect on consumers' choice and welfare, both competition agencies agreed on the necessity of divestitures. This joint decision brought about the largest divestiture in the history of merger control: MCI Internet business was purchased by the UK company Cable & Wireless for $1.75 billion.

This case is also an illustrative example of effective cooperation between the competition authorities of the EU and the US based on the 1991 US-EC Antitrust Cooperation Agreement.[33] The investigation was conducted within a framework of constant contacts, consultations, meetings of competition officials and negotiations with the parties. The investigating authorities even organised joint oral hearings,

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[32] US Department of Justice. "Networks Effects in Telecommunications Mergers, MCI WorldCom Merger: Protecting the Future of the Internet", Address by Constance K. Robinson, Director of Operations and Merger Enforcement, Antirust Division, before the Practicing Law Institute, San Francisco, 23 August 1999, pp. 12-13.

[33] Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (1991 EC/US Competition Co-operation Agreement) OJ 95 1995 pp. 47-52.

which usually take place only on rare occasions. The complexity of the investigation involved the active participation of competitors, like Sprint and GTE, who supplied their observations regarding calculation of market shares as third parties.[34] FCC and Attorneys General from ten US states were also involved in the investigation process, and supplied the available revenue and traffic data to the competition authorities. In the words of Deputy Attorney General Klein, the cooperating parties "enjoyed a close and constructive relationship…pursuing…separate responsibilities throughout the investigation".[35] Following the proposal of commitments by the merging parties, the cooperating authorities agreed that the DoJ would monitor the compliance and implementation of the negotiated divestitures.

Two years later, in 1999, MCI-WorldCom notified another merger, this time acquiring control over another leading provider of global telecommunications services – US corporation Sprint. Parallel investigation procedures were initiated by the Commission and the DoJ, both of them reaching the second phase.[36] As expected, the question of the dominance on the global universal Internet connectivity market arose again, due to the fact that both merging companies were top-level ISPs. To define the relevant product market, the Commission repeated the steps used in *WorldCom/MCI* and found that the merging parties possessed significant market shares which would be strengthened after the merger and which raised significant concerns regarding compatibility of the proposed concentrations with the Common Market.[37] The American authorities focused exclusively on the US market for the purposes of the Clayton Act and, using the 'HHI' market concentration index[38] also found dominance and concerns of significant lessening of competition. To avoid repeating the market analysis and calculation of relevant market shares that was analogous to the *WorldCom/MCI* case, it should only be noted that the Commission found that, despite the divestiture of the MCI Internet business to the Cable & Wireless, the latter was unable to become a competitive company capable of challenging the dominance of the 'big four'. This issue will be considered further below, in the discussion of proposed remedies.

Another relevant market where the Commission has analysed the prospective effects of the proposed mergers was that of the global telecom services offered to the corporations. The specifics of this market consisted in the special bidding procedure and bundled offers made to limited number of corporate customers. Investigation revealed that the two-step bidding procedure was designed in such a way that only top-level ISPs offering a package of services were able to pass to the second stage, at which the price was negotiated. Thus, lower-level ISPs could not compete effectively in this highly concentrated market. Secondly, consumers of these kinds of services usually require a package of services, very diverse and complex, and only major bidders were able to offer them. And finally, the number of corporations that require global telecom services remains limited, so suppliers are competing for a scarce resource.

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[34] Commission Report to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws 1 January 1998 to 31 December 1998, Brussels, 2 April 1999, p. 11.

[35] "Justice Department clears WorldCom/MCI merger after MCI agrees to sell its Internet business: largest divestiture of company in merger history", Press Release, July 15, 1998.

[36] "Commission opens full investigation into the WorldCom MCI/Sprint merger", Press Release IP/00/174, Brussels, 21 February 2000.

[37] Case No IV/M.1741 *MCI-WorldCom/Sprint*, Commission Decision, 28.06.2000.

[38] The Herfindahl-Hirschman Index (HHI) is a measure of the size of firms in relationship to the industry and an indicator of the amount of competition among them. It is defined as the sum of the squares of the market shares of each individual firm. As such, it can range from 0 to 1 moving from a very large amount of very small firms to a single monopolistic producer. Decreases in the Herfindahl index generally indicate a loss of pricing power and an increase in competition, whereas increases imply the opposite.

The Commission identified three major global competitors in this field: MCI-WorldCom, Concert Alliance and Global One Alliance, which included Sprint, France Telecom and Deutsche Telekom among others. Confronted with the difficulties in calculating market shares, the Commission again used various methods: revenues from global telecom services, amount of sales to the 200 largest consumers, ranking survey demonstrating the perception of customers, and other tools. The Global One Alliance was already falling apart because of the exit of Deutsche Telekom and the exit of Sprint would leave Global One without any interconnection partner in the USA. This would significantly diminish its competitive strength, leaving WorldCom-MCI and Concert Alliance as the two dominant competitors.

Taking into account all of the above-mentioned facts, the Commission came to the conclusion that that two major competitors are likely to engage in parallel behaviour and create a position of joint dominance on the global telecommunication systems (hereafter 'GTS') market. Because of the specifics of bidding procedures, high costs of entry, and the loyalty and dependence of customers, remaining players would find it more profitable to cooperate and decide who will win which bid. In order to reach this conclusion the Commission used the example of *Exxon/Mobil*,[39] where it found a position of joint dominance on the market for oils and fuels.

The Commission stated that MCI-WorldCom and Concert Alliance will be able to discipline the market and keep their customers even with increased prices and degraded services. Understandably, the merging parties raised objections against the definition of joint dominance and argued that the buying power of customers would counterbalance this alleged collective dominance.[40] The Commission did not provide any arguments to the contrary and ultimately decided to drop its objections regarding the GTS market.[41] Given that there were numerous arguments and sufficient factual evidence in favour of collective dominance and parallel behaviour, this decision, and more specifically what prompted it, can be questioned. Perhaps the Commission was confident enough that it would be successful in challenging the merger on other markets, which would solve this problem as well.

The American antitrust authorities proceeded further, challenging the proposed merger on the grounds of its impact on the GTS market. However, they chose a slightly different approach, by delineating the US geographic market and two product markets: data network services and custom network services for big businesses. Following this distinction, the DoJ assumed that both markets were already characterised by a high HHI score and that they would be further concentrated if the merger was allowed. The calculation of market shares followed a similar path to that taken by the Commission in using several quantitative criteria.

Here, the paths of the EU and US investigations part, because the remaining product markets identified by the antitrust authorities concerned only the US. While the Commission identified that merging companies were also active on the voice telephony and long distance calls markets, their activities would not affect competition on the Common Market because of the structure of the international calls system. On the retail level, call termination was offered by the local telephone companies. On

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39 Case No. IV/M.1383 *Exxon/Mobil*, Commission Decision, 29.09.1999, CELEX 32004D0284.

40 For the impact of buying power on the prospective collusion see P. Rey, "Collective Dominance and the telecommunications industry" in P. A. Buigues and P. Rey (eds.), *The Economics of Antitrust and Regulation in Telecommunications: Perspectives for the New European Regulatory Framework* (Edward Elgar, 2004), p. 100.

41 Nevertheless the example of *MCI-WorldCom/Sprint* was included in the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services 2002/C 165/03, para. 103.

the wholesale level, the terminating companies usually settled their call balances without payments, so the concentration of the US companies would not affect competition in Europe. The only market that remained as far as the Commission's objections to the merger were concerned was universal Internet connectivity.

Understandably, the situation was of greater concern to the US antitrust authorities. The DoJ raised a number of objections to the merger on the following markets within the US: long-distance calls services sold to residential consumers; international long-distance services from US to other countries; and private line services from US to other countries. After the dissolution of the Bell network, AT&T, MCI-WorldCom and Sprint became the "big three" leading companies providing long-distance services on the retail and wholesale levels. While the 1996 US Telecommunications Act offered a possibility for "Bell babies" to be active on the long distance calls markets,[42] the required conditions were satisfied only by New York Bell. The proposed merger would have brought the joint market share of MCI-WorldCom and AT&T close to 80%. The specifics of the long-distance services between US and other countries are that international interconnection is usually heavily regulated by national governments, while US providers often are not allowed to own network facilities on foreign soil. In this situation long-distance service providers have either to own the network or to have an agreement with a foreign operator to terminate their calls. The "big three" were positioned best in all categories: they were dominating the long-distance calls transmission between the US and 50-60 foreign countries. Thus, the DoJ requested an injunction to prohibit the merger based on its anticompetitive effects on six product markets.[43]

While the merging parties objected to the way in which the European and American competition authorities defined the relevant product markets and calculated market shares, after *WorldCom/MCI* there could be little doubt that the universal Internet connectivity market would be highly concentrated both in the EU and the US.[44] Following the existing precedent, the merging parties proposed the divestment of the public Internet services business of Sprint in the hope of receiving clearance for the proposed merger. And as the EU and US competition authorities were initially satisfied with concessions offered by the merging parties in *WorldCom/MCI*, they unanimously rejected a similar divestiture proposed in *MCI-WorldCom/Sprint*. As practice has shown, the sale of the MCI Internet business to Cable & Wireless failed to preserve competitive restraints on remaining market players. This was reflected in the Commission's analysis, which stated that Cable & Wireless did not succeed in becoming a major competitor on the market for universal Internet connectivity. Its market shares decreased, and the customer base and quality of services fell. The previous divestiture was complicated not only by procedural considerations;[45] it has also proved that in integrated network industries the divestiture of this kind is practically impossible without negatively affecting the competitive strength of the purchaser. In the litigation initiated by the purchaser of MCI Internet business, Cable & Wireless

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[42] Telecommunications Act of 1996, paras. 271, 272.

[43] See "Justice Department sues to block WorldCom's acquisition of Sprint: Unless blocked, the deal would result in higher prices for millions of consumers", Press Release, 27 June 2000.

[44] See S. Pociask and J. Rutner, "MCI WorldCom's Sprint Towards Monopoly: An Analysis of the Proposed Telecommunications Merger", Economic Policy Institute, 2000.

[45] *GTE Corp. et. al.* v. *WorldCom Inc. and MCI Corp.*, Case No. 98-CV-1155, filed 7 May 1998, U.S. District Court, District of Columbia, Cable and Wireless plc v. MCI Corp. and WorldCom Inc., Case No. 98-CV-1460, filed 10 June 1998, U.S. District Court, District of Columbia. WorldCom-MCI was sued by a competitor and purchaser for violating its commitments by concentrating its Internet backbone services and seeking to negotiate a sale with the company other than Cable & Wireless. Summary available online at <http://www.techlawjournal.com/courts/mcicwcom/Default.htm>.

admitted that "it is not possible to divest integrated Internet business without weakening the purchaser's competitive strength".[46]

That is why this time a similar divestiture offered by Sprint was strongly criticised by the antitrust authorities. The Commission and the DoJ both recognised the problematic nature of this kind of divestiture. Because of the nature of the integrated network business, it is an extremely complex process to assure the migration of the whole network, resources and customer base to the new purchaser, and because Sprint is using the same network to supply Internet and other telecom and telephony services, it would still have access to its customers and will be able to make them switch to the merged company's Internet services.[47] The consent of customers to any automatic switch to another company is also quite a problematic issue. The quantity and adaptability of personnel, the transfer of licenses and IP rights, the provision of support and maintenance services, the assurance of constant access to network points and facilities for repair and programming – all these factors made the remedy look more like a behavioural rather than a structural one.[48] A complex and long-lasting process of monitoring and surveillance was in fact needed to assure the effectiveness of such a transfer. However, the previous failure to preserve effective competition in *WorldCom/MCI* made the competition authorities reject a similar divestiture proposed by the merging parties and prohibit the merger.[49]

This case is also characterised by a high degree of bilateral cooperation between the Commission and the DoJ. Expert consultations, meetings, oral hearings and negotiations with the parties, requests for information from third parties, and consumer surveys were common events throughout the investigation process. To facilitate this cooperation, parties provided an information waiver to the competition authorities, so that the relevant information, otherwise considered confidential, could be circulated between the cooperating authorities.

## VI. *AOL/Time Warner* and Assessment of Non-Horizontal Mergers

The merger between media giant Time Warner and one of the leading ISPs, AOL, was another case that presented a challenging experience for the competition authorities on both sides of the Atlantic, since it was a relatively rare occasion to jointly evaluate a vertical, or as some commentators claim, conglomerate[50] merger in the telecom sector. Anticompetitive concerns on the European Common Market stemmed from the fact that AOL and the leading European media publisher and copyright holder Bertelsmann AG held 50% share stakes in AOL Europe. Additionally, AOL and Bertelsmann

[46] Department of Justice. 2000. *United States* v. *WorldCom, Inc., and Sprint Corporation*, Complaint filed in the United States District Court for the District of Columbia on 26 June 2000 (WorldCom -Sprint Complaint).

[47] GTE spokesman Bob Bishop stated that "what they are doing does not even remotely address the antitrust problem we've got". He said that "they are simply selling infrastructure," while retaining their huge customer base. This is merely "an attempt to win clearance by the EC with the appearance of divestiture". See "MCI Plan to Sell Internet Backbone Business Does Not Placate Competition, Tech Law Journal", available online at <http://www.techlawjournal.com/atr/80529.htm>.

[48] While the Commission clearly favors structural remedies that are aimed at settling the problem at once, there are instances like in the present case where behavioral remedies are needed in order to assure continuous open access to networks and infrastructure, transfer of customers and other commitments. The enforcement of these kinds of remedies still remains problematic, as some commentators note. See K. Paas, "Non-Structural Remedies in EU Merger Control" (2006) 27 E.C.L.R. 209; S. Turnbull and S. Holmes, "Remedies in Merger Cases: Recent Developments" (2002) 23 E.C.L.R. 499.

[49] "Commission prohibits merger between WorldCom MCI and Sprint", Press Release IP/00/668, Brussels, 28 June 2000.

[50] J. M. Turner, "Mega Merger. Mega Problems: A Critique on European Community's Commission on Competition's Review of the AOL/Time Warner Merger" (2001-2) 17 Am. U. Int'l L. Rev. 131.

were bound by the Marketing Agreement, which granted AOL preferential access to Bertelsmann's content in exchange for advertising and promotion services. The Commission found that the proposed merger would cause the creation of a dominant position on the market for online music. It stated that, as a result of the merger, AOL would have access to an immense depository of copyrighted music, which would allow it to dominate the market for on-line music. Another anticompetitive result of the merger would be dominance in the music player market, since AOL would have been able to adopt the music content to be played exclusively through its music player WinAmp, which at the moment held only 20% of the market. In this respect the Commission went far beyond its traditional market analysis by claiming that WinAmp would achieve a dominant position.

The Commission also analysed the markets for dial-up Internet access, broadband Internet access, and paid-for broadband content. However, because the US companies did not own a significant infrastructure in Europe, no anticompetitive concerns were raised in relation to these markets. For instance, the broadband content market was found to be predominantly national because of the language differences. As a result, the Commission pursued remedies in the form of severing structural links between AOL and Bertelsmann by requiring the former not to adapt Bertelsmann's music for the WinAmp format and not to object to its contracts with other ISPs. Bertelsmann was ordered to continuously exit from AOL Europe.

While for the Commission it was the first merger that involved a vertically integrated broadband content provider, the US had broader experience with these kinds of developments in the telecom industry. As a result of the merger wave that followed the adoption of the 1996 Telecommunications Act, the telecom sector became very concentrated. Those ISPs that did not own their own network had to lease the lines from the incumbents which controlled the local loop necessary for the provision of dial-up access or from the cable companies that allowed for the delivery of the paid-for contents via their cable networks. Before the merger, AOL was one such ISP, although with the largest consumer base and a wide dial-up coverage. The main economic objective for AOL was to gain access to Time Warner's cable network and its media content, so that it could effectively follow its 'walled garden' strategy, engaging in conduit and content discrimination against other ISPs;[51] Time Warner in its turn would be able to sell its media products to a wide consumer base of AOL. The new entity would thus be able to foreclose the market for broadband Internet access by foreclosing other ISPs from using its cable network and preventing non-affiliated content from being accessed by its customers, thus foreclosing content providers as well.[52] To prevent this kind of result, the FTC and the FCC, which were both investigating the merger, chose somewhat different remedies. The merging parties were requested to conclude open access agreements with several independent competitors. This obligation usually imposed by the FCC according to the "essential facility doctrine" on incumbent network providers was now based on the "significant lessening of competition" on the markets concerned, a traditional antitrust test.[53] In addition, the FCC requested the interoperability of instant messaging services.[54]

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[51] D. L. Rubinfeld and H. J. Singer, "Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger", (2001) 16 Berk. Tech. L. J. 631.

[52] For detailed market and business strategy of merging companies see A. M. Wigod, "The AOL-Time Warner Merger: An Analysis of the Broadband Internet Access Market" (2002) 6 J. Small & Emerging Bus. L. 349.

[53] "FTC Approves AOL/Time Warner Merger with Conditions: Competitive Concerns Addressed Through Open Access and Interactive Television Provisions, DSL Marketing Requirements", Press Release, 14 December 2000, available at <http://www.ftc.gov/opa/2000/12/aol.htm>.

[54] This was an occasion when the competition authority and the regulatory agency had differing opinions, which once again re-

This conditionally approved merger raises a number of questions. First, it was a rare occasion when the non-horizontal merger raised significant anticompetitive concerns. This unusual result can also be attributed to the specifics of the telecom sector, more specifically its network-based structure. With its rapid pace of technological innovation, the Internet became a vehicle for the transfer and distribution of all kinds of media products, including music, movies, TV programs, and video games. In this situation, media content providers have no other choice than to acquire its own network (cable, dial-up or DSL) or to merge with ISPs in order to make their content distribution more efficient. ISPs have found a different kind of advantage: by joining forces with media companies they can acquire a large customer base that can be attracted by the diverse content of the Internet portal to which they have access. Secondly, the competition authorities were able to test their proficiency in assessing the emerging markets on another occasion. The Commission was able to evaluate future developments on the markets for on-line music and music players, claming that the merger would elevate WinAmp to a dominant position. Although some commentators observed that the Commission was not sufficiently forward-looking in assessing a possible impact on the broadband market,[55] they also have to take into account that at the time of the investigation the merging entities did not possess a sufficient infrastructure in Europe to present similar concerns as those raised by the FTC. The Commission also tested its assessment of the vertical mergers in terms of leverage of market power. This case was one of the first transactions where the Commission faced convergence between networks and services, and where it had to develop a sound competition approach, while the regulatory framework was still in the early stages of its development.[56] The US antitrust authorities have, once again, acknowledged the danger of a further concentration of broadband access market by imposing severe regulatory remedies in the case of non-horizontal mergers, which usually enjoy a lower level of scrutiny. And finally, although the level of cooperation was not as intense as in other instances, European and American competition regulators were able once again to observe each others' investigation techniques, market assessment methods and remedy strategies.

## VII. Conclusions

This study of the past experience of the European and American competition authorities in assessing mergers in the telecommunications sector and in cooperating with each other in the process allows certain conclusions to be drawn, which will be relevant to the further harmonisation of substantive and procedural aspects of merger review in the EU and the US.

First, we should conclude that sector specific features matter. As is obvious from the above discussed cases, network effects, the dominance of incumbents and network owners, the presence of dynamic and emerging markets and other characteristics of the telecom sector create significant problems for the effective assessment of the market and in forecasting its future development. Both the EU and the US competition authorities faced similar problems that were unique to the telecom sector. Competition officials encountered significant difficulties in defining relevant product markets and calculating market shares. The problem lies not only, however, in the lack of reliable information due to certain accounting

vived the debate about the FCC's competence to intervene in the antitrust merger reviews. See statement of FCC Commissioner Furchtgott-Roth, "FCC Approves AOL Time Warner Merger", Tech Law Journal, available at <http://www.techlawjournal.com/atr/20010112.asp>.

55 See Turner, note 50 above.

56 P. Larouche, "Communications Convergence and Public Service Broadcasting", TILEC, 21 June 2001, pp. 13-17.

practices or disclosure requirements. Because of the integrated nature of telecom markets, the possibility of using the same network (cable or local loop) to deliver different services, offers of bundled packages made it problematic to delineate relevant markets.

Since merger control is aimed at preserving competition following the proposed concentration, it is crucial to predict the possible development of the market in question. As the *MCI-WorldCom-Sprint* saga demonstrated, competition authorities were unable to predict the development of the market and, as a result, the proposed remedies were not successful. This was also because of the high level of complexity and interdependence of the markets, as well as the strategy of undertakings to combine access with content, allowing them to offer new kinds of services that did not exist before the concentration.

The problem of finding efficient and sustainable remedies is also conditioned by the unique structure of telecom markets. While conditional approval usually provides for structural remedies that sever the links between undertakings in order to solve the problem of control, it is evidently insufficient in the telecom sector. While access to network facilities remains the key factor that allows new entrants to compete effectively, competition authorities have had to resort to open access obligations, which constitute behavioural remedies. Traditional structural remedies have also proved unsuccessful in assuring the divestiture of assets because of the integrated nature of telecom services. While the use of behavioural remedies seemed to be a logical decision, the enforcement of this type of remedy poses significant challenges to the competition authorities on both sides of the Atlantic.

The analysed cases show that the degree of harmonisation of substantive elements of merger review in the telecommunications sector in the EU and US is rather problematic. It might appear obvious after a comparison of the methods and approaches used by the competition authorities to define relevant markets and find dominance or anticompetitive effects that the merger regimes on both sides of the Atlantic have already reached a high degree of convergence. Nevertheless, I would view this conclusion as premature. First of all, we should note that all the analysed merger cases were decided prior to the adoption of 2004 ECMR, which officially adopted the SIEC test traditionally used in the US antitrust practice. The apparent compatibility of the merger assessment in the analysed cases should be explained by taking into account the specific nature of telecom mergers. In all the cases involving anticompetitive concerns as regards the EU and US markets, the merging parties enjoyed significant market shares and threatened to create or strengthen dominant positions and to foreclose existing and potential competitors. Thus, the factual circumstances have allowed the EU and US competition authorities to find violations of the substantive competition law using their traditional tests: 'dominance' in the EU and 'SLC' in the US.

Nevertheless, the experience of investigating telecom mergers has improved each party's arsenal of economic and legal methodology, reasoning, investigation techniques, drafting and monitoring remedies. Thus, the Commission has gained significant experience in dealing with non-structural remedies, which has influenced its approach, as solidified in the 2001 Remedies Notice.[57] It has also perfected its economic assessment and reasoning, for example concerning the definition of collective dominance, which became increasingly important after the *Airtours*[58] failure. The Commission has also acquired additional experience in dealing with the specifics of the sector, like defining the relevant product market and dominance, which had an impact on its subsequent 2002 Guidelines on Market Definition under

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[57] Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 02.03.2001, p. 3.

[58] Case T-342/99 *Airtours plc* v. *Commission* [2002] E.C.R. II-2585.

the Regulatory Framework.[59] For the US antitrust authorities, the investigation of telecom merger cases was another opportunity to restrain the FCC from intervening in the antitrust review and to delimitate the competences between the antitrust and regulatory agencies. It was also another chance to deal with the post-1996 Telecommunications Act competition problems in the telecom sector by using traditional antitrust procedures and remedies.

As to the issue of procedural cooperation between competition authorities, there is no doubt that the cases analysed constitute some of the most successful examples of cooperation in the history of the 1991 Competition Cooperation Agreement. The supply of necessary data, negotiations with the parties, organisation of joint meetings and hearings made it possible to come to compatible outcomes in terms of remedies in such complex cases. Thus, the issue of comity did not arise partly due to the fact that the proposed mergers produced anticompetitive effects on different markets and partly because the competition authorities were able to agree on the remedies that would solve the problem for all the parties concerned. This cooperation contributed considerably to the evolution of the advanced common practices that the competition authorities now use in their daily interaction: mutual notifications, information waivers, joint investigations, negotiations with the parties, planning of remedies, monitoring and reporting, etc.

In summary, the joint review of mergers in the telecom sector was another step towards the development and harmonisation of general competition law principles and the refinement of an existing bilateral inter-agency cooperation framework between the EU and US competition authorities. Notably, in all the cases discussed above competition authorities from both sides of the Atlantic managed to arrive at non-conflicting outcomes.

While the merger wave in the telecommunications sector has become a legacy of the last decade, the recent downturn in the sector and the existing potential of the significant capital invested in the modern networks such as global fiber-optic lines awaits further consolidation in the years to come. A significant number of local exchange, long-distance and wireless providers are currently experiencing significant financial difficulties, which also opens the door for potential acquisitions.[60] It remains to be seen whether EU competition law and the US antitrust, perfected by numerous guidelines, notices, recommended practices and significant record of the jointly investigated cases, will be able to preserve competition in the continuously deregulating sector of telecommunications networks and services.

[59] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002/C 165/03.

[60] See generally C. S. Goldman, I. K. Gotts and M. E. Piaskoski, "The Role of Efficiencies in Telecommunications Merger Review", 56 Fed. Comm. L.J. 87, Appendix B.