Summary of Thesis submitted for PhD degree

by Jonathan Fiske

on

E.C. COMPETITION LAW
IN AN ERA OF
MODERN TELECOMMUNICATIONS

This thesis examines competition law in the context of the changing telecommunications sector. Its purpose is to facilitate a re-assessment of contemporary competition law and policy by raising questions about its interpretation. This is principally achieved by questioning the underlying philosophy that informs the law and policy of competition in the particular context of developments occurring within the telecommunications industry. The focus is on competition law and policies of European Community law, but there are common problems faced by other systems of competition regulation.

The thesis examines issues which must be taken into account in the useful development of legal norms for the positive development of an industry that is an important infrastructure to modern commerce. The thesis does not seek to advance any “perfect” model for competition regulation, in general or for the telecommunications sector. The premise throughout this thesis is that competition problem areas continue to be unresolved and need to be addressed in order for a competitive marketplace in telecommunications to succeed. The principal problem of market-dominance is pointed to and its threat to the continuance of a competitive market. This area is particularly
interesting in relation to the present nature of telecommunications, which is one that inherently requires or encourages forms of co-operation and interconnection. Addressing competition problems, particularly in the early years of sector reform and liberalisation, is considered important in order to further ensure the success and endurance of a competitive market. In this respect, a re-evaluation is timely because of the changes occurring both politically and technically to the telecommunications sector.

This study was undertaken during the early years of telecommunications liberalisation, and completed prior to 1998 when full liberalisation was to be in place throughout most of the EC.
E.C. COMPETITION LAW
IN AN ERA OF
MODERN TELECOMMUNICATIONS

being a Thesis submitted for the Degree of PhD
in the University of Hull

by
Jonathan W Fiske (BA, MA)

February 1998
Acknowledgements

I am very grateful for the continuous support of my wife Catherine for her comments and humour throughout the progression of this thesis. I also very much appreciate the advice and supervision of this work from Professor Hilaire McCoubrey. Both of these people have been tremendously supportive in seeing me through this experience. Furthermore, I wish to thank my parents for the support they have given, despite the distance.

Many thanks are extended to Professor Ferdinand von Prondzynski and Professor Cosmo Graham for their assistance, as well as to Professor Richard Whish, Professor Robin Mansell, Edward Pitt, Tim Cowen and Nick Riley for their time and thoughts. I would also like to thank those who provided their advice, but remain anonymous by request. Others who have been of assistance include Eric Davies of the European Documentation Centre (Hull), those who provided public corporate information and material, Commission of the European Communities, FCC, Office of Fair Trading (UK), OFTEL. I would also wish to encourage the continuation of maintenance of informative Internet sites, as a means for accessing government and company materials.
Author's Note

This thesis began shortly after the European Community (EC) (formerly the European Economic Community (EEC)) was renamed the European Union (EU) under the Treaty on European Union (TEU) in Maastricht, 1992. However, consistent labelling of the law with the name of the political entity has lagged. The EEC Treaty was officially renamed the EC Treaty (hence the term 'EC law') in the TEU.

In an effort to maintain some consistency and avoid confusing distractions, liberty has been taken in this thesis in using the term EC (European Community/ies) in place of EU, since the central focus is on EC law. In regard to citations or bibliographical reference the terms EEC, EC and EU are used depending upon the author and date the item was published.
# Table of Contents

Acknowledgements i  
Author's Note ii  
Table of Contents iii  
Abbreviations vi  
Treaties and Conventions vii  
Directives and Regulations viii  
Decisions, Notices and Cases x  
Government Documents xiii  

## INTRODUCTION

1

## CHAPTER ONE  The New Telecommunications Industry: An Industry and Market Being Reshaped and Redefined

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Introduction</td>
<td>8</td>
</tr>
<tr>
<td>1.2</td>
<td>Technological</td>
<td>9</td>
</tr>
<tr>
<td>1.3</td>
<td>Structure</td>
<td>11</td>
</tr>
<tr>
<td>1.4</td>
<td>Political Influences</td>
<td>17</td>
</tr>
<tr>
<td>1.5</td>
<td>Summary</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>Endnotes</td>
<td>26</td>
</tr>
</tbody>
</table>

## CHAPTER TWO  Telecommunications Policy and Antitrust Measures

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
<td>Introduction</td>
<td>31</td>
</tr>
<tr>
<td>2.2</td>
<td>Liberalisation towards Competition</td>
<td>33</td>
</tr>
<tr>
<td>2.3</td>
<td>Policy to Law</td>
<td>43</td>
</tr>
<tr>
<td>2.4</td>
<td>Terminal Equipment Directive (88/301 EEC): An Example of Initial Commission and Member State Confrontation Over Re-structuring Telecommunications</td>
<td>47</td>
</tr>
<tr>
<td>2.4.1</td>
<td>Article 2 of Directive 88/301/EEC</td>
<td>50</td>
</tr>
<tr>
<td>2.5</td>
<td>Article 90</td>
<td>51</td>
</tr>
<tr>
<td>2.6</td>
<td>Telecommunications (Antitrust) Guidelines 1991</td>
<td>56</td>
</tr>
<tr>
<td>2.7</td>
<td>Summary</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>Endnotes</td>
<td>62</td>
</tr>
</tbody>
</table>
CHAPTER THREE  Theory of Competition Law: Supervising the New Telecommunications Market

3.1 Introduction 69
3.2 The Rise of Economic Influence in Contemporary Competition Legal Theory 71
3.2.1 Competition in Telecommunications during the Early 20th Century 74
3.2.2 Economic and Antitrust Thinking in the Early 20th Century’s Competitive Telecommunications Period 78
3.3 Two Schools of Thought in Competition Law and Policy 80
3.4 Economics and its Influence on Competition Law: An Alchemy of Legal Science 84
3.5 Economics: a Natural Science versus Ideology 88
3.6 Competition Legal Theory Applied to Telecommunications 107
3.6.1 The Idealist versus Strategic Model 108
3.7 Summary 114
Endnotes 116

CHAPTER FOUR  Concentrations and the Future Strategic Telecommunications Industry

4.1 Introduction 127
4.2 Anticipating Structural Developments of the Marketplace 128
4.3 Strategic Alliances 134
4.3.1 Definition 134
4.3.2 Purpose for Establishing Alliances 137
4.3.3 Examples of Market-Demand 139
4.3.4 Alliances, Partnerships and Corporations 141
4.3.5 Network Alliances 142
4.3.6 Network and Alliance Players 144
4.3.6.1 Unisource, Uniworld, WorldPartners/ WorldSource and AT&T 145
4.3.6.2 Newco/Concert 148
4.3.6.3 Atlas/Phoenix (Global One) Alliance 154
4.3.7 Beyond the Alliances 159
4.4 Industrial Concentrations and Their Control 162
4.4.1 Oligopolies 162
4.4.2 Mergers 168
4.4.3 Concentrations 171
4.4.4 Joint Ventures 176
4.4.5 Vertical Mergers 188
4.4.5.1 BT-MCI (Concert) Merger 193
4.4.6 Converging Telecommunications Providers 195
4.4.7 Oligopolies Under EC Law 199
4.5 Summary 204
Endnotes 206
CHAPTER FIVE Safeguarding Competition in Modern Telecommunications

5.1 Introduction

5.2 Article 85: Managing Competitive Behaviour

5.2.1 Rule of Reason and Per Se Rule

5.3 Infrastructure

5.3.1 Universal Service

5.4 Network Competition

5.4.1 Entry Barriers

5.4.2 Essential Access and Bottlenecks

5.4.3 Predation

5.4.4 Tying

5.5 Alternative Providers and Alternative Markets

5.5.1 Satellite Communications

5.5.2 Mobile and Wireless Communications

5.6 Summary

Endnotes

CHAPTER SIX Globalisation: Telecommunications as an Example of International Legal Conflict of Competition Laws

6.1 Introduction

6.2 Globalisation

6.3 Jurisdiction

6.3.1 Woodpulp

6.3.2 Boeing-McDonnell Douglas

6.4 Internationalisation of Competition Policies and Law

6.5 Summary

Endnotes

CONCLUSIONS

BIBLIOGRAPHY

Books

Articles

Media Articles
Abbreviations

DGIV Directorate General of Competition
DGXIII Directorate General of Telecommunications Information Technologies and Industries
EC European Community
EEA European Economic Area
EEC European Economic Community
EU European Union
EVUA European VPN Users Association
FCC Federal Communications Commission
FTC Federal Trade Commission
GATT General Agreement on Tariffs and Trade (now WTO)
GATS General Agreement on Trade in Services
ITU International Telecommunications Union
NAFTA North American Free Trade Area
OFTEL Office of Telecommunications
ONP Open Network Provision
PTO Public Telecommunications Operator
PTT Post, Telephone & Telegraph
TA Telecommunications Authority
TO Telecommunications Organisation
UK United Kingdom
US United States (of America)
USO Universal Service Obligation
VPN Virtual Private Network
WTO World Trade Organisation

AT&T American Telephone & Telegraph
ATT American Telephone & Telegraph
BCE Bell Canada Enterprises
BT British Telecommunications plc
CWC Cable & Wireless Communications
DT Deutsche Telekom
FT France Telecom

ECLR European Competition Law Review
CMLR Common Market Law Report
CML Rev Common Market Law Review

FT Financial Times
IHT International Herald Tribune
NYT New York Times
Treaties and Conventions

European Community/European Union
EEC Treaty (1957)
Single European Act (1986)
Treaty on European Union (TEU) (1992)
European Economic Area (EEA) Agreement (1994)

United Kingdom
European Communities Act (1972)
Competition Act (1980)

United States
Sherman Act (1890)
Clayton Act (1914)
Telecommunications Act (1996)
Directives and Regulations

Commission Directives


Commission Regulations

Council Directives


Proposals

Proposal for a Directive on the Application of Open Network Provision to Voice Telephony (95/C 122/04)


Decisions, Notices and Cases

European Community


Aerospatiale SNI and Alenia-Aeritalia e Selenia SpA and de Havilland (Re the Concentration between...) (Case IV/M53), [1992] 4 CMLR M2.


Alcatel/AEG Kabel (Case IV/M165) Decision, 18 December 1991.

Atlas Case IV/35.337 and Re Phoenix/Global One (Case IV/35.617), [1997], 4 CMLR 941.


Elopak Italia Srl v Tetra Pak (Tetra Pak II) OJ [1992] L72/1 Decision 92/16 EEC.


European Broadcasting Union v Commission and Others (Case C-320/96 P), 1997, 4 CMLR 1.


Expatriation of German Company (Case 3Z BR 14/92), [1993] 2 CMLR 801.


Regie des Postes v Paul Corbeau, [1993] ECR I-2533. (Case 320/91)

Spain, Belgium and Italy v Commission, jointly (Cases 271/90, 281/90 and 289/90), 17 November 1992.

Thierry Tranchant v. Telephone Store Sarl (Case C-91/94), [1997] 4 CMLR 74.


Volvo/Atlas (Case IV/M 152), 14 January 1992 EMCR B69

Information Issuances on Cases


Iridium Globalstar, [1995] 5 CMLR 1, IP (95) 549 of 8 June 1995.


Non–European Community

Cargill, Inc. v Montfort of Colo. Inc., 479 US 104 at 117 (1986);

EEOC v Aramco, III S. Ct. 1227, 1230 (1991),

MCI v AT&T, 708 F.2nd. 1081 (1988).

Netherlands v US (1928), (Islands of Palamas Case), 2 R.I.A.A

United States v Terminal Railroad Association of St. Louis, 224 US 383 (1912)
Government Documents

European Community

Policy
Green Paper on a Common Approach in the Field of Mobile and Personal Communications in the European Union, Commission of the European Communities (COM(94) 145)

Green Paper on a Common Approach in the Field of Satellite Communications in the European Community, Commission of the European Communities (COM(90) 490)


Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, Part One, (COM(94) 440)

Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, Part Two, (COM(94) 682)

Green Paper on the Review of the Merger Regulation, 'Community Merger Control', Commission of the European Communities (COM(97))


White Paper on the Growth, Competitiveness and Employment: the Challenges and Ways Forward into the 21st Century, Commission of the European Communities, (COM(93) 700)


Consultation on the Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks (COM(95) 158).


'Trans-European Information Networks', The European Telecommunications Policy, European Commission, Brussels, 1995, CD-91-95-0433AZ.

**Communications**


Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Methodology For the Implementation of Information Society Applications, COM(95) 224, Brussels 31 May 1995.

Communication on the Status and Implementation of Directive 90/388/EEC on Competition in the Markets for Telecommunications Services (COM(95) 113)

Commission Communication on the Provision of and Access to Space Segment Capacity in Satellite Communications (COM(94) 210)


Commission Proposal to the Council on the Development of ISDN as a Trans-European Network (COM(93) 347).

Commission Communication on the Action Plan "Europe's Way to the Information Society" (COM(94) 347)

Resolutions & Recommendations


Council Resolution on the Development of the ISDN as a European-Wide Infrastructure (92/C 158/01).

Council Resolution on the Exclusion of Voice Telephony From Competition In Telecommunications (93/C 219/02).

Council Resolution on the Harmonisation in the Field of Telecommunications (84/549/EEC)


Council Resolution on the Review of the Situation in the Telecommunications Sector and the Need for Further Development in That Market (93/C 213/01)

Europe and the Global Information Society: Recommendation to the European Council ("Bangemann Report"), CD-91-95-043-3AZ


Background Reports


Commission of the European Communities, Background Report, 'Mobile and Personal Communications' 13 September 1994:


XIVth Report on Competition Policy, Commission of the European Communities, Luxembourg.

XVth Report on Competition Policy, Commission of the European Communities, Luxembourg.

XVIth Report on Competition Policy, Commission of the European Communities, Luxembourg.

XIXth Report on Competition Policy, Commission of the European Communities, Luxembourg.

XXIIIrd Report on Competition Policy, Commission of the European Communities, Luxembourg.

XXIVth Report on Competition Policy, Commission of the European Communities, Luxembourg.


'Merger Control Law in the European Union', Commission of the European Communities, Brussels
Non-European Community Documents

United Kingdom


Office of Telecommunications (OfTEL), D. Cruickshank, 'Beyond the Telephone, the Television and the PC', Consultative Document, London August 1995


United States


International Organisations


Government Publications and Speeches

European Community


Non-European Community
Cruickshank, D., 'Liberalisation and the Promotion of Competition in Infrastructure and Services: Lessons from the UK Experience', Speech to Euro-Forum, Dusseldorf, 6 September 1995, by Director General OFTEL.
INTRODUCTION

This thesis is an examination of competition law in the context of the changing telecommunications industry. It is undertaken with the aim of facilitating a reassessment of contemporary competition law and policy by raising questions about its interpretation. This is principally achieved through questioning the underlying philosophy that informs the law and policy of competition in the particular context of developments occurring within the industry. The competition law of the European Community is selected for particular study, but there are common problems faced by other systems of competition regulation to which reference is also made.

A re-assessment of this area of law and policy is timely and the telecommunications industry offers an appropriate focus for study and analysis. Competition (‘antitrust’) law and policy recently passed its centennial. Although it may be argued that competition law and policy have existed longer in a number of countries, examples and analogies may be seen in a variety of royal decrees and grants of historic monopolies, the system that protects the right to compete really only developed within the past century. The interpretation of competition law has not, of course, been static in the context of any single legal system. In the United States for example, the argument for economic-dominance in antitrust decisions was popular in the 1980s and early 1990s, because of its predictability. This method was not always the case. After a century of experience, the present is an appropriate time for reflection, particularly as a number of significant competition problems remain unresolved.

A re-consideration is also rendered timely by the contemporary expectation that the
commercial world is undergoing a period of revolutionary change. This revolution involves the change of the Industrial Society into an Information Society. Whereas previous generations have witnessed the emergence of nation-states as building blocks in the system of public international law and, later, the birth of the industrial society, it is today widely held that the latter years of the twentieth century are developing not only a new age of information technology but, with it, potentially new political, social and economic structures. The telecommunications industry is the infrastructure for this new order. The questions of its legal structure and regulation are thus matters of profound potential significance for the 21st century world order. Competition law and policy are by no means the only area in which important questions arise in this regard, but do represent a vitally significant aspect of the future shaping of an Information Society which may be distinctly different from what has gone before.

In this context, the present thesis is neither intended as a review of competition law and its development over the past century nor a case-by-case assessment of its progress. It is, rather, intended to initiate a discourse upon the optimum approach of competition policy to the new ‘Information Society’. In regard to competition law, while its history may be of interest and the different interpretations worthy of comparison, the value of its historical development is really only pertinent in this thesis so far as it has had a direct effect upon contemporary problems and changes.

The ‘Information Society’ will be, and to a degree already is, focused upon information-exchange in contrast to industrial manufacturing. This development is founded upon technological advances which have occurred in the previous separate (albeit distantly related) telecommunications, computer and media industries. In the case of the latter, these developments have effectively re-created it as the multimedia industry, incorporating news-information services and entertainment. Developments
in these industries and through related technology such as digitalisation have brought about the circumstances in which inter-sectional convergence can occur. The convergence of telecommunications, computer technology and multimedia, in brief, creates the industry and marketplace for the provision of services upon which society is becoming increasingly dependent. The dependence is through further technological development and through the maximisation of information-service provision. Much has been written in the popular press and by politicians suggesting that the majority of employment will be dependent on information-service markets by the early part of the 21st century. Whether this will indeed be so or to what extent can not be presently known without significant changes and the benefit of hindsight. Only then can comparisons be confidently made in order to determine how much the information society developed to supersede the industrial society. It is not the purpose of this study to state a position either in support or in contradiction of the proposition that an economic, social and political revolution is occurring. It is for the present purpose simply assumed that important change is occurring, whether these are ultimately evolutionary or revolutionary in character may be a matter of general interest, but is of slight importance to the analysis sought to be advanced.

The principal endeavour of this thesis is to begin the re-assessment of competition law and policy by pointing to the problem area of market-dominance and its threat to the continuance of a competitive market. The premise throughout the study is that a competitive marketplace in telecommunications has yet to be achieved and while it is being developed, competition problem areas which continue to be unresolved need to be addressed. For example, adherents of the neo-classical theory which recently influenced American thinking argue that market dominance is inherently not a long-term commercial phenomenon. This is said to be the case because in a competitive market the existence of a dominant-player would be an incentive for rivals to defeat it, for example through innovation and pricing. This argument is not accepted at
face-value in this thesis. While there may be some supporting evidence for the proposition, it may also be doubted whether the fully competitive market is necessarily a workable paradigm for all markets and industries. It may, rather, be the ideal which should be the goal for markets and industries but must be seen as an aspiration rather than a universally valid description of the real functioning of the commercial world. A more realistic position would be not the presumption of a fully-competitive market, but the acceptance of an imperfect market with the goal through law and policy of achieving this ideal. The telecommunications market and particularly the conflicts within it demonstrates the difficulty in achieving the perfectly competitive market.

The discourse which is here sought to be advanced in re-assessing competitive law and policy is founded upon a combination of practice and theory. The practice is what is actually occurring within the telecommunications industry and market, while the theory is the fundamental thinking behind the policy and the law guiding and governing competition.

The thesis is then structured on a step-by-step approach. Chapter One, by necessity of a changing industry, establishes the context in which this study was prepared and undertaken. It sets out what is occurring within and to the telecommunications market. This places the thesis within the practical situation. The second chapter continues this contextualisation, but through the policy and legal changes in the European Community in developing a competitive (telecommunications) market.

Chapter Three addresses the root of the argument underlining the thesis, which is the philosophical approach of competition law. By necessity the chapter discusses more of the fundamental problems behind competition management through law and policy and does not refer much directly to telecommunications. However the
argument supports the concerns and criticisms about various types of markets and obstacles to competition in Chapters Four and Five.

Chapter Four focuses on the problem of concentrations in markets, particularly in telecommunications. Among the problems include the need and attraction at times for alliances between rivals, as well as the challenge of oligopolies. Chapter Five addresses the EC's approach to protecting competition in telecommunications and further contradictions the industry presents to a competitive market.

Chapter Six seeks to extend the encouragement for a re-assessment beyond the confines of the domestic (EC) market. It advances another view in this thesis of the new telecommunications industry, which is that the industry and market is of a type that is an international one. In encouraging a new debate over competition policy and enforcement, this chapter opens more questions and raises challenging issues which require addressing and answering.

The intended ultimate result of the thesis is to encourage a thought-provoking re-evaluation of competition law and policy in keeping with the needs of a changing industrial society. Although, as remarked above, the principal focus of this study is on EC law, the basis of the argument may also be applicable to other systems. It is contended that the essential problem lies with the philosophy supporting the general policy and laws. The discourse is more than an academic debate, for the extreme approaches which have been fashionable, especially but not solely in the United States, have not provided answers to common competition problems. These problems may cause short-term disruptions and structural distortions in much of the telecommunications market if not addressed and properly managed. The market in domestic jurisdictions may even suffer if international competition problems are not addressed. The thesis brings to the forefront important matters requiring attention
and these early years of telecommunications liberalisation present an opportunity to address the problems and implement new solutions.

The thesis neither aims nor pretends to have achieved a global analysis of competition law. It is a wide area of law, and not all its aspects are or need to be covered within the scope of this study. The main focus is upon the maintenance of a competitive telecommunications market, but the concern is that a weak or misguided application of competition law will allow for an over-concentrated and ultimately uncompetitive industry. The areas chosen for emphasis have been selected in light of these concerns.

In a few instances topics have been omitted not only because space would not permit a justified analysis of them, but also because they would require extensive and separate study in their own right to do justice to them. In particular, enforcement and investigation procedures, intellectual property, pricing and tariff matters have either been omitted or given little reference. The reasons are that their importance and topical relevance, especially with regard to modern telecommunications are of such an order that proper examination would be impossible within the confines of the present discussion. Each should be accorded a thesis-study. In light of this, any attempt for analysis of these subjects would distract from the intent of this thesis. The emphasis is not on the reasoning of particular judgements, but rather the use of cases and legislation is to understand the wider philosophy behind the competition law.

This thesis was written during an exciting period in the transition to the “Information Society”. The research began with some foresight and inspiration of change through the guidance of policy publications, but more accurately resulted from concern about the actual success of competition governance. By some coincidence, the research
began just prior to the strategic alliance era. This commenced through the formal announcement by Deutsche Telekom and France Telecom about their intention to form an alliance (Atlas) in December 1993.

The changes and developments both through legislation and corporate activity have been continuous, at times seemingly furious, but nevertheless making the period of the construction of this thesis exciting. The law and policy cited in this thesis, and the industry and market information pertinent to the examples of the problems are accurate as of 30th October 1997.
CHAPTER ONE

The New Telecommunications Industry:
An Industry and Market Being Reshaped and Redefined

1.1 Introduction
To begin the discourse on competition law in the changing commercial society, this chapter is to necessarily establish an understanding about the 'new' telecommunications industry. It provides a basis for some of the problems and their sources raised throughout the thesis. It is in essence about a telecommunications industry in transition which, because of significant developments, also highlights the difficulty in anticipating the new structural form of the industry.

There is a popular opinion which holds that a new telecommunications industry is emerging; one whose transition is not so much a continuous evolution, but rather a revolution. An example of this opinion is found in a publication by Britain's Office of Telecommunications (Oftel):

"A new era, possibly as significant as the industrial revolution of the nineteenth century, is about to begin." 2

The belief that there is a significant change occurring originates from a combination of activities in the industry. These changes are based on both technology and politics, some of which are simultaneously occurring. There is uncertainty about the shape of the new telecommunications structure. There is, however, also a need for adequate regulation which meets current and future requirements. In this chapter it is necessary to discuss some of the factors that are shaping the new industry and the
regulation of competition within it. These factors are titled technological, structural and political.

1.2 Technological

The technological changes are of interest in this analysis only in so far as they potentially create new types of products, and therefore could form new markets. As will be shown in a subsequent chapter, there can be problems of definition. Some of the effects of new technological developments include improved efficiency of communication and additional types of communication exchange (such as voice, data, and video). Restrictions on the location of communications are beginning to be removed and the costs of communication are also being reduced. New technology also reduces the cost of entry and may therefore encourage competition. However, technology further affects the telecommunications industry by allowing for over-capacity and there is the risk of forming new barriers to market-entry.

Some significant technological advances in the industry include digitalisation, fibre optics and the microchip. These developments establish not only new markets, but create new relationships between companies. One new market produced by technological advances could be the convergence of the television, telephone and computer. Although it is technically possible to merge into one unit, its appeal to the consumer is another matter. What is important is the commercial relationship that emerges from this technical advance. The services from three previously separate service providers could now come from one provider.

"It is clear...that telecommunications systems will be a vital component in the distribution of any future digital or broadcast services. It is also clear that as technological developments such as digitalisation emerge and the traditional telecommunications systems begin to offer video-based services, broadcast services will become increasingly difficult to distinguish from other services
with a telecommunications component."  

From a legal perspective, as observed by Oftel, "these developments will mean that the traditional regulatory distinctions between broadcasting and telecommunications will be difficult to sustain".  

The microchip has assisted telecommunications by improving capacity and decreasing costs. Furthermore microchips in modern computers, according to Cane, "provide the processing power to handle everything from speed to full motion colour video coupled with high-fidelity sound". Another example of the modern sophistication and advantage of the microchip and computer is the benefits in maintaining communications equipment. The digitalisation of the industry also allows for greater speed in transmission and reception of information. The consequences between the computer industry and telecommunications are however at odds. Whereas the computer industry is able to offer customers faster, smaller and more powerful devices at the same price, the telecommunications industry is forced to offer the same product at a falling price. Telecommunications providers are presented with the problem of finding value added services for basic telephony more quickly than prices fall.

Fibre optics is a source of this profit-loss problem encountered by telecom firms. It allows for a greater volume of telecommunications traffic. This technology permits long distance communications to be transmitted at a high capacity and at a lower cost than the traditional copper wire system. The new system costs about half as much as the old system. A single optic fibre is thinner than a human hair and currently has the ability to simultaneously carry 30,000 telephone conversations. According to the International Telecommunications Union, less than a third of the capacity of the trans-Atlantic and trans-Pacific fibre optic cables is used.
optics has the ability to transmit video and image based services as well as voice, data, switching, highly reliable transmission and economical service delivery.\(^{15}\) This is now more efficient, effective and economical than the copper wire system. It also increases the types of services that can be provided.

The consequence of new transmission and receiving methods is the possibility of increased competition for traditional telecommunications providers from others, such as cable companies.\(^{16}\) In addition, there is a greater potential for many different types of services to be provided through telecommunications. A few examples include entertainment, home shopping and on-line business information.\(^{17}\) This provides telecommunication firms with the opportunity for new markets which will be a source of revenue to substitute falling prices in the original voice and basic data (e.g. fax) markets.

Fibre optics and satellite technology advance the types and capacities of communications exchange.\(^{18}\) Transmission and reception are also furthered through the use of mobile communication.\(^{19}\) The result, in theory, is the potential for competition between service (i.e. transmitter and reception) operators. In addition, there is potential competition through types of communication exchanged.

### 1.3 Structure

The carrier of telecommunications has in the past usually been state-owned and operated. This was the situation in the European Community until deregulation began with the privatisation of British Telecom, the Netherlands opened its markets in 1989 and Sweden's more recent membership to the Community. The United States has been an exception to the rule. AT&T held a privately owned monopoly that was accepted for most of the twentieth century\(^{20}\) until the 1984 divestiture. The political changes in the EC telecommunications industry's structure resulted from the 1987
Green Paper on the Development of the Common Market for Telecommunications Service and Equipment. This began the process of opening up the EC's telecommunications market. The basis of liberalisation can be found in the Green Paper.

"The strength of European telecommunications is one of the major requirements for improving the competitiveness of the European Economy, strengthening Community cohesion and achieving the completion of the Community wide market." 22

The Commission has successfully overcome resistance by some Member States to accept, as Pombo called it, "the Internal Market philosophy, particularly where an economic area as sensitive as telecommunications was implicated". Following the use of Article 90, 24 (see Chapter Two) progress nevertheless depends on the implementation and enforcement of the Directives. A further problem extending beyond political philosophy is the practical difficulty between Member States regarding varying degrees of technical structure, ability and development. 25 A method of understanding the apparent direction of the industry and the situation within the EC, is to divide the history of the telecommunications industry into distinct eras. These could be described in terms of three ages of telecommunications. 26

The first age is the natural monopoly. It was defined as one where:

"...a product or group of products can be produced most cheaply by one large firm. ... Natural monopoly raises the issue of organising an industry so as to gain the potential efficiency advantage of production by a single firm without creating the conditions for monopolistic conduct or losing incentives for management of cost." 27

Chalmers defined a natural monopoly as "[t]he principle that a certain activity is
logically suited to being carried out by a single organisation without competition". 28
He further explained its connection to the telecommunications industry.

"For many years it was widely assumed that telecoms operating was a natural
monopoly on account of the size of investment required as well as some of
the public-service functions associated with a utility. 29

Vallance characterised this first age of natural monopoly as one in which operators
control fixed networks. These networks he explained are "...tied to, or even
vertically integrated with, national suppliers."30.

"These operators provide basic services nationally by themselves and
international service on a correspondent basis (that is - combining with one
another to provide end to end services). Their ethos at its best is a strong
public service one, achieved by politically controlled regulation, or indeed
public ownership. They provide universal service at affordable price, often
heavily averaged. And they do so, in all countries, by cross subsidies from
business and high users for the benefit of low users. ... That stable public
service world is indeed a utility world."31

The purpose of the state telecommunications monopolies (in Europe) in providing
universal service may not have been an accurate perception. Stehmann and
Borthwick offered the view that "the correlation between network monopoly and
achieving the universal service goal may be weaker than is often assumed". 32
However, they also stated "universal service [has] been virtually achieved in the
more advanced industrialised countries". 33 This may not necessarily be from a direct
policy action. Instead some writers have suggested "the modern definition of
universal service arose when...cross-subsidy practices were threatened by
competition". 34 Stehmann and Borthwick reported:

"According to an OECD study, European TOs historically give rather low
priority to universal service...One may therefore argue that the universal
service objective was redefined by vested interests as a useful tool to slow liberalisation."  

Universal service and its future (for example, as a means to building 'the information superhighway') is further examined later in this dissertation, but it is a stage which some industry experts believe some countries have moved beyond in their development. Valiance believes in a second stage in the progress of telecommunications

The second stage is the age of technology and deregulation. The liberalisation is extended to all sectors of the industry; "local, long-distance and international, covering voice and the public and private services, switched and unswitched, wire line and radio, terrestrial and satellite, mobile and fixed, and not only services but also infrastructure provision." Liberalisation (in theory), is protected by regulation that manages the market to guarantee competition and "protects, stimulate and sustain market entrants". He suggests competition develops and the utility market disappears in this stage.

The third stage is one of convergence.

"To some observers, it is the merging of technologies, to others it is the blurring of industry boundaries and the proliferation of overlapping services from both traditional and non-traditional suppliers. In the strictest sense, convergence is the inclination of different market segments towards each other." The stage of convergence as described by Valance occurs where digital technology replaces the electronic switching. This technology (as previously described) enables an expansion of capabilities in the types of services which can be delivered. This new potential brings together telecom firms with other industries, namely computing, entertainment and other sources of information dissemination. An intelligent network
is capable of being created with the aid of complex software. This offers greater capacity to communicate larger quantities and volumes of information.\(^{39}\)

Vallance believes that the United States and Britain are at the beginning of the convergence stage.\(^{40}\) He also believes many countries including some in the EC have only begun the second stage. Consequently, there is a potential for conflict from these distortions and a lack of harmonised progress in the EC.

The 1998 deadline for telecommunications liberalisation in the EC also highlights the difference between the telecommunications developments within the Community. It also emphasises the common uncertainty about what shape the new telecommunications industry will form. Convergence is one important reason why, as Chalmers claimed "...traditional telephone companies are falling over themselves in attempting to buy or get into partnership with companies active in these sectors."\(^{41}\)

Liberalisation is another reason. It is not only a business opportunity, but the threat of competitors which is spurring alliance formations. Alliances are dealt with in a later chapter. However, two points of interest emerge from the issue of convergence. The first is that there is a potential for new markets and new services in which firms can compete to obtain more customers and potentially a greater share of the communications business. Secondly there is the issue about the way firms participate in convergence.

A convergence might mean a complete merger or full assimilation of firms. For example, an entertainment firm and a telecommunications firm could form a loose alliance where there is an agreement that one delivers the other's product. In the meantime the independence of each firm is retained. Or they could unite to form a new company.
However, Overbury and Ravaioli believe telecommunications and information technology are not yet truly converged. This they claim, is:

"...because the basic function of the communication of information is still different from that of processing information."^42

They believe the two have instead become interdependent. The improvements in communication through the medium of data processing and through the medium of telecommunications have occurred separately.\(^43\) They argued the implication was expansion and not convergence.\(^44\) From an historical perspective this may be interesting. It is an interesting argument in discussing the meeting of different aspects of communication. It has been claimed the data processing industry and telecommunications have developed along different lines.\(^45\) The former had origins in a more competitive environment. Telecommunications developed more slowly over a longer period of time due to its state control and organisation.\(^46\)

One industry observer stated:

"[P]eople believe that customers will be more inclined to buy communications from people who can also offer them entertainment, video links, home shopping and the rest of it ... [A]s a result, people are frightened that someone else - in a now hugely competitive and an ever more competitive sector - will have access to a superior product or transmission system."^47

In relation to the debate about convergence, this observation could be used to suggest that data processing and telecommunications will not simply be interdependent as Overbury and Ravaioli stated.\(^48\) Although interdependence may currently exist, the vision of Oftel stated above about the future of the communications industry as well as the perceived demand for 'one stop shopping',\(^49\) suggests that the third stage is an acceptable prediction of the industry's evolution.
Measures can then be taken to ensure any foreseeable or potential anti-competitive formations do not occur.

1.4 Political Influences

Political changes have encouraged the promotion of the notion that the industry will be best managed by market forces and should be based on competition.\textsuperscript{50} This is a distinct change from the traditional attitude which regarded telecommunications as a public utility.\textsuperscript{51} Mansell described the new attitude:

"For some observers, the evolution of public telecommunications networks raises issues that do not differ from those that need to be considered in other manufacturers of shoes or automobiles."\textsuperscript{52}

An example of this view can be seen in the writings of Gasman who stated "[a]ll public policy should aim ... to maximise economic efficiency, and to leave individuals as free as possible to do as they wish as long as they do not impose undue costs on others."\textsuperscript{53} However the current nature of the industry may not necessarily allow for the ideal of open competition. This could be due in part to the transitional period telecommunications is going through from a monopolistic to a competitive state.\textsuperscript{54}

One feature which obstructs the creation of an ideal competitive industry is the threat of established dominant firms (PTTs, TAs or TOs) being tempted to use their position and economic strength to thwart the entry of competitors into the national markets.\textsuperscript{55} This position of dominance is influential and directly affects the competitiveness of the market. It is a basic yet significant difference between the telecommunications industry and any other goods and service provider in the private sector. Access to infrastructure owned and operated by the PTT or TO, connection and service tariffs, cross-subsidisation and separation of PTT's commercial operations from influences on national regulations are important competition
Traditionally the PTTs, according to Overbury and Ravaioli had: "...exclusive and total control for the establishment and operation of the network infrastructure; for the supply of a few, but well standardised services; for the supply of terminal equipment to customers; for all standardisation and type approvals; for regulation and frequency management; for research and development and policy making." Telecommunications has been one area in particular where not all EC members have been enthusiastic to relinquish control.

Opening the telecommunications industry to competition is seen by the European Commission as important for the benefit of consumers and the EC as a whole. For consumers, the Competition Commissioner Karel Van Miert claimed the advantages of competition in telecommunications concerned price, service quality and choice. Liberalisation has demonstrated such consumer benefits where the market has opened. According to the OECD, the benefits of liberalisation will be markets expanding, consumer choices improved and prices reduced. These are important to the economy of the modern society. More than six out of ten jobs in Europe depend directly or indirectly on information technology. The modern industrial setting is being based on the provision and use of information through advanced means.

Liberalisation also brings commercial efficiency to the traditional protected monopolies. The PTTs who had little incentive to develop new services, be efficient or reduce charges find they must do so. They can now be undercut through price, service and quality by new rivals. The situation in Europe has been described in the following manner:

"The backwardness of Europe's telecom monopolies ... is more than just an
irritation to users: It is hampering Europe's ability to compete. ... [T]he disparity in prices and services is sapping Europe's economic vitality."63

These disparities range from variations in charges to length of time it takes to be connected. One observer wrote:

"In most countries long distance calls are priced disproportionately high in relation to the cost of providing the service. International calls are overpriced to an even greater extent, a condition which is particularly evident across the European continent where the close proximity of so many countries means that many international calls cover no greater distance than the average domestic call." 64

The problem of such costs is partly due to the inefficiency of state - monopolies and their overcharging. The problem also concerns national borders. A call placed between states "stops" at the border. The signals are often converted to the standards and technology of the destination-state's system. The tariffs charged by the destination state to the sender state is often very much higher than the cost.65 The tariffs are, according to the consultant firm Touche Ross, "curiously asymmetrical in the sense that the price of a call from country A to county B is in some cases up to double the price of the call in the reverse direction." 66

An additional obstacle for the consumer has been used by some PTTs to their advantage.

"Countries with high international tariffs which limit the number of outgoing calls win; a positive difference between call minutes aimed into the country and those going out earns them hard currency payments." 67

This problem with monopolies should end with the opening of most states' telecommunications market by 1998.
In 1987, the Commission published its *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment* (COM(87) 290) -hereafter the Green Paper (1987)- on the opening of the European Community's telecommunications market. Three influences can be attributed to the Commission's creation of the Green Paper (1987). The influences include, pressure on the Commission by the commercial sector to open and regulate a competitive telecommunications industry, the 1985 *British Telecommunications* case (41/83 [1985]) and the *White Paper on the Completion of the Internal Market* (COM (85) 310). The objectives of the Green Paper (1987), (an analysis of which will be further developed in the following chapter), include: separating the regulating and operational activities of the PTTs, prohibiting cross-subsidisation of services, allowing access by other telecom operators to other PTTs' networks, and establishing common markets in services, equipment (both terminal and network) and ending PTTs' monopolies over customer equipment such as private telephone exchanges and telephones. Karel Van Miert re-enforced the Commission's determination in opening the telecommunications market when he said:

"It is clear telecommunications can not continue to be a sector treated differently from other sectors, sheltered from the logic of the single market."\(^{69}\)

For the purpose of this thesis what happens after liberalisation is of particular interest in regards to competition law. For example, the establishment of telecom alliances to create a network to gain access to markets, to block new competitors or to maintain a dominant position is important for the law to manage. A market dominance is therefore a private domination over an important infrastructure to the new industrial society. It is also a concern because telecommunications has become what could be called a social institution and the continuation of a universal service could be
challenged. "The ability of everyone to make and receive telephone calls at reasonable price is taken for granted...[it is]...at least as necessary for full participation in a modern society." It is not just an institution in the late twentieth century but an important medium for the commercial well-being of modern service-based societies.

Although universal service is dealt with later in greater detail (see Chapter Five), the effects of its objectives resulting from the sector - changes are worth noting. Traditionally in Europe as well as other parts of the world, telecommunications has been seen as a public utility. The provision of a universal service is closely associated with the concept of public utility. Due to costs and the nature of telecommunications, universal service has traditionally been seen in European states as being best provided to the population through public service via the monopolies referred to above. In essence, telecommunications has become to be regarded in general as a 'right' of humankind. The recent and continuing upheaval in the industry has changed both the 'public' and the 'utility' principles which in turn has caused some alarm over provision of this modern 'right'. Both the European Community and the United States have sought in their own ways to maintain a form of universal service. Government policy in the United States has been described to pursue the goals:

"...to enable telecommunications to make a maximum contribution [1] to efficiencies because productivity is the key factor in the global competition that is now the norm, and [2] to the quality of life in the information society in such areas as education, health care, telecommuting, and democratic processes."

However, it is actually becoming more difficult to implement these goals because the telecommunications, cable television, broadcasting, computing, newspaper and other
media-related industries were undergoing a process of convergence. Universal service remains an important concept in the United States, but Geller suggested this concept should be revised in order to benefit those truly in need, and in such a way that competition is not hampered.

The importance of universal service in the European Community was recognised by Cawley who said "[s]afeguarding and developing universal service in telecommunications and financing uneconomic aspects of universal service obligations in the context of services and infrastructure liberalisation has become a central policy issue."

The reasoning for universal service as a central policy issue can be found in the Commission's publication *Meeting Universal Service Obligations In a Competitive Telecommunications Sector*. Within the publication, it is stated:

"The rationale for imposing universal service obligations is political, social and economic. It is desirable on political ground that citizens in a democracy have access to communication facilities which they require to exercise their political rights, and it is desirable on social grounds that all individuals should have access to communication facilities, to avoid a gulf emerging between 'information-rich' and 'information-poor' groups. In addition, there are persuasive economic arguments for encouraging households and firms to attach themselves to the telecommunications network."

Four reasons have been given from a pure policy position. They are: to achieve universal geographical coverage, geographical averaging of residential prices, low cost access through an access deficit, and targeted telephone subsidies such as to the poor, elderly, disabled, rural dwellers and low users. In essence, universal service occurs because competition would be socially harmful. Evidence to the contrary has
emerged and suggests competition does not necessarily harm universal service. One fear which arises from allowing competition to replace a public supported universal service (i.e. traditional monopolies) is about new entrants 'cherry-picking' the more profitable customers of the market. For example, business customers could be targeted more than the residential market by new entrants. This leaves the question, why should one firm be forced to carry the less profitable residential or universal service obligation? Or to alter the question slightly, will some residential customers, such as those in cities benefit more than the less-profitable such as the rural customer? These are some points which regulators are faced with and these are elaborated upon in a later chapter. However, it does bring to the forefront the issue of the incumbent operators and their new relationship with their competitors.

Competition it has been suggested, is "an odd sort" in telecommunications. New entrants will require access to infrastructure networks as more European markets open up. The oddity is the fact that the network is owned by the entrants' rival, the PTT (or former PTT). It is in a sense, as one source described, like a supermarket using a competitor's in-house distribution system. One question that is important, is whether one new entrant competitor be denied access to the network while another is accepted? Should the owner of the network be permitted discretion as to who is allowed access? Furthermore, how is the charge for access determined? This is a potential area for anti-competitive behaviour on the part of those with the power to accept or deny access. Government intervention in restraining the incumbent network operator is in principle counter to the argument that pure competition can exist in telecommunications. This problem raises an interesting and seemingly contradictory issue of duty to supply. An EC Commissioner stated:

"The cases on Telecommunications show that, in general, a company in a dominant position in one market may not use its power to extend its dominance or monopoly into other markets. This principle is relevant to, but
not to be confused with, the principle that dominant companies must make facilities available when this is essential to enable competitors to compete. 67

To avoid the need to access the incumbent's network, two alternatives may be found. One is that the network is 'unbundled', voluntarily as some American companies have done 88, or by legislation. Another is to form alliances with other telecom firms, creating private networks.

1.5 Summary

The changes occurring within and to the telecommunications industry from both technological advances and alternative political perspectives raise many thought-provoking questions about the resulting structure of the sector. These questions are not only about the shape of the industry to come, but the consequences in relation to competition law. The industry will increasingly come under the auspices of competition law, but by how much is the next question. As the industry's market opens questions need answering whether it should and can be treated as other general competitive markets, or do particular characteristics (interconnection) and social-expectations deter "pure" competitive-market approaches. While the nature of the industry in its newer guise allows for (new) opportunities and a competitive market, it also presents a contradictory picture. The need for interconnection and at times co-operation can also test policies on competition.

In some instances co-operation is desirable such as for market access, infrastructure access and technological development. Yet it is an industry which is supposed to become a competitive one. While on the one hand firms do compete and may strive to block new entrants, they also seek close co-operation through strategic alliances, as will be shown later. Within this new environment, legislators have a unique
opportunity to shape an industry from the outset.

Although there are unique and ambiguous features of telecommunications which require special attention, these helpfully emphasise weaknesses in competition policies. The period of liberalisation is an opportunity to correct any continuing failings of the system overseeing competition. For those reasons the telecommunications industry affords, for the present purpose, not only an important study in its own right but a potentially significant model for the regulation of competition in a dynamic economic system.
ENDNOTES


7. Ibid.


9. Oftel, op.cit, 1.4.4, p.4.

10. Oftel, Ibid., para.1.4.4, p.4.


29. Ibid.

30. Vallance, op.cit., p. 3.1.

31. Ibid.

33. Ibid., p.610.


35. Stehmann and Borthwick, op.cit., p.610.

36. Vallance, op.cit., p.3.1.

37. Ibid., p.3.2.

38. Ibid., p.3.2.


40. Vallance, op. cit..

41. Chalmers, op. cit., p.49.


43. Ibid., p.274-275.

44. Ibid., p.275.

45. Ibid.

46. Ibid.

47. Alt, op.cit., p.9.2.

48. Overbury and Ravaio1i, op.cit., p.274.

49. This is a fashionable term used to describe the situation where a consumer (normally a large corporation or multinational firm) can purchase all of their communication needs through one telecom firm. This also means being billed by one company. An example of the use of the term may be found in A. Cane, 'A Permanent Revolution', *Eurobusiness*, Survey: Telecoms, September 1995, p.53.


65. Ibid.

66. Ibid.

67. Ibid.

68. Pombo,op.cit., p.558


71. P. Guidi, op. cit., p.60.


76. Ibid.

77. Ibid.

78. Ibid.


81. Ibid., p.1.


84. Cairncross, op. cit., p.25.

85. Ibid.

86. Ibid.


88. Cairncross, op.cit., p.28.
CHAPTER TWO

Telecommunications Policy and Antitrust Measures

2.1 Introduction

The contextual analysis advanced in chapter one continues in this chapter, but with a focus upon the policy and legal changes which have occurred within the European Community in developing a competitive (telecommunications) market. The discussion of the basic policies and principles of EC telecommunications policy is conducted through the use of policy documents, legislation and case law. Whereas the first chapter established an understanding of the changing telecommunications sector, this chapter is focused on the practical change in the political-legal approach to telecommunications. The issue that becomes evident in the progression of this chapter and the thesis is that there is some conflict and contradiction between policy and law. This is in addition to the challenge of harmonising Member States' approaches to telecommunications.

The chapter is organised to show the development of policy into law. During the transition in telecommunications to liberalisation, measures to overcome national resistance to change are taken such as through Article 90 and the Telecommunications (Antitrust) Guidelines. These measures are taken to ensure that Member States do act to liberalise their telecommunications markets and that the rules of EC competition law are understood and applied to this sector. The inclusion of Article 90 is important as it was a mechanism in facilitating the liberalisation process within sovereign countries. Article 90's application to telecommunications in particular, as it was previously little used, resulted in academic interest about its role.
In the instance of this thesis, its importance as a legal device and some of its controversy are cited. However, in this instance it is a part of the wider context of the EC’s liberalisation process.

Inherent in this thesis is an element of the unknown, which is the sense of social change based on communications. The liberalisation process does to a great degree encourage such progresses of change but, as previously shown, there is also the somewhat distinct issue of technological change. From a regulatory position, what will evolve from this change and how the resulting developments can be influenced are questions which have developed since the first Green Paper in 1987 firmly initiating political changes to telecommunications.

The origins of EC's telecommunications policy can be traced back to 1984 with the Council Recommendation for the implementation of harmonisation in the field of telecommunications.\(^1\) The most significant basic source of general EC telecommunications policy, as previously noted, was the 1987 Green Paper entitled *Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Service and Equipment* (hereafter the Green Paper (1987)).\(^2\) This gives important guidance about the Community’s telecommunications policy. It is not the only Green Paper which is concerned with telecommunications *per se*. Others have since been published in related sectors of the (wider) communications industry. For example, there is the Green Paper on the *Liberalisation of Telecommunications and Cable Television Networks*.\(^3\) It is the former though which provides direction as to the original intentions and objectives of the European Commission. Yet the Green Paper (1987) is a document of policy and not law. The law later stems from policy in the traditional EC form of Regulations and Directives. Policy may act as a guide to the interpretation of law, as seen below in the *Terminal Equipment Directive* case (202/88).
It is logical to first examine the policy before the law, and then the industry where the ideals of regulators and ambitions of industry players meet and often conflict. Strengths or weaknesses then emerge as to the law's ability to govern the demands of modern competition.

2.2 Liberalisation towards Competition

Liberalising and deregulating the telecommunications industry are not only adherent to recent political and economic philosophy. These steps can be seen as the natural progression towards achieving the ideal on which the EC was founded. In theory any closed industry is essentially in breach of the ideal of a common market. Telecommunications is also important to both the modern social and commercial infrastructure of the EC. The opening of the telecommunications industry to competition is the result of socio-economic change from an industry-wide opinion about telecommunications. Telecommunications is the industry which will be, if it is not already, the essential medium or infrastructure for the economic prosperity of companies and hence nation-states. The goal of the EC is based around such opinions and thus an EC-wide telecommunications industry is favoured.

The EC Commission's Green Paper (1987) was the influential blue-print for liberalisation. It continues to be relevant (although diminishing because of the increasing numbers of legislation fulfilling the objectives) for directing the telecommunications sector towards an open market and subsequent supervision under competition law. It has six main objectives towards competition: the liberalisation of the supply and provision of both terminal and network equipment, the liberalisation of services with the exception of public voice and the operator of the basic network - at least temporarily, separating regulatory and operational functions, ensuring there is open access to networks and interconnection,
standardisation within the EC, and full application of competition law. These objectives seek to open up almost every level of the telecommunications industry. (Mobile telecoms, satellite and cable television are later introduced into the equation through Directives.)

The six objectives stem from the EC's principles of competition throughout the Community, (i.e. competition within the EC, and between the Community and non-EC entities). In other words not only is competition regarded as positive and necessary for a common market, but it in turn strengthens the EC as a whole in competition with non-EC states such as Japan and the United States - two strong industrial competitors. It is also a strength against competition from other alliances of nation-states including Asia and NAFTA (North American Free Trade Area). Governing the industry, whether it is by strict regulation or a looser framework is visible in debates about the future of telecommunications. The reasons for liberalisation may be divided into two categories: political and economic.

The political reason continues the goal of achieving a common market in Europe. The objective of a common market was reinforced by the Single European Act which furthered the EEC Treaty by the addition of Article 8A. This Article was for the establishment of an internal market by the end of 1992. Economic integration of EC members means eliminating barriers of trade between the Member States and not necessarily the states becoming the same. This is an interesting point (independent of any subsequent Treaties promoting further integration), because of the nature of telecommunications. Access to infrastructure and networks, and universal service are a couple of significant characteristics of the industry which effectively extend EC interests into the national markets - at least initially. Achieving a common market in the EC also contains economic purposes. The breaking down of market barriers between Member States defined on national barriers are political acts
for the purpose of achieving economic benefits. National barriers in telecommunications has been a last outpost of national protectionism.\textsuperscript{13}

Protectionism in the telecommunications industry rested primarily on national regulations and differing technical standards. Both hinder cross-border delivery of communication services and in developing an open market.\textsuperscript{14} These are often very profitable to the state and among the largest enterprises and employers in the Member States.\textsuperscript{15} These state and (frequently) monopolistic companies have held the role of both the regulator and the regulated.

The \textit{economic} reason is the changing philosophy of the purpose of the industry. A widely accepted opinion about the significance of telecommunications in contemporary economic society is found in the Commission's 1993 White Paper focusing on growth, competitiveness and employment.\textsuperscript{16} The Commission notes access to information and its transmission is a key to prosperity and growth.\textsuperscript{17} Information is now more recognisable as a commodity as state economies shift from industrial (manufacturing) based to service based.\textsuperscript{18} The change from the traditional acceptance of the industry as a public-utility was also influenced by technical changes. This makes it possible for the public telecom utilities "...to move beyond basic services to provide more diversified and sophisticated services".\textsuperscript{19} Another expression of the economic reasoning is found in the report \textit{Europe and the Global Information Society}.

"Information has a multiplier effect which will energise every economic sector. With market driven tariffs, there will be a vast array of novel information services and applications." \textsuperscript{20}

This follows the argument that the new information based industry is not only a new market in its own right, but one which will generate other secondary markets. The
consequence will be a society dependent on the exchange of information-based services, hence the term the Information Society. The EC (and other states) have proposed policies towards the creation of the information society, largely because there is the opinion that this is the direction society is naturally taking, and government initiatives assist in ensuring their constituents will not be at a disadvantage. Additionally, there is the opinion that this is a source of economic and employment exploitation for the benefit of their states or trade areas. Such opinion of social-economic development in policy and political rhetoric is visible, particularly since the 1987 Green Paper. For example:

"The convergence of information and telecommunications technologies is giving birth to a new industrial revolution, accompanied by economic, social and cultural upheaval.... The new technologies are spreading throughout our economic and social environments, gradually transforming our approach to work and leisure and touching a growing number of very different areas: learning, health care, transport, communication, etc. In doing so they are heralding a new form of social organisation: the information society." 

The White Paper *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* is a beneficial source which further demonstrates government recognition of change. It states:

"To...stimulate the creation of new markets, the Commission proposes to identify strategic trans-European projects....The strategic projects would be carried out at each of three interdependent 'levels' that make up the telecommunications networks: the carrier networks for transmission of information, generic services and telematics applications.

With regard to the networks which serve to carry the information (voice, data, images) the objective would be to consolidate the integrated service
digital network and to install the high speed communications network using advanced transmission and switching techniques (asynchronous transfer mode: ATM), which help digitised multimedia services to make a breakthrough." 24

These statements imply an interventionist approach to the social and economic changes, and this is indeed the policy adopted by the Commission. In the said White Paper the approach was reasoned as:

"This major challenge confronts us all. That is why we are arguing, first and foremost, the need to press on with building a unified Europe which will increase our strength through co-operation and through the benefits of a large area without frontiers of any kind. That is why we are calling on everyone - not only political decision-makers and business leaders - to contribute to the combined effort by seeking to understand the new world and by participating in the joint endeavour.

Nothing would be more dangerous than for Europe to maintain structures and customs which foster resignation, refusal of commitment and passivity. Revival requires a society driven by citizens who are aware of their own responsibilities and imbued with a spirit of solidarity towards those with whom they form local and national communities - communities which are so rich in history and their common feeling of belonging." 25

This call of solidarity towards change underlines the populist approach to the political policy of the EC in seeking to establish a common EC information society. The White Paper's stress on the importance the information society will have on economic and employment growth, quality of life and an increase in competitiveness is developed further in 1994 in subsequent documents, *Europe's Way to the*
Information Society: an Action Plan\textsuperscript{26} and Europe and the Global Information Society\textsuperscript{27}.

The policy approach adopted by the EC Commission in developing a trans-European telecommunications network(s) is based on promoting access, interconnection and interoperability. These are planned to achieve the four following objectives, which are best understood through the language of the Commission:

"facilitating the evolution towards the information society by promoting the increased use of and improved access to advanced technologies, notably through adapted education and training facilities, to encourage new working arrangements...and develop new information applications and services, particularly in areas of collective interest such as healthcare, education and training, and cultural activities which contribute to improving the quality of life and the environment,

-improving the competitiveness of European industry and strengthening the internal market by encouraging the development of pan-European networks, applications and generic services which will support the growth of trans-European electronic commerce and new commercial applications, and enable citizens of the union to access and transfer information freely within an area without internal frontiers,

-reinforcing economic and social cohesion by reducing disparities between the regions concerning both the general availability of and access to telecommunications infrastructure, services, and applications

-accelerating the development of new growth area activities (e.g. multimedia and electronic information services) leading to job creation, by creating a
favourable environment to obtain critical mass of demand and investment.\textsuperscript{28}

To create the said pan-European information infrastructure for the new information society and to achieve the social and economic benefits, an EC report invited the private sector to create initiatives and use its entrepreneurial skills to bring about the information society.\textsuperscript{29} Among the four proposed plans of approach by the Commission to creating the information society, is the adoption of a regulatory and legal framework for the liberalisation of services and infrastructure in telecommunications. A second is to encourage trans-European networks, services and applications.\textsuperscript{30}

In addition and in elaboration to the four EC proposed plans of approach, eight common principles were stated at an international level. At the 1995 G7 Ministerial conference on the information society the following were proposed: 1) promoting dynamic competition, 2) encouraging private investment, 3) defining an adaptable regulatory framework, 4) providing open access to networks, while 5) ensuring universal service provision of and access to service, 6) promoting equality of opportunity to the citizen, 7) promoting diversity of content; including cultural and linguistic diversity, 8) recognising the necessity of world-wide co-operation with particular attention to less developed countries.\textsuperscript{31} Also common to the Members States, including the EC, involved in the summit were the following principles towards the Global Information Infrastructure: 1) promotion of interconnectivity and interoperability, 2) developing global markets for networks, services and applications, 3) ensuring privacy and data security, 4) protecting intellectual property rights, 5) co-operating in R&D and in the development of new applications, 6) monitoring of the social and societal implications of the information society.\textsuperscript{32}

The difference between these objectives and the pre-Information Society system was
beneficially explained in the EC White Paper on *Growth, Competitiveness, and Employment*.

"If a common information area really is to be established, the digital national networks must, like the telephone network, be interconnected and managed in a coherent fashion in order to form trans-European networks which will provide access to a wide range of interactive services. At present, this transition to interactive trans-European networks and services is being held up by the fragmentation of markets, by insufficient interconnection and interoperability and by the absence of mechanisms to ensure coherent management. Although these are obvious shortcomings, the problems concerning the telecommunications networks and services differ considerably from those of the other trans-European networks for the following reason: supply of services is inadequate and where it does exist, too costly, with the result that the demand is also too low as in this case it is supply which determines demand." 33

This, the EC White Paper acknowledges, is a vicious circle and is not helped by the strong tendency of private sector only to invest in areas of limited or acceptable risk.34 In over-coming this shortfall and to create new markets, the Commission in addition to encouraging R&D and removing problems of security, intellectual property, and financial obstacles, encourages competition and the liberalisation of the telecommunication industry.35 According to the document, *Europe's Way to the Information Society - an Action Plan*:

"Competition law plays an important role in maintaining open markets, as well as in ensuring that co-operation between TOs does not result in new barriers being set up. The Commission takes an active role in the application of competition rules to the telecom sector.....The competition rules support a positive contribution to the achievement of the information society, and the
Commission will apply these rules taking into account the reality of the newly emerging global markets and the rapid speed of change.”

On the one hand, with the demise of the belief that telecommunications is a natural monopoly and the philosophy of development associated with this model, there is the opinion that the industry may or should essentially be regarded like any other competitive commercial entity. One only needs for example, to turn to the writings of some American sources such as Gasman's *Telecompetition* for arguments of a more libertarian nature. A similar message initially appears to be supported by the Directive produced to bring competition to the six principle markets addressed above. It is at least the ideal for which to aim. On the other hand, there is the possible contradiction of a necessity for direct intervention such as in the provision of universal service. The Commission first encourages competition, but then intervenes in order to retain elements of the old telecommunications environment. Achieving the balance is controversial as it conflicts with the Idealist model (i.e. the belief in perfect competition: elaborated in Chapter 3) in which the market achieves the demands of the consumer. There are significant implications with efforts to achieve these policy objectives and the restructuring of the industry across the EC. Prior to establishing the commercial situation of a competitive market, there was the political issue of government control.

Historically most telecommunications firms have been government owned. This has two fundamental implications. The Public Telecommunications Authorities have had, according to Overbury and Ravaiolì, "...the ability to formulate and enforce policies ... of ...its telecommunications activities." "As an often powerful and influential arm of the government ...[they]...can also implement other policies and goals that may not be consistent with the provision of economical and efficient telecommunications services."
In other words the Green Paper (1987) was an important initiating step towards breaking down an institution politically regarded with some esteem by many states.

The ownership of a telecommunications firm by the state is initially less important than the powers the company politically holds over the industry (i.e. as a regulator), and its economic control and benefit (i.e. state support, purchasing power, supply power and recipient of great wealth for government coffers). Similarly it can establish its own technical standards, thus creating an additional entry barrier to a potentially competitive market.\(^{42}\) The Public Telecommunications Authorities also had power not only to determine national tariffs and policies, but could according to Overbury and Ravaoli, "...negotiate with foreign carriers and international communications organisations....", and "...implement...policies and regulations that may be inconsistent with the free flow of information across national boundaries...".\(^{43}\) They were both the regulator and communications provider. The consequence of the Commission's goals as outlined in the Green Paper (1987) and the subsequent Directives enforcing the aims set out, are an intrusion into an important source of wealth and power of states. Whether this source is justified is a separate subject. It is nevertheless essential to 'intrude' in order to achieve the ideals of both a common market and a competitive market. This necessity has been visible in the behaviour of member states toward a common telecommunications market.

The support among EC states in creating a competitive telecommunications market has been mixed. In this regard Britain has been one of the more positive of EC states.\(^{44}\) It began the process in the EC as part of the more general market-oriented and privatisation process by the government in the 1980s. The national telecom company was privatised and separated from the traditional connection with the Post Office in 1981. In 1984 the first licence was granted, creating a duopoly and began the course towards a competitive industry.\(^{45}\) Other states, while voicing support,
have been taken to court by the European Commission for failing to implement telecom Directives.\textsuperscript{46}

2.3 Policy to Law

Despite the Green Paper (1987) being published a decade ago, at the time of writing much has yet to be successfully implemented and it therefore remains a significant policy guide for the foreseeable future. Three basic messages which permeate the Green Paper (1987) continue to be of relevance. The first states:

"Failure to adopt the system of regulation of the telecommunications sector in Europe to the new technology and market conditions would risk immense damage to the long-term economic strength of the Community as a whole - and to the fulfilment of the requirements of the European citizen who is entitled to freedom of choice in his or her way of life: communications will be an increasingly important aspect for the user." \textsuperscript{47}

The second message states:

"Existing structures have grown up over a long period and have been successful in bringing telephone services within reach of everybody in Europe. The objective of general public service must be reconciled with the objective of broader choice for the user." \textsuperscript{48}

The philosophy here supports the concern that less-economic services and traditional public access may be sacrificed in order to pursue more profitable communication service areas. However, having achieved its objective the message assumes it is also necessary that traditional service is enhanced through (if not replaced by) choice. The means of choice is most-likely achievable by a competitive market.
The final message states:

"Regulatory changes in telecommunications must therefore take account of the views of all parties concerned." 49

This may be interpreted to state both traditional expectations of a universal service and contemporary needs provided through alternative market approaches should be met. Similarly alternative providers, it might be argued, should be accepted. There may emerge a problem or dispute that needs consideration. If company X is obliged to provide universal service including in profit-losing areas, they may have some grievance about their obligation which other companies are not required to fulfil. Thus the rivals may be able to pursue the profit-making areas only. This imbalance may require consideration. Alternatively, potential competitors may be kept out of the market because the infrastructure is owned and operated by the incumbent firm. This too may fall within the meaning of the third message. Regulatory changes require level-playing field approaches rather than creating unfair advantages for some firms.

The task created in the Green Paper (1987) may be regarded by some observers as a difficult and complex one. No doubt this would be due to the apparent ambiguity of the Commission's ambitions: 1) to remove trade barriers in the telecommunications industry while, 2) attempting to balance both liberalisation and harmonisation, public services and competition. From a purist position, this is not only ambiguous but completely contradictory ideals. If one were to take the 'libertarian' position, harmonisation and public service are two objectives that meddle and hinder the process of competition on the basis that competition should be left to the 'natural laws' of economics. Competition on its own would provide the needs demanded by the consumer. If there is scepticism over faith in competition, it may stem from the EC's concern about trade barriers in other guises replacing the national (economic) borders the EEC Treaty is designed to remove for a common market. Thus to open
the closed telecommunications industry, and to clarify the markets to which competition will apply and change policy into legislation the EC Commission began forming Directives. This took the approach of focusing on industry and market sectors individually.

The initial Directives created for liberalising the European telecommunications market focused on what may be called the 'traditional' telecommunications industry. These Directives concerned terminal equipment (88/301/EEC), services (90/388/EEC) and open network provision (90/387/EEC). Directives regarding 'modern' aspects of the industry such as satellites, cellular telephone and cable television to name a few have since been developed. What is particularly interesting is the recognition of the telecommunications industry as something 'special' in comparison with other industries. A document was formed especially for the telecommunications industry concerning antitrust. The Telecommunications (Antitrust) Guidelines 1991 is a Commission Notice "clarifying the application of Community competition rules to the market participants in the telecommunications sector". A factor of interest in this is the apparent need to create a notice to "clarify" the laws of competition. However, the previously mentioned Directives were created with a view towards competition.

The 'delicate balance' referred to earlier is, in telecommunications, between the economic model of competitive market and state planning or interference in the free market under Article 222(EEC). The Directives which followed the Green Paper (1987) began to establish a new EC-wide regulatory framework for telecommunications, based on the three principles of liberalisation, harmonisation and competition.

In the British Telecommunications case the European Court of Justice (ECJ)
confirmed that EC competition law did apply to the telecommunications sector, yet its significance has more to do with Article 90 (see below) and its interpretation. British Telecommunications (BT) was found to have abused its dominant position, and its actions in preventing some message forwarding agencies from offering given types of services was ruled illegal. This case was based primarily on Article 86. BT's argument was based on the claim that the application of EC competition law would obstruct its performance of duties. The Commission accepted the argument in its decision that BT had duties of general economic interest within the meaning of Article 90(2), namely the provision of telecommunication services throughout the United Kingdom. However, it was ruled that Article 90(2) is not at the Member State's discretion with regard to its application, whereby the State "...has entrusted an undertaking with the operation of a service of general economic interest."......"Article 90(3) assigns the Commission the task of monitoring such matters, under the supervision of the Court."  

In dismissing the argument of BT's duties under Article 90(2) and State application of those rules, the Court stated the plaintiff:

"...totally failed to demonstrate that the results of the activities of those agencies in the United Kingdom were, taken as a whole, unfavourable to BT, or that the Commission's censure of the schemes at issue put the performance of the particular tasks entrusted to BT in jeopardy from the economic point of view."  

This case had three important and lasting results. First, the ECJ confirmed that competition law applied to the telecommunications industry and operators. The second and third results concern Article 90. The ECJ ruled it was for the Commission to decide any derogations from competition law under Article 90(2). This however, was subject to judicial review. The third result was the ECJ stating it
would favour a narrow form of interpretation of the scope of derogation in telecommunications. Since this ruling, the Commission has used Article 90 as an important tool in liberalising the telecommunications industry and enforcing Directives. However, the use of derogation from competition laws under Article 90(2) became restricted. For example in Terminal Equipment Directive (88/301 EC), the Commission ruled only the provision of the public telecommunications network could be considered a service of general economic interest. It seems, with time this should become redundant once competition is evident. This is supported simply with the argument that once there are alternative networks for the provision of the same basic service, there would be no need for such derogation.

2.4 Terminal Equipment Directive (88/301/EEC): An Example of Initial Commission and Member State Confrontation Over Re-structuring Telecommunications

As with the other Directives and areas under consideration listed earlier, terminal equipment may be deemed a market in its own right. Beyond it being considered as one however, it is an important feature in the infrastructure of telecommunications. This Directive is both of intent and of particular importance because it acted as a signal to the end of the state monopoly of telecommunications. It formally brought to light the general question concerning whether or not telecommunications could be justifiably considered a natural monopoly.

Recognising that the monopoly rights over telecommunications "...often go beyond the provision of network utilisation services and extended to the supply of user terminal equipment for connection to the network...", the Commission by way of this Directive is of the opinion that through technical and economic development, there has been a "...proliferation of types of terminal equipment". The Commission has also been encouraged by some states such as Britain in reviewing the "...gravity
of special or exclusive rights". The conclusion drawn by the Commission was:

"[U]sers must be allowed a free choice between the various types of equipment available if they are to benefit fully from the technological advances made in the sector."

Thus the Commission, according to one observer:

"...delineates its goals as technical progress, consumer choice..." and "...the elimination of restrictions on imports from other Member States, fair competition, and mutual acceptance of goods legally manufactured and marketed in other Member States..."

As observed by others, Member States were generally (at least publicly) not against the Green Paper's (1987) recommendations. An example previously presented was the notion of separating the traditional unitary authority of Post and Telecommunications where it acts as both regulator and service provider. Some Member States established new and separate regulatory bodies. Others as late as 1990 had failed to do so. Most of the Member States by 1997 had formed new regulatory bodies but many were too under-developed to adequately function.

The 1988 Directive began the formal process of removing special privileges and exclusive rights in the telecommunications industry. In the preamble of the Directive, it was written:

"The special or exclusive rights relating to terminal equipment enjoyed by national telecommunications monopolies are exercised in such a way as, in practice, to disadvantage equipment from other Member-States, notably by preventing users from freely choosing the equipment...regardless of origins."

Furthermore:

"The provision of installation and maintenance of services is a key factor in
the purchasing or rental of terminal equipment. The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights."

These two important points address both the before and after markets of purchase or rental of equipment. Liberalisation of control over the market would not be effective if one existed without the other. In particular, refusal or other means of obstruction to aftersales servicing would hinder the market process. It could also act as a barrier that the EC seeks to abolish.

"Such rights [of exclusivity] must therefore...be abolished if the abolition of exclusive importing and marketing rights is to any practical effect."

To avoid further market distortion, 88/301/EEC states:

"[T]he terminal equipment market requires the introduction of transparent technical specifications and type-approval procedures..." [in order to] "allow the free movement of terminal equipment."

Although Member States generally supported the Green Paper (1987), the legislation introduced to implement the aims in the Green Paper were received less enthusiastically by some. The 88/301/EEC Directive was challenged before the European Court of Justice by France, Italy, Belgium, Germany and Greece.

"The challenging Member States focused on the power of the Commission to issue the Directive under Article 90(3) rather than on the substance of the Directive itself."

The States objected to 88/301/EEC on the grounds of: "...the distortions of procedure, the incompetence of the Commission, violation of the principles of proportionality, and violation of procedure." The ECJ ruled in the Commission's favour except for annulling Article 2 (of the said Directive), "...in so far as it related to special rights", all of Article 7 and Article 9 "...in so far as it related to those
annulled provisions. The issue the ECJ objected to was that of *special rights* and the Commission's authority to oblige States to remove them.

### 2.4.1 Article 2 of Directive 88/301/EEC

Article 2 of the Directive "...requires Member-States which have granted undertakings special or exclusive rights regarding the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment to withdraw those rights and to inform the Commission of the measures taken or draft legislation introduced to that end."

The intention of this Article can be found in the preamble as noted earlier. It is to eliminate a principle and powerful obstacle to the freedom to provide goods and services, competition, and all measures having an equivalent effect to barriers of trade. The Commission's authority regarding Article 2 of the Directive was questioned as to its justification in obliging the withdrawal of special rights and secondly, its use of Article 90(3) in imposing such obligations. The ECJ found Article 2 contained two concerns by the Commission; that of exclusive rights and those considered to be special rights.

Referring to Article 30 EEC and to case law, the ECJ stated exclusive importation and marketing rights were already regarded to be a breach of Community law.

"[T]he prohibition of measures having an effect equivalent to quantitative restrictions...applies to all trading rules enacted by Member-States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."

The ECJ did state: "exclusive importation and marketing rights in the telecommunications terminal sector are capable of restricting intra-Community trade." Such restrictions are contrary to Articles 2 and 3 EEC and Article 30 EEC,
and "must...be interpreted in the light of that principle..." for preventing the distortion of competition. So while the Commission "...was justified in requiring the withdrawal of exclusive rights regarding importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment...", it was not justified in seeking to have special rights removed. This was due to its failure to "specify the types of rights that are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty."  

Although aspects of Article 2 were annulled along with all of Article 7 and relevant aspects of Article 9, it was said "...[t]he told effect of the...judgement is an endorsement of the Commission's philosophy as expressed in the Green Paper." The Directive is a direct attack against State monopolies but demonstrated through the resulting case of 202/88 the sensitivity many states still have about the industry. Less than eight months after the case was the deadline for the implementation of the Directive. Ireland, Luxembourg and two of the Case 202/88's plaintiffs (Greece and Belgium) were in breach of "...the requirement that conforming national legislation be adopted." Germany had created practical measures which complied with the Directive's principles, but its national laws had not been adapted to meet these objectives.  

2.5 Article 90  
The use of Article 90 EEC with regard to the telecommunications industry has proven to be a positive device for the Commission. It has been a legislative tool to assist in opening the closed, state-monopolised telecommunications markets. The use of Article 90 has, however, attracted some attention from industry and legal analysts. Article 90 in effect bridges EC and Member States' conflicting interests in competition policy. In particular, the conflict between competition and state (public)
undertakings. One lawyer stated:

"EC competition law is often seen as a nexus between Brussels bureaucracy and industry. Article 85 and 86, the principle instruments of competition policy enforcement, apply to undertakings. They are not concerned with measures imposed by national governments."\cite{86}

Article 90 on the other hand is concerned with measures contrary to the EEC Treaty giving public undertakings (and other undertakings) special privileges, such as grants of special or exclusive rights from a Member State.\cite{87} Another description of the purpose of the Article comes from Taylor. He wrote:

"Article 90 of the EC Treaty seeks to reconcile the pursuit of free trade and fair competition with the protection of public services performed by state monopolies."\cite{88}

However the scope of the Article has attracted some legal debate.\cite{89} In regard to telecommunications, Article 90 has been instrumental in opening the market to competition and in countering the Member States which have been reluctant (practically as opposed to verbally) to accept competition in the industry. The Article has also been described as:

"... a delicate balance between what may be considered to be a presumption that public monopolies and privileged undertaking are legal, on the one hand, and the recognition that they may be illegal if they fall foul of the rules enshrined in the Treaty, particularly those on competition."\cite{90}

It is this 'delicate balance' which has begun a debate. Although Article 90 had been used before, it appears historically to have been one of the lesser used Articles. Until the mid-1970s the European Court of Justice and the Commission accepted exclusive rights in the name of public interest, particularly of a non-economic nature, could be granted by Member States. Such rights were therefore not in violation of
Article 90(1). However since the mid-1970s the ECJ and the Commission began to use Article 90(1) (along with Article 86) to remove monopolistic barriers to trade.\textsuperscript{91} Article 90 became an issue with the legislating of the first telecommunications Directive. According to Bright:

"A breach of Article 90 only occurs where there is a breach of another relevant provision of Treaty rules and there is a casual link to a Member State. For the purposes of competition rules there needs to be established all the incidents of a breach of Article 85 and 86 including an effect on trade between Member States and, for Article 86, the existence of a dominant position within the Common market or a substantial part of it." \textsuperscript{92}

However, the question has been raised; to what extent is it in fact possible for a state to give a public monopoly or private undertaking exclusive privileges?\textsuperscript{93} In Bodson \textit{v} Pompes Funebres, the ECJ held where there was market dominance, prices that were artificially high could be found to be incompatible with EC competition law. In the instance where a public authority fixes the prices, it could be in violation of EC law under Article 90(1) in conjunction with Article 86.\textsuperscript{94} If the state did not infringe Article 90 and the undertaking does not abuse any exclusive rights that would effectively be an abuse of a dominant position under Article 86, then neither would be found to be at fault. However, as found in Hofner \textit{v} Macrotron, if the state has created conditions of exclusivity where a firm is able to violate EC competition law (namely Article 86) then under Article 90(1) an illegal abuse has occurred.\textsuperscript{95}

In Porto di Genova \textit{v} Siderurgica Gabrielli\textsuperscript{96} exclusive rights were given to recognised companies for the loading and unloading of ships at Genoa. The Court stated the creation of exclusive rights was not in itself abusive, but under Articles 90 and 86 can become abusive if they create a situation in which the undertaking in question "...cannot avoid abusing its dominant position ... or is induced to commit
From these cases, each with their own individual importance, it may be recognised that the firm or undertaking which is given exclusive privileges does not necessarily have to be publicly owned or controlled. Yet as in the *Sacchi case*, the undertaking could be in both the private and the public sector. In this instance the Italian Broadcasting Authority (RAI) was controlled by a state holding company. The state had interests within the firm's organisation and could therefore intervene in decisions, operations and management. This is one example of where regulatory and commercial operations unjustly conflict should a competitive market exist.

"[A]n exclusive right granted to a limited company in relation to radio and television broadcasts and cable transmission means that such an undertaking falls within the ambit of Article 90(1)." 99

Article 90(1), it may be found, establishes the identity of those to whom the Article is applicable. Article 90(2) extends defining the identity by stating:

"Undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules... on competition ..." 100

The difficulty the Court or Commission may find in 'intervening' in Member States for the good of the European Community, as well as the defence which the state has against EC involvement, is made in the second half of Article 90(2): Undertakings are subject "...insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them." There is an important provision to this 'exception-to-the-rule'. Article 90(2) dictates that the development of trade must not be affected so as to be contrary to the interests of the Community.
Article 90(2) was the result of compromises between the interests of the Member States and the Community's, and the result is therefore fraught with interpretation difficulties. Paragraph 2 of the Article is designed to be a form of equilibrium between the two conflicts of interests, should one arise. One interpretation of Article 90(2) claims EEC Treaty rules and especially those concerned with competition have been limited in their application. This limitation applies to public service performance by either public or private undertakings. In the case of telecommunications, the provision of 'universal service' is an example of a public service which has traditionally been fulfilled by state owned and operated telecoms firms. This service, in theory, ensures all people within the state have access ('reasonable access') to a telephone. In Regie des Postes v Paul Corbeau the ECJ ruled Member States were permitted through Article 90(2) to grant exclusive rights for the provision of universal service. This was accepted insofar as the restrictions on competition benefited in the achievement of the public service. The Court also ruled an undertaking fulfilling such an obligation could restrict or eliminate competition only as far as it was necessary to ensure the continuation of providing - in this case - universal service.

The anti-competitive behaviour had to be justified on the grounds of maintaining economically acceptable terms. This case concerned universal service in the postal sector. In telecommunications a more active approach has been taken since the late 1980s. This 'active' approach refers to the Commission's efforts in opening up the telecommunications market. At the time of writing, the liberalisation of telecommunications has been at a more advanced stage than the proposed liberalisation of the postal sector. Advancing the liberalisation of telecommunications has been achieved through the use of Article 90(3), the British Telecommunications case and the introduction of Directives concerning specific sectors in the telecommunication industry.
2.6 Telecommunications (Antitrust) Guidelines 1991

The Guidelines are defined to: "clarify the application of Community competition rules to the market participants in the telecommunications sector." They are also of interest because the telecommunications industry has been singled out for special treatment in the application of competition law. The preface to the Guidelines points out the industry's uniqueness in such application. On the one hand the Guidelines "must be viewed in the context of the special conditions of the telecommunications sector", while "the overall Community telecommunications policy will be taken into account." One of the special features of the industry in regard to its treatment is that "the telecommunications operators should be allowed, and encouraged, to establish the necessary co-operation mechanisms...." Initially this seems to counter the intentions of a competitive market. The policy envisaged is one of a co-operative competitive market, terms that contradict one another. The preface states this is possible provided the rules are complied with "in order to avoid the diseconomies that could result." The initial ambiguity of this approach, and yet one that is a dichotomy, is understood by reflecting back to the general policies towards the Information Society. On the one hand, co-operation in general is needed for research and development, for interconnection and interoperability. On the other a competitive market is often seen to be best for innovation and efficiency. Ungerer said of the principles aimed towards the Information Society and their relation with competition law:

"These principles present the essential features of the future framework, which include on the one hand, a growing role for the competition rules and, on the other, the establishment and maintenance of public interest legislation..... Competition law is, therefore, likely to become increasingly important for the telecommunications sector, due primarily to deregulation and the dynamics of convergence and globalisation."
Meddling (as advocates of non-intervention in the marketplace would see it) in the industry can cause economic distortions and imbalance thus affecting the ability of the market to function in a proper, 'fair', competitive spirit. Social policies are often the origins or cause of such interference and their merits are debatable. For a sensible examination of the telecommunications industry as one which is becoming competitive or at least capable of becoming one, it must be understood in terms of its infrastructure.

The industry's infrastructure could symbolically be understood as a patchwork quilt. Each square represents the traditional structure. The individual states have (had) their own connections, standards, and comparative levels of technical ability and quality. It is also important to reiterate the previous norm of a (usually state owned) monopoly. In order to form the quilt, the patches must be sown together. For a common (telecoms) market as the European Community sees it, the quality of the patches - the service and technical infrastructure, must be improved to a common standard:

"...to enable European users to benefit from a wide range of better and cheaper telecommunications services." 114

Again, to achieve this the competitive market is regarded as the appropriate vehicle. There is seen to be the need though for forms of co-operation in order to maintain competition (i.e. prevent barriers to entry) and also for a result of common benefits and standards - regardless of where one is in the EC. This would, in theory, achieve the principles in the EEC Treaty (see above) - that of better living standards and also so that the EC as an economic entity is able to compete with non-EC entities. 115

Co-operation is deemed undesirable when collusion goes against the principles of the EC and competition law (i.e. abuse of a dominant position). It is stated the Guidelines "...should be seen as one aspect of an overall Community policy towards
telecommunications, notably of policies and actions to encourage and stimulate those forms of co-operation which promote the development and availability of advanced communications for Europe. One cited example is "to create - or ensure - Community-wide full interconnectivity between public works." The Guidelines state:

"The telecommunications sector in many cases requires co-operation agreements, inter alia, between telecommunications organisations (TOs) in order to ensure network and services inter-connectivity, one-stop-shopping and one-stop-billing which are necessary to provide for Europe-wide services and to offer optimum service to users."

Thus the significance of having the Guidelines is to assist carrying out the application of competition law and guiding firms in avoiding breaching these laws. They apply the "principles governing...competition rules...only [where they] are of specific relevance to telecommunication issues." The purpose of the Guidelines is to assist the two challenges of EC competition law and policy; the creation of a competitive framework and market structure, and to ensure the behaviour of market players is competitive in telecommunications sectors.

The question that continues to be predominant, asks how will the EC pursue its goals beyond the rhetoric towards a modern, liberalised telecommunications industry and the purported Information Society? What is the interpretation behind the policy, which in turn is behind the law? Mansell wrote:

"The texts issued by the European Commission concerning telecommunication liberalisation refer to extra-Community threats created by inter-national rivalry in service and equipment markets. When it looks to external markets, the Commission and policy-makers within the member states seem to recognise the reality of the Strategic model. They recognise
that full reciprocity in the liberalisation of markets within the Triad of the European Community, the United States and Japan, is far from a reality and that there are multiple indications of market-distorting practices. However, within the context of intra-Community policy, the Commission's rhetoric and actions often suggest that the Idealist model is rather more influential. Within the Community, the conflicts between harmonisation and competition, and between success in global markets and the promotion of universal services, are rarely problematised explicitly." 121

The conflict for the EC lies in the choice between the Idealist model and the Strategic model, (which are considered in following chapters). The Idealist position may be a suitable goal for the long-term, but it may be questioned whether it is appropriate to use it as the more influential philosophy in achieving a liberalised, open-market telecommunications industry, as opposed to something to strive towards? Mansell stated:

"[R]ivalry in national, regional and global markets is not to be permitted to 'jeopardise the availability of a universal set of services' and the current public telecommunication network and telephone service are prime examples. This is the rhetoric of evolving telecommunication policy and regulation in the European Community context.....carries with it the assumptions that are reminiscent of both the Idealist and Strategic models. For instance, on the one hand, the harmonisation of a minimum set of standards and regulations is expected to secure the widest public interest in telecommunication development. On the other hand, there is awareness of the disadvantageous impact of rivalry and monopolisation and the need to secure the provision of a set of universal services." 122

This effectively summarises the problems facing governments and regulators in achieving a balanced system.
2.7 Summary

The EC has developed a policy and legal framework within which to carry out liberalisation reforms. The changes range from stating the policy-aims to enforcing the changes on EC-member countries. The liberalisation process is largely technical but the most important factor emerging is the requirement for competition law (assisted by the Telecommunications Antitrust Guidelines) to manage the liberalised market.

The process of liberalisation in the EC required the removal of exclusive rights and privileges of incumbent operators. Although originally in equipment and non-public services, the process towards full liberalisation (as of 1, January 1998) benefited from the existence of Article 90 in EC law. Nevertheless, out of the combined process of liberalisation and the technical changes occurring within the industry continue to emerge questions about the best policy to be adopted and goals to be achieved. These are in particular related to the anticipated Information Society. This is seen through the collection of policy documents including the EC's 1987 Green Paper, the 1994 White Paper about the Information Society and the 1995 G7 Conference.

Movement towards the 'Information Society' has brought about debate upon how this would best be achieved. A traditional interventionist policy is one option more widely supported in some countries than others. Alternatively, there is the argument which favours the marketplace be allowed to naturally develop this new society. At the centre of this debate between countries is the European Commission, which ultimately determines the shape of the European Information Society. In this context it will be interesting to observe how often the Commission will have to intervene in order to push reluctant Member States to accept the current wave of change in political and economic thinking for the market-type of telecommunications sector.
Of central significance for this thesis is the conflict between an interventionist and a non-interventionist approach to the market. The point here being that even a "free market" is an economic and political construct which may, paradoxically, require policy-driven intervention to sustain it. The conflict is evident through the political rhetoric of government policy documents and speeches. The conflict, as discussed in subsequent chapters, is at the heart of competition law management and enforcement in the marketplace.

It is clear that a market-based telecommunications industry is the favoured direction of EC telecommunications industry development. Yet, it is not clear where the line is to be established between non-intervention (except for anti-competitive behaviour) and intervention by necessity. The problem is not unique to the EC, for other and more traditionally market-favoured economies such as the US have similar debates. The division between competition and political intervention is not restricted to developing the information society. It is also a matter of concern within the subject of competition policy and enforcement.
ENDNOTES


6. also Mansell, op. cit., Chapter 1.

7. Cairncross, op. cit.; Mansell, Ibid.


9. COM (87) 290 Final (June 1987), op. cit.


12. Ibid., p. 200.


14. Ibid., also see Carpentier, 12.4-12.5.

15. Coleman, p.204.
16. This is often stated in relevant EC documents e.g. White Paper, 'Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century', COM (93) 700 Final, Brussels 5 December 1993.

17. Ibid.


23. 'Trans-European Information Networks', The European Telecommunications Policy, European Commission, Brussels, 1995, CD-91-95-0433AZ.


25. Ibid.


28. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Methodology For the Implementation of Information Society Applications, COM(95) 224, Brussels 31 May 1995.


32. Ibid.

33. White Paper, COM(93) 700 Final, op. cit.

34. Ibid.

35. Ibid.


38. For example, the protection of Universal Service: also see O. Stehmann Network Competition for European Telecommunications, Oxford: Oxford University Press, 1995, p. 88-90: Universal Service Obligation discussed further in Chapter Five of this thesis.


40. Ibid.

41. Overbury and Ravaioli, op. cit.

42. Entry Barriers are examined in a later chapter.

43. Overbury and Ravaioli, op. cit.


46. Ibid.


48. Ibid.
49. Ibid.


51. Ibid., p 946.


55. Ibid., at 382.

56. Italy v Commission, op. cit.


58. Ibid. at para.2.

59. Ibid.

60. Ibid.

61. J. M. Naftel 'The Natural Death of a Natural Monopoly: Competition in EC Telecommunications After the Telecommunications Terminals Judgement', [1993] 3 ECLR 105, 110. This list is supported with reference by the Commission in the Directive to Articles 30, 37, 59, 90 and importantly for the purpose of this study Article 86. It also refers to Articles 5,3 and 36.

62. see Naftel op. cit, p. 109.

63. Ibid. p. 109.

64. Ibid. p. 109.


67. Ibid. para 6
68. Ibid. at 924, para 6.
69. Ibid. at 924, para 9.


72. Ibid.; also France v Commission C-202/88 op. cit., at 1263.

73. France v Commission C-202/88 op. cit., at 554.

74. Ibid., at 581 para 31.

75. Articles 2 & 3 EEC.

76. Article 30 EEC.


78. Ibid., para 33.

79. Ibid. at 582 para 36.

80. Ibid. at 582 para 41.

81. Ibid at 583 para 44.

82. Ibid at 583 para 45.

83. Naftel, op. cit., p.111.

84. F. Pombo op. cit., p. 561.

85. Ibid.


89. Ibid.

90. Gardner, op. cit., p. 78.

91. Gardner, op. cit., p. 78.


97. Ibid.


100. Article 90(2) EEC


102. also see: Taylor, op. cit., p. 322.


104. Ibid. - also see: Gardner, op. cit., p. 82.

105. Ibid.


108. Ibid., p. 949.

109. Ibid.

110. Ibid.

111. Ibid.


115. Ibid. at 951.

116. Ibid. at 950.

117. Ibid. at 949.

118. Ibid, op. cit.

119. Ibid. at 953.

120. Ungerer, 'EC Competition Law in the Telecommunications, Media, and Information Technology Sectors', op. cit., p.1111.

121. Mansell, op. cit., p.221.

CHAPTER THREE

Theory of Competition Law: Supervising the New Telecommunications Market

3.1 Introduction

The underlying purpose of this thesis is to demonstrate the challenges and conflicts competition law will face in a liberalised, market-based telecommunications industry. It is also sought to set out a framework within which constructive discourse between competition law and policy can be developed. In opening this discourse, it is suggested that competition law and policy have some problems which remain unresolved, even a century after the formalisation of antitrust law. It is suggested that with this market-liberalisation, telecommunications serves as an ideal example for consideration of these weaknesses and their possible redress. Having discussed the changing industry and some of the laws and policies being used to open the telecommunications market, it is important to address the thinking which supports policies and judicial approach to competition law.

This chapter is the third necessary step in presenting the tensions that are developing in the modern telecommunications market, and shows weaknesses, contradictions and flaws in competition laws and policies. Behind every policy, legislation and judgement there is a philosophical-basis, so it is naturally appropriate at this point to address this foundation supporting competition law. This step moves the discourse from understanding the situation in the changing industry and the policy and legal developments undertaken in Europe to the fundamental problems facing regulators as detailed in the following chapters. This chapter encourages this progression
through challenging some recent perceptions about how the law can be predictably applied, as well as the belief that the market can in most instances determine appropriate outcomes. It is argued that these beliefs can be misleading, despite their appeal.

Although this chapter seemingly departs from references to telecommunications and focuses on theory, the matters addressed are nevertheless of paramount importance. The argument in this chapter underlines the analysis in the remainder of this thesis, and calls for a new and more appropriate approach to be developed for interpreting competition policies and laws. This is particularly important for the encouragement and maintenance of competition within the telecommunications industry.

Liberalising the telecommunications market into a competitive environment and the application in that process of competition law based upon theoretical appreciations in some cases originating a century ago has the potential to create an interesting situation. The nature of the modern telecommunications industry, the nature of its development under competitive conditions and the nature of competition legal theory all contain ambiguities. These ambiguities are created by conflicting interpretations and exceptions-to-the-rules of traditional thinking about the philosophy of competition, and telecommunications affords an interesting and productive model of the issues arising.

Although this thesis is concerned with law rather than economics,¹ the inclusion of economics in the analysis of the competition law is unavoidable. This is because it is an influential element in competition policy. The extent of how influential it should be in both policy and legal reasoning is debatable.² The American school of thought known as the 'Chicago School' has been associated with the popularisation of the dominant use of economics in antitrust cases during the 1970s and the 1980s.
Although the domination of economics - or rather the Chicago School's application of economics to law - has come under question lately in the United States, lessons for the EC may be learned from the experience overseas. However, the EC may have lessons for overseas. Competition theory, economic influences and recent lessons in antitrust law are particularly interesting in application to the modern telecommunications industry.

The behaviour permitted by the law and what some theories of the law argue it should permit can be two different things. The result of this debate influences or determines what type of industrial structure is permissible. Yet, what is permissible by law may not have beneficial consequences for competition or for society. This is where some conflict may exist in relation to some potential formations of telecommunication networks.

3.2 The Rise of Economic Influence in Contemporary Competition Legal Theory

The influence of economics in legal theory is relatively recent. Originally, it had little or no importance in antitrust law, but since the mid-1960s and particularly from the 1970s onwards its contribution has increased. The occurrence of a new "industrial revolution" around the centenary of the creation of contemporary competition (antitrust) law is an interesting, timely event. It is timely in that the contemporary promotion of the aim of competition policy in telecommunications comes around the centenary of the expiry of the first Bell patents in 1890. A century ago there was a period of great competition in the American telephone market which initiated the debate about the role of competition and competition laws in the telecommunications industry. The history of legal theory is however, of less importance than the apparent parallels that have been achieved within a century of the first formal antitrust legislation.
Although notions of competition law were evolving prior to the Sherman Act (1890) in other countries, the Act is significant. It was the first legislation to respond to problems in competition resulting from the industrial change in the nineteenth century. (The Sherman Act was followed by the Clayton Act which was later amended in 1936 by the Robinson-Patman Act.) In contrast, competition in Britain is reported not to have changed much during the nineteenth century. Although Germany experienced similar rises in big-business they did not create the same competition problems. Despite the English common law's history in forming rules for competition, its development has been described as "haphazard". Efforts to create a more formal system with the aid of statutes did not begin until 1949. The English rules have been described in the following manner:

"Part of the law is judge-made in the form of common law doctrine of restraint of trade, the roots of which extend back to the Middle Ages. The remainder is contained in statutes." 11 & 12

The United Kingdom's membership in the European Community is of contemporary significance, despite Whish's noteworthy comment:

"There is no single, coherent policy that binds UK or EEC law together: there is no single premise from which decisions flow which binds UK or EEC law together: there is no single premise from which decisions flow through the application of logic alone." 13

The UK is bound to the EC law through its membership to the Community, similar observations about competition law and related problems to competition legal theory may be made. Yet, it is possible Whish's statement may soon become more relevant to history and less so to contemporary law, as talk continues about revising the UK competition law. 14

US and EC competition law have had different aims. Their differences may be
attributed to the American "common market" being of a more established nature than the EC's common market at the time of its (EEC as it was in 1958) formation. The United States has also been an influential economic power during the twentieth century, and it has been a source of economic and legal development and debate from which lessons may be learned by other states or 'Communities' such as the EC. Hawk observed:

"Given the parentage of the EEC's competition law and the fact that both regimes concern anti-competitive business practices, the EEC and the US face many of the same legal and economic questions, such as the definition of abusive competition. In many instances the EEC and the US have arrived at much the same answers, for example, with respect to horizontal exchanges of price and cost information and criteria for membership in a group of competitors or access to a competitively necessary facility."  

There are many instances where the answers to the shared legal and economic questions have differed. The differences are due to policy or aims of the laws. For example, the goal of integration is fundamental to EC law. Different conclusions are also found to be more philosophically acceptable. Furthermore, the history of the US and the EC have differed. For example, Waller stated:

"Unlike the US economy, which was largely integrated and continental in scope at the time the EC was created in 1957 in order to establish a new European common market and to 'promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability an accelerated raising of standard of living and closer relations between the States belonging to it.' In part, EC competition law must play the role that the commerce clause and the supremacy clause played in the United States in creating a true Community-wide market in which to have competition at all."
Both EC and American competition legal philosophies stem from nineteenth century thinking. There also seems to be some strong parallels between contemporary industrial events and the late nineteenth century.

The future of both the American and European Community competition legal systems will be interesting to follow in so far as the strengths each have to offer and their relation to the establishment of a global economy. Waller was of a similar view about the important contributions each have to make to a global marketplace. He stated: "[t]he differences between the EC competition law and its United States counterpart ..... have important implications for the development of competition law on a global basis." The EC offers a system of integrating markets previously separated by political boundaries. The American system offers greater economic depth to the analysis of competition issues and problems. However some reflection about the parallels in the experiences with competition and telecommunications may contribute to some beneficial lessons.

The period 1870-1914 has been identified as significant especially in the United States. Others have been less specific in defining the period as between the end of the American Civil War up to around 1900. The First World War is also a date used to determine the end of this particular and important era, especially in American economic history. It was important in so far as the changing industrial nature of the country, the introduction of antitrust laws and the development of an American interpretation of economic philosophy. This is also an important period specifically for the telecommunications industry.

3.2.1 Competition in Telecommunications during the Early 20th Century

In Europe perhaps competition seems new because the telecommunications market has mostly been composed of state monopolies, often connected with the state run
post office. The situation in the United States has been a little different. For much of the century AT&T dominated the American market, although it was privately owned. This has not always been the case as there was a period of competition which one observer described as "intense competition". The original Bell patents expired in 1894. Independent companies (non-Bell companies) were then able to open and operate telephone exchanges, in both cities and towns the Bell company had not previously served, and in places (normally the larger urban cities) which Bell had operated as the incumbent. By 1902 the independent companies provided nearly 60 per cent of the telephone service along the North Central and South regions of the Atlantic side of the United States. They were also quickly succeeding in the South Central states. Bell companies dominated the Northeast, with some exceptions such as urban and rural markets outside of large metropolitan areas (e.g. New York). By 1907 independent operators accounted for nearly half of the telephone business. By 1912 however, the market control of the independent operators fell. Bell companies directly controlled 55 per cent of the market in the United States, and another 30 per cent through sublicence agreements.

Weiman and Levin stated:

"The sudden rise and fall of the independent movement have raised doubts about the viability of competition in the early telephone industry. The traditional view holds that telephone service was a natural monopoly and so regards the competitive period as a disequilibrium episode. Advocates of the alternative view deny the existence of natural monopoly in the early telephone industry and accuse Bell of predation to recapture its monopoly position. They assert that American Telephone and Telegraph and its operating companies, through a combination of predatory pricing and investment, forced the independents to exit or to consolidate on terms that blocked future entry. By wielding access as a strategic weapon, it also
argued, AT&T leveraged its initial advantage in long-distance service to gain greater control over local exchange and toll markets.\(^29\)

The extent to which either is true is debatable.\(^30\) By 1913, "AT&T had effectively subdued competition" in the United States.\(^31\) The significance of this date is the 'Kingston Commitment' which was to guarantee access for independent operators to Bell (AT&T) networks. It however, came too late for competition to effectively survive in the United States. The consequence was effectively a private monopoly under Federal regulation.

It seems ironic on reflection that after introducing the Sherman Act to counter the perceived threat of big business and monopolies, the telephone industry that had seen competition became a monopoly.

Nevertheless, the turn of the century and its significance for the United States as a whole was described by Morgan when she stated:

"In a period of rapid growth throughout all sector, the economy was transformed from a predominantly agricultural economy to a state of highly developed industrial capitalism within a period of 30-40 years. The diminished role for agriculture and concomitant growth in industry had been accompanied by a marked change within the industry. The growth in the size of firms and their concentrations into 'trusts', 'combinations', and oligopolies were associated in the contemporary mind with greater efficiency and lower prices. By the late 1890s, these large firms and combinations (acting as cartels or as corporate entities) had come to dominate large sectors of the supply of raw materials ... through their final manufactured products. The development of the combinations and the competitive behaviour of large firms were believed to be peculiarly American phenomena, moreover, ones
Morgan's observation contains three important points of interest. First, there is the economic change from an agricultural based economy to an industrial based one. Secondly, there is the economic theory of the time that these large firms would be more efficient and cheaper than a number of smaller firms. The third point is the sudden existence of monopolies, cartels and oligopolies. During this period there also appears a divide between public reaction to these cartels and the birth of American economics. The American public generally grew hostile to trusts, combinations and cartels. Simultaneously American economic thinking developed and became identifiable separate from European philosophies. While the American economists as Morgan described "... were impressed by these rapid and severe changes in the economy, which challenged their perceptions of the nature of competition and shaped their ideas" , popular opinion looked at the changes from a more political perspective.

Neale and Goyder described the situation in the following manner:

"The impetus behind the movement for the earliest legislation gathered strength during the 1870s and 1880s. Already half a century before this a deep-rooted political tradition against concentrations of private power had forced the break-up of the central bank of the United States. After the Civil War, the railways with their privileges, charters and subsidies became the main object of suspicion and hostility." 

Presently, American thinking provides both an influential and a reflective debate concerning antitrust for the twenty-first century. Certain parallels spring to mind a century later, most notably the telecommunications industry with the break-up of AT&T in 1984 in the United States, and the privatisation of British Telecom (BT) in
the UK with other countries following suit. Without trying to stretch a European example of the AT&T break-up too far, the European Commission's insistence that Deutsche Telekom be privatised and more of the German market be opened could be regarded as an EC parallel. Yet certain fears arise for the future of long-term competition after some of the experiences of the brief spell of competition the United States. Although one must be cautious with drawing on the past, the experience may be of value.

3.2.2 Economic and Antitrust Thinking in the Early 20th Century's Competitive Telecommunications Period

Although the Sherman Act was created in response to the public concern about the concentration of economic power in such trusts, economists of the time were generally against the formation of antitrust laws. They believed the cause of monopolies was due to tariffs. Later, as one observer pointed out, many who disagreed with antitrust legislation such as Schumpeter, von Mises and von Beckerath, "did not go out of their way to attack" the Act when American economists' opinions changed. Between 1900-1920, their opinion supported the antitrust legislation. Nevertheless, economists had little or nothing to do with the passage of the Act.

In the early years of antitrust there was little economic evidence to support legal theories and arguments. Decisions were decided on the wisdom of the judiciary. Some concepts of industrial organisation used later on in the twentieth century are allegedly to have originated in antitrust cases in the early years of the existence of the Sherman Act. Sullivan observed:

"In time all this changed. For the last several decades many economists have been addressing the theoretical and empirical study of competition, the antitrust law's basic concern, in substantial ways. Increasingly and with
varying degrees of frustration and satisfaction courts have turned toward theoretical economics for insight and the aid in the development of antitrust doctrine."  

As was once written about "the life of law", it "has not been logic: it has been experience". Recent trends in American antitrust thinking have sought to inject more logic into the system through the application of economics. This is in significant contrast to the practice of early antitrust cases. This 'logic' is founded on nineteenth (and to a degree eighteenth century) philosophies, including, but not exclusively, the writings of Englishmen John Locke, Adam Smith and John Stuart Mill. Their writings and also those of Jeremy Bentham and David Hume continue to be influential with contemporary American liberalism, based on faith in political, personal and economic liberty.

Correia observed:

"There was a natural link between capitalism and liberalism because capitalism represented the embodiment in the marketplace of an ideology based on individualism and rationality."

The American economists of the late 1800s were in (what has been described as) a period of transition. That is to say, the economic and industrial climate around them was in transition as was the generation of economic thinkers. They are said to be the last generation to rely on European (namely English and German) economic sources and the first to develop distinctly American methods. "They sat on the saddle point between the earlier classical school and the later neo-classical school", claimed Morgan.

Morgan described the new generation as follows:

"[T]hese economists were not theorising in ivory towers (not even ivory
towers shared by others): they were living in a vibrant and increasingly
commercialised economy. They made use of their own observations and
perceptions of the new phenomena in their economy, and they intertwined
their theories with their interpretation of the evidence in their economic
writings." 52
They were in a manner fulfilling a virtue which Schumpeter later wished economists
as a whole would follow. He wrote:

"If we economists were given less to wishful thinking and more to the
observation of facts, doubts would immediately arise as to the realistic
virtues of a theory that would have led us to expect a very different result." 53

Instead, contemporary writers are critical of the apparent lack of economic theory 54
which could have been used to create an entirely different Sherman Act - or no
antitrust legislation. This nevertheless is historical reflection. Dewey concluded
"...an economist is in no position to chide Congressmen and judges for failing to
accept immediately truths that it took his trade the better part of a hundred years to
learn." 55

Now that (according to the neo-classicists) the 'truths' and 'logic' of economic theory
have arrived, the antitrust debate is for all intent and purposes dead.56 Schumpeter
would probably have disapproved of this trend, as the ideal of perfect competition
which is a founding point of classical (and neo-classical) economic thinking, was the
focal point of his criticism.57

3.3 Two Schools of Thought in Competition Law and Policy

In competition law the two schools of opposing thought can, on reflection, be
generally termed 'the interventionist' and 'the non-interventionist'.58 These have also
been called 'the structuralist' and 'the neo-classical'.59 In the United States where
these opposing views have each been popular at some point in the last one hundred years of American anti-trust law, the structuralist philosophy has also been called 'the Harvard School' while the neo-classical philosophy has also been called 'the Chicago School'. The latter has also been called 'the Permissive School'. The neo-classical philosophy bases its views on economics. Such schools of thought not only affect general antitrust decisions, but can strongly influence the development of a competitive telecommunications industry and consequently affect the endurance of competition in its market.

Tye described this philosophy as follows:

"The permissive model of antitrust enforcement (often ascribed to the Chicago school) promises to provide determinate results to difficult antitrust questions by choosing efficiency goals over equity goals, perfect markets over imperfect markets and (in more cases than not) private contractual solutions over enforcement of antitrust laws by public authorities. Specifically with regard to vertical restraints (resale price maintenance, exclusive territories, mergers, etc.), the permissive model faults antitrust prohibitions of such activities. The logic is that firms with monopoly power at one stage of a vertical market relationship can exploit whatever market power they have through high prices. If such firms engage in vertical restraints of competition, these restraints can only be explained as motivated to achieve efficiency gains, according to the theory. If one accepts the notion that economic efficiency is the chief objective of antitrust policy, the result is a permissive view toward vertical restraints."  

In the United States where enthusiasm for the permissive (or the Chicago School) influence on antitrust theory has been particularly noticeable, its future has been under question. The term 'counterrevolution' has been used to describe the change.
Some, including Rule and Meyers, regard this as "unfortunate". Some interesting questions have arisen in light of the American experience. For example, Liesner and Glynn asked; "...does economic theory provide good grounds for supporting that a positive non-neutral stance on the part of the state is desirable...".

As states grow economically closer, whether it is through the process of commercial globalisation or through the creation or joining established regional entities such as the EC, the debate about competition law extends beyond the boundaries of individual states. This increasingly international debate is evident as world trade organisations begin forming to govern global trade in services such as telecommunications. It also is evident in Eastern European states who prepare to join the EC.

Waller suggested that "[t]he broader principles embodied in EC competition law appear very attractive to the rest of the world, potentially even more so than the pure competition approach of the Sherman Act". The possible deterioration of the state as one traditionally seen as being capable of functioning in isolation, and the ability of the state (or federation of states) to regulate competition-interests beyond its borders, are called into question. EC law may be more appealing because it allows to some degree, provided the integration of the markets of the member states is not obstructed, differing systems of competition rules to operate. Whish stated:

"[C]ompetition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking. .... Furthermore different systems of competition law reflect different concerns".  

EC competition law (or the United States or any other country with international economic interests or relations) also "does not exist in a vacuum". Goyder also
claimed, it was "separate from all the pressures of international trade, but on the contrary is substantially affected and influenced by them". With the establishment of greater global economic interdependence and the important supporting role which telecommunications has in the globalisation process, the effectiveness of competition law may be called into question.

One problem or perhaps criticism (as demonstrated later) of antitrust law is its weakness in predictability. The EC adjudication of competition law has been subject to such criticism in recent years. The concerns arise from the new issues raised by globalisation, in particular for the purposes of this study in the telecommunications industry, may involve shared concerns about competition legal thinking for both the EC and the United States. Furthermore the philosophy behind competition law shared generally, should perhaps be due for reappraisal. However, Hawk stated:

"[T]he revolution in US anti-trust law in the last ten years brought about by changes in accepted economic thinking ... has magnified the differences between EEC and US antitrust."

Through the process of globalisation and the creation of international trade organisations, will these two entities (in the long term) grow closer in legal philosophies concerning competition? Consider again the thoughts (cited earlier) from Waller. The influence of both the Sherman Act and EC competition law could be important in the shaping of a global competition law; or rather the harmonisation of competition law among states. There are important implications for future competition laws, and both the American and the European Community approaches have something different to offer. This is becoming the case with regard to telecommunications as it establishes a more global nature to its industrial infrastructure. The debate could centre around relative influence of the permissive (Chicago) approach and the interventionist (EC or Harvard) approach to
Without dismissing the contributory role economics has in competition law, relying on economic models as legal solutions may be misleading. The point is illustrated by attempts to apply such a philosophy to a strategy for governing the entire telecommunications industry.

3.4 Economics and its Influence on Competition Law: An Alchemy of Legal Science

Two terms associated with neo-classicism are 'consumer-welfare' and 'efficiency'. Bork determined the existence of two types of efficiency; 'allocative' and 'productive'. Bork wrote in his book The Antitrust Paradox:

"Allocative efficiency ... refers to the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their output most. Productive efficiency refers to the effective use of resources by a particular firm. The idea of effective use, ... encompasses much more than mere technical or plant-led efficiency." 77

Another leading 'Chicago' advocate, Posner, defined 'efficiency' as a "technical term", meaning; "exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and resources is maximised." He further explained, "When resources are being used where their value is greatest, we may say that they are being employed efficiently." 78

The 'Chicago School' in its endorsement of economic analysis essentially regards economic efficiency, according to Landes, as "the only value that counts in antitrust analysis". 79 This philosophy does not favour reactions against large firms simply because their size could be a potential threat to smaller firms. Economic efficiency it
has been suggested, provides a clear and predictable method for both the judiciary and the business world. This thinking relies on the 'natural laws of economics' to determine the strong from the weak and therefore prevent resources from being wasted. The endorsement of this school of thought by authorities may, if one needs a point in time, have been in 1981 when the Attorney General William Smith announced that the policy of the Department of Justice would continue to be the 'promotion of competition'. But he cautioned that big in business does not necessarily mean bad and emphasised 'efficient firms should not be hobbled under the guise of antitrust enforcement.' Later, the Assistant Attorney General William Baxter stated "the 'sole goal of antitrust is economic efficiency'". Baxter's successor claimed that currently "the sole basis of antitrust enforcement' should be based 'on economic efficiency notions". The appeal of economics is the provision of perceived clarity and certainty to such circumstances. It is seductive because it provides all the solutions, and is very attractive when an industry such as telecommunications is undergoing drastic change and its future shape is uncertain. In regards to the ordinary application of competition rules, some observers (such as Korah) have argued that the European Court of Justice and indeed the Commission should in fact be more open to the use of economics. Korah wrote:

"With a few notable exceptions, the Commission's practice is to recite many primary facts in its formal decisions, and then to give its legal appraisal. Unfortunately, the analysis in the latter is seldom connected to specific facts. This gives the Commission a very wide discretion in reaching its conclusions, and makes them unpredictable." The "assertions of principle" has been a greater basis for decision-making than economic analysis. A few people including Whish, have suggested the possibility
of some growing influence of 'Chicago School' (or neo-classical) thinking within the European Commission. This may particularly be the case with some of the younger members of the Commission. The basis for this influence is on the belief that through government intervention the system has been too restrictive. Consequently the use of economic analysis brings to the decision-makers a method by which problems may be resolved. As Korah wrote:

"By not spelling out the economic and legal arguments more precisely, the Commission loses a wonderful chance to educate not only businesses and its advisers, but also its own officials, national courts and the Community Court."  

This argument leads to other concerns such as the need for more openness in the Commission.

Questions then may be raised about what kind of an active model would be suitable. How precise is the model to be followed? Perhaps the English system has a useful method. The Monopolies and Mergers Commission according to Korah;

"...spells out why particular practice are pro- or anti-competitive or otherwise in or against the public interest. It does not always write as tightly as would an economist, but it does usually provide reasons to connect particular facts to particular conclusions."

Again, the notion of 'greater openness' arises as a beneficial aid.

The view of Korah brings to light what some writers think should ideally exist, and what seems to make the 'Chicago School' so appealing. This ideal is simply a want for predictability and a method that provides all the answers. In Liesner and Glynn's description of the Chicago School philosophy some of its appealing nature may be found. They wrote:

"This school of thought uses an approach to economic analysis similar to that
of the natural sciences in that the hypothesis succeed or fail on the basis of empirical performance. An atomistic approach is adopted to consumers and firms (who maximise utility and profits respectively) and the relevant analytical arena within which results are obtained and policy implications derived is that of 'equilibrium', a configuration at which the system has no inherent tendency to move without the impetus of an externally created disturbance." 89

The ideals can be further seen in the description of the 'Chicago School' (or 'neo-classicism') philosophy defined by Muller. The Chicago School, he wrote, "...is a classical system of theoretical 'predictions' that eliminates the need for proof in the particular case: The model tells the judge what forms the behaviour will be profit-maximising (and thus 'rational') for all firms in any set of circumstances and that, in turn, tells him what practices are in 'fact' being used in the case before him..." 90

Note from the quotations the term 'predictions', and the comparison to 'natural science'. These, among other things, are cause for concern. They have begun to be addressed in the aftermath to the 'Chicago' years.

Recent opinion has moved away from the constraints of 'Chicago School' theory. However, one which parallels it in an organised and structured manner has not emerged. 91 Instead the latest thinking has allowed for more independent thought. 92

Criticism of the theory may be defined into two general categories; questioning the conclusions, and questioning its claim to being scientific.

The questioning of economics and its dominating influence - Chicago style - is important for three reasons. The first and most important is the question of economics providing 'real' solutions, as opposed to theoretical ones disguised as 'real' answers. 93 The second question is affected by the first. This is about oligopolies and
how economics permits the existence of such a situation in a system based on perfect
competition in the marketplace. Thirdly, one may question the exclusion of other
sources of influence.\textsuperscript{94} The third question appears to be dependent on the issues
arising out of the first question.

One might argue; either economics is used as the primary if not the sole influence on
antitrust and competition decisions or not at all. Can selections of economic
principles and models be taken and applied at will, while excluding other elements?
This is not likely because the model would be distorted. The distortions may have
undesirable consequences because all of the criteria needed to produce the model are
not employed. One should however, be concerned about having faith in the
domination of economics as the principle source from which decisions are made in
competition law. An even greater concern is the promotion of economics as a
science - a natural science.\textsuperscript{95} A danger of holding this belief is the risk of being led
away from the 'real' problems due to the perception that the answers are best left to
nature. This is the case with competition.

3.5 Economics: A Natural Science versus Ideology

A principal question that emerges from promoting the use of economics as the main
influence in competition law, asks if economics is 'to predict' or 'to explain'
events?\textsuperscript{96} The question attacks the application of economics.

The difference between the 'to predict' and 'to explain' focuses on time; the future
or the past. 'Explaining' often answers 'why - questions' or how a phenomenon
occurs or occurred. 'Predicting' is less a provision of an answer than anticipating
optimism or apocalyptic results to an action. In a quite simplistic way 'predicting'
may be called 'speculating' as in the example of the stockmarket.\textsuperscript{97} These terms
affect the understanding and use of analysis.
The words 'science' and 'scientific results' have been applied to economics and in economic analysis by supporters of the 'Chicago School'. Again, the appeal of these perceptions is the impression of achieving 'predictability'. As in natural science, each event can be anticipated with certainty. This then provides for a structured system. The belief in applying natural law to economics and thus to law is founded in part on the Spencer-Darwinian notion of survival of the species and evolution. These ideas has been extended to the marketplace. Therefore, the laws of nature are the best means to govern the natural system of competition. Antitrust intervention in the 'Chicago School' belief may only be appropriate in extreme instances.

This philosophical model is therefore deemed to be 'scientific' under the nineteenth century meaning of the term, which Flynn explains is, "a science producing unyielding and eternal truths and fixed assumptions for measuring reality". Economists or those seeking to use economics for their own purposes are not the only ones to have erred, but other social sciences have succumbed to this illusion. All, according to Flynn, seek to establish "fixed rules capable of mechanical and repetitious application divorced from the deeper moral values that ... reflects ... the evolution in reality and our understanding of it".

It is the 'scientific' element which has been both popularly influential and a reason why significant areas of competition policy (e.g. mergers) have in many instances failed. Its failure is in the self-denial or misleading belief in the laws of nature governing a perfectly competitive marketplace. Schumpeter wrote:

"[E]conomic laws' are much less stable than are the 'laws' of any physical science, that they work out differently in different institutional conditions, and that neglect of this fact has been responsible for many an
The question which then may be asked is; is the use of 'law' either confusing or distorted? Magee suggests it is a word which is ambiguous. Laws of societies state or "prescribe" what the citizens of the societies are permitted - or forbidden - to do. These laws may be breached. In contrast, laws of nature "are not prescriptive but descriptive. It tells us what happens", and may be proved to be false. It can not however, be breached. The difference is whether or not the statement is a command. Magee further explained the ambiguity.

"The pre-scientific belief that it was (by some god) is the reason for the unfortunate ambiguity: the laws of nature were thought to be commands of the gods. But nowadays no one would dispute that they are not prescriptions of any kind, to be 'kept' or 'obeyed' or 'broken', but explanatory statements of a general character which purports to be factual and must therefore be modified or abandoned if found to be inaccurate."

A problem is when 'natural laws' are made or at least attempted to be converted into social laws or commands. There can also be the problem of introducing commands to distort the laws of nature. A greater problem is the belief that something is a natural law with at least some primitive interpretation of it being the equivalent to a command from the gods; then believing efforts to correct any 'injustice' of the natural law is harmful.

"The search for natural laws has been seen as the central task of science, at least since Newton." This search is not confined to what are traditionally classified as 'the sciences'. The search for natural laws is equally active in the 'social sciences'. Popper wrote:

"Scientific interest in social and political questions is hardly less old than
scientific interest in cosmology and physics: and there were periods in antiquity ...... when the science of society might have seemed to have advanced further than the science of nature ..... But the social sciences have not yet seemed to have found their Galileo." 108

The value given to the term 'science', as earlier described by Flynn, is a problem in its application. The glorification of science as being eternal truth causes difficulties when doubts about the validity of a scientific law are raised, or the 'law' is proven incorrect. The problem with science being questioned is not the pursuit of 'truths', but the promoters and worshipers of the revelations. Magee wrote:

"The popular notion that the sciences are bodies of established fact is entirely mistaken. Nothing in science is permanently established, nothing unalterable, and indeed science is quite clearly changing all the time, and not through the acceleration of new certainties." 109

The problem is not necessarily with science itself, but the purpose and expectations given to it and those in pursuit of the answers. Secondly, but in conjunction with the problem of expectations and value is the problem of confusing non-science with science; often with the purpose to achieve the afore reference to validity and eternal truth. With this in mind, the words of Popper are worth remembering. In his book The Logic of Scientific Discovery, he wrote:

"The wrong view of science betrays itself in the craving to be right." 110

Soros provides an interesting perception of social sciences, a category in which both economics and law are placed. Social science is more an alchemy than a science he claims, and hence the name is a misnomer. 111 Soros wrote:

"Social scientists are just as interested in the pursuit of truth as natural scientists, but they have an opportunity to conjure that is largely denied to
the natural scientists. The best way to guard against abuse is recognising the possibility."  

Social Science may be described as an alchemy because theories may be altered in order to form a 'truth'. The actual problem may rest in some form of vanity. "Science", according to Soros, "has a great reputation and it is therefore appealing to say you are doing science." The term has a sense of authority and natural order to it. Therefore applying it gives respectable legitimacy to the subject or theory. 

There is an appealing similarity between science and law which may create some illusions of supreme, authoritative perfection. Wise finds there are three perspectives through which law and science may be linked: "technical, evaluative, and rhetorical."  

"Both law and science present a technical or 'engineering' aspect that analyses and seeks to control events and behaviours and solve practical problems." Antitrust law was originally intended to understand and control the behaviour of large businesses. Science on the other hand has sought to discover explanations to be used for predictions, in this case, economic behaviour. The mixture of the two is therefore appealing through their purpose of overall control and reasoning. Science fills a void in antitrust law or doubt as to its supremacy by providing answers above and beyond those determined by social-political will. 

Having stated Popper's claim above that the social sciences have not found their Galileo, it is important to note he did believe economics was an exception. Physics, Popper claimed has been successful beyond all other sciences. Even efforts by the social sciences to copy the methods of physics have been disappointing, with the exception of economics. One would expect therefore, that economics can claim to be as pure a science as can be. The imitation of neo-classical economics' application
to antitrust law has produced, claims Wise, "...an antitrust law that is coexistence with neo-classical price theory." Should this not vindicate the Chicago School and all others believing in the science of economics. To explain the fault or at least disagreement with this position and even with the views held by Popper, the focal point of economic theory requires further emphasis.

Classical economic theory which is often attributed to Adam Smith's The Wealth of Nations, assumes the function of the marketplace is based on perfect information. Consumers and other market-players have perfect knowledge about the market and are therefore able to make rational choices.

"Economics", wrote Posner, "is the science of human choice in a world in which resources are limited in relation to human wants. It explores and tests the implications of the assumptions that man is a rational maximiser of his ends in life, his satisfaction - what we shall call his 'self-interest'." 'Self-interest' and the 'rational human being' according to theory efficiently control the use of resources and the distribution of wealth.

This leads to three economic concepts. These claim Posner include; "the inverse relation between price charged and quality demanded"; secondly "the economist's definition of cost, 'the price that the resources consumed in making (and selling) the seller's product would command in their next best use - the alternative price'." "The third basic concept", states Posner, "...is also derived from reflection on how self-interested people react to changes in their surroundings." He adds there "is the tendency of resources to gravitate toward their highest value uses if exchange is permitted." The value is measured by the consumer's willingness to pay and according to Posner, "[w]hen resources are being used where their value is greatest ... they are being employed efficiently." In a sense, claim others, competition
places "each productive resource in the precise position where it can make the
greatest possible addition to the total social dividend".\textsuperscript{125}

In theory, this may be appealing for the management of resources, the distribution of
wealth, and efficiency or the protection against wasting resources. The problem lies
in the lack of such a mechanical process and the actual uncertainty created by the
thinking participants. At the very least 'the rational human being' means 'the thinking
human being'. There is a problem with the implied assumption that the thinking
participant is 'reasonable' in their thinking. While there is doubt about the plausibility
that perfect information is available to all and is held by all concerned, there may also
be doubt about the aspect of 'self-interest'.

With regard to the participant, Soros wrote:

"The participants' perceptions influence the market in which they participate,
but the market action also influences the participants' perception. They can
not obtain perfect knowledge of the market because their thinking is always
affecting the market and the market is affecting their thinking. This makes
analysis of the market behaviour much harder than it would be if the
assumptions of perfect knowledge were valid." \textsuperscript{126}

The involvement of thinking participants claims Soros, distorts the laws of neo-
classical economics. This can be seen in his claim:

"[T]he events studied by the social sciences have thinking participants" while
"natural phenomena do not. The participants' thinking creates problems that
have no counterpart in natural science." \textsuperscript{127}

Soros believed quantum physics was the closest analogy in which scientific
observation gives rise to the 'uncertainty principle'. However, in social events the
human participants' thinking is responsible and cause for the element of uncertainty, rather than the outside observer. 128 Unlike the perfect world of natural science where events are mechanical in their progress, market-economics fails to fulfil such a definition as a natural law because of the significant element of uncertainty. This makes the assumption of perfect knowledge an ideal. This ideal is an important component in this alchemy of economics. Instead the marketplace and the rest of the world involving thinking participants is inherently imperfect. 129

Soros stated:

"The situations we need to understand in order to reach our decisions are naturally affected by these decisions. There is an innate divergence between the expectations of the people taking part in events and the actual outcome of these events. Sometimes this divergence is so small that it can be disregarded but at other times it is so large that it becomes an important factor in determining the course of events." 130

This idea was further explained by Soros. He observed a quite interesting issue which appears to be a paradox of 'reality'. Soros stated:

"On the one hand, reality is reflected in people's thinking - this is the cognitive function. On the other hand, people make decisions that affect reality and these decisions are based not on reality, but on people's interpretation of reality ... the participating function. The two functions work in opposite directions and in certain circumstances they can interfere with each other." 131

In other words, this cognitive function disrupts the basis of classical economic theory, which is the belief in positions of equilibrium. "Equilibrium is the product of an axiomatic system", according to Soros and "the crowning achievement of the axiomatic approach is the theory of perfect competition". 132 The importance of this
'scientific' event is the allowance of the assumption of the 'rational human being'. This is to strengthen the weakness of the 'cognitive function' or to replace it altogether. This rational behaviour assumed the 'self-interest' view of Adam Smith whereby consumers will choose the best alternatives available. This rational behaviour argument is, importantly, supported by the added quality of 'perfect information'. Producers are recognised as rational maximisers of profit and consumers as rational maximisers of utility.

The agenda of each rational participant may clash. This does not create an equilibrium, but instead returns the argument back to a divergence between expectations of the market participants. It is not only the consumer, but the seller who is affected by this theory. The seller seeks profit maximisation, but is controlled by the industry as a whole. In perfect competition, stated Sloman, "...[e]ach firm is so small relative to the whole of the industry that it has no power to influence price. It is a price taker". This would suggest that the market is cyclical in form.

There is the cycle involving consumer and the seller in relation to price. Similarly price is controlled in the relation between competitive sellers. Yet is it not rational to assume that the influential 'self-interest' of a seller is to break the cycle and seek to turn market events to the seller's own advantage. Neo-classical economic theory would suggest this would not be possible.

Whish demonstrated the problem of the rational participant and sole objective of the seller was to maximise profits. He suggested:

"Directors of a company may not think that earning vast profits for the shareholders is the most important consideration they face: they may be more interested to see the size of their business empire grow or to indulge themselves in the quiet life that monopolists may enjoy, although the threat of"
take-overs may mean that a quiet life is a less realistic option than might be imagined." \(^{136}\)

Obtaining market power and domination is denied by the neo-classical theory. \(^{137}\) Acknowledgement at a moderate level in the theory only quickly dismisses power as short term. \(^{138}\) Nevertheless, the agenda for power does not fit neatly into the model, it is a plausible 'self-interest' and requires recognition. Furthermore, Whish explained a fundamental constraint of the absolute application to the marketplace in the neo-classical argument.

"[T]here is the difficulty with the theory of perfect competition that is based on a static model of economic behaviour which may fail to account for the dynamic nature of markets and the way in which they operate over a period of time." \(^{139}\)

The model does not allow for firms to hold agendas other than profit-maximisation nor behavioural patterns within and varying between industries.

Rather than achieving a status of reality, the theory is more of an ideal world. Reality is instead a world in which rational behaviour is questionable and the information available is imperfect. The fallacy is in believing that the 'ought' exists as the 'is'. Problems arise when the alleged 'scientists' alter their models sufficiently, for example in antitrust, to conform to a defined supposition of what 'is'. Flynn stated:

"Scientific models - are like all broad aesthetic statements, premised upon assumptions; moral or ought assumptions that define what will and what will not be permitted to be 'reality' for the purposes of analysis and what will and will not be permitted to be the values given weight in the analysis. An empirical investigation unaware of its own assumptions and values is neither empirical nor an investigation." \(^{140}\)
Schumpeter also observed a quite important problem which scientists and philosophers constantly face. He wrote:

"[W]henever we attempt to interpret human attitudes, especially attitudes of people far removed from us in time or culture, we risk misunderstanding them not only if we crudely substitute our own attitudes from theirs, but also if we do our best to penetrate into the working of their minds. All this is made much worse than it would be otherwise by the fact that the analysing observer himself is the product of a given social environment - and of his particular location in this environment - that condition him to see certain things rather than others, and to see them in a certain light." 141

Others including Flynn, have made similar observations supported through the use of Plato's famous Cave analogy.142 Schumpeter concludes that within economic analysis the problem of ideological bias is raised.143 Flynn stated an important observation and recognition of the dangers of scientific claims. He wrote:

"It is an exercise in confirming one's fixed and unchallengable ideological beliefs."144

A professor of economics at the London Business School John Kay raised the question about the accuracy of economics. He wrote:

"It is a conventional joke that economic forecasters always disagree, and that there are as many different opinions about the future of the economy as there are economists." 145

However, Kay's own opinion did not agree with this conventional wisdom. Instead, he stated the truth about economic forecasters was the opposite. Most forecasters proclaim the same predictions.146 Another study of economists and their tendency to agree has a similar conclusion, yet with an important difference. Round and Siegfried
"[S]ome economists do appear to be more agreeable than others, and that the most agreeable are those who have earned the distinction of being regarded as experts ..." 147

The important admission though, is the agreement within groups and not necessarily between groups of economists. 148 Kay seemingly separated economists through their forecasting and the actual result. "The difference between forecasts are trivial", Kay wrote, "relative to the differences between all forecasts and what happens." 149 He also found that the economic forecasts are almost always wrong. 150 As to why this seems to be the case depends, like anything else, on the examiner's interpretation and materials such as information available. More importantly though, questioning the reliability of economic forecasting further questions the 'law' of economics. That is to say, economics as a natural law is called into question. Furthermore, in Kay's words:

"The degree of agreement among forecasters is outstanding. It is just the economy is different." 151

If economics is a law of nature and a science of such high reverence, why then can the applicants fail to be considerably more accurate in their forecasts? While Kay sought to find an answer, it leaves those who are told to rely on economics as the means to determine legal judgements or to leave events, issues or problems to be resolved by 'predictable' outcomes of natural economic laws, with uncertainty. The poor performance in predicting the future of the economy is a practical example of Popper's theory that the future can not be known. It is not a surprise that forecasters or other economists who use the same models such as the Chicago School, will find the same answer. 152

"Economic forecasters know very little about why they are forecasting, so there are worse rules of thumb than expecting that the future will be like the
The difficulty in forecasting is quite important. This is due to the structural changes in the economy. According to Kay, the failure appears to be in the approach of identifying the changes. Popper generally argues it is impossible to make such an identification. The result insofar as forecasting economics in relation to competition law, is that 'predictions' replace proof. Economic models and their predictions have become proof or 'fact'. This has been the relatively recent experience in the United States. The risk which follows may be stated as Flynn did with specific reference to the Chicago School philosophy.

"Neo-classical analysis of the reality confronted by antitrust disputes misstates the idea of good to be pursued (the normative purposes of the law) and wanders about in a cave of seeing shadows generated by the false sun (normative assumptions) of its own creation."  

A misunderstanding of economics leads not necessarily to 'truth' or accurate judicial decisions, but risks harmful results in the long term. Instead economics is at risk, if it has not already achieved such a faithful following of disciples, of being akin to astrology and promoted by quack doctors. Either a misunderstanding or misuse of economics can only further its parallel to unscientific methods and astrological - typé prediction. The greater reliance on economics risks leading to legal - idealism; something a model such as the Chicago School attempts to overcome. As Turner wrote:

"Ideal rules are those that are both clearly predictable in their application, and economically rational, in that they render unlawful conduct that is anti-competitive, but not conduct that is economically beneficial."  

Once again this is the appeal of economic models like that of the Chicago School.
Models must be kept in perspective.

"Economic models are created by devising links between the main economic variables ... to predict how they will change." 159

However, the reality of economic models is that they are "...biased towards expecting the future to be like the past, and will often fail to identify the most important changes in economic behaviour." 160

It should be emphasised that economics is not being dismissed. Economics is not being dismissed as fraudulent or even denied as a resource or benefit to legal theory and judicial decision-formation. Perhaps Popper was correct when he claimed economics is the most successful of the social sciences in coming close to achieving a method in scientific explanation like physics. 161 It is its use or abuse that is of concern. Furthermore and again, Soros observed that Popper appears to have overlooked the human involvement in economics. This reduces the level of certainty. Soros went further to develop what he called his Theory of Reflexivity. One critic claimed this was simply 'speculation'. 162 Although elementary in definition, in essence this is all that is achievable. Expectations of economics and its application to such things as law in any extreme form may threaten the credibility of the subject. Instead, it is a beneficial guide in providing rational and logical explanations. Nevertheless economic like any science, is not infallible. As Magee explained:

"The popular notion that the sciences are bodies of established fact is entirely mistaken. Nothing in science is permanently established, nothing unalterable, and indeed science is quite clearly changing, all the time, and not through the accretions of new certainties." 163

The appeal of science and the appeal to regard areas of studies such as economics as science may be found in the glorification of the search for eternal truths as earlier stated. Truths therefore may be regarded as providing certainty and stability, and
with it knowledge. Yet any understanding of knowledge as a certain and stable position is a mistake and misrepresentation. Magee wrote:

"[W]hat we call our knowledge is of its nature provisional, and permanently so. At no stage are we able to prove that what we 'know' is true, and it is always possible that it will turn out to be false .... So it is a profound mistake to try what scientists and philosophers have almost always tried to do, namely prove the truths of a theory, or justify our belief in a theory, since this is to attempt the logically impossible. What we can do, however, and this is the highest possible importance, is to justify our preference for our theory over another." 164

The problem is less to do with science or any of the so-called social sciences and the theories under those titles, but with their interpretation and social-expectations.

"That the whole of science, of all things, should rest on foundations whose validity it is impossible to demonstrate has been found uniquely embarrassing. It has turned many empirical philosophers into sceptics, or irrationalitists, or mystic. Some it has led to religion." 165

The issue is to separate the 'religion' from the 'science', and the science from the non-scientific theories (i.e. faith and observation). Furthermore, it is socially responsible to recognise that non-scientific ideas are not necessarily useless, bad or lacking in beneficial substance. 166 One must recognise the risk and misapplication of declaring a statement a universal, scientific or natural law. Frequently they prove to be unsustainable because of verification problems. 167 Yet they are commonly used in this way and as with theories claiming to be scientific, the sole purpose is to declare a 'truth'. Too often claims of universal law are confused with 'trends'. Popper wrote:

"[T]rends exist, or more precisely, the assumptions of trends is often a useful statistical device. But trends are not laws. A statement asserting the existence
of a trend is existential, not universal. ... And a statement asserting the existence of a trend at a certain time and place would be a singular historical statement, not a universal law. The practical significance of this logical situation is considerable: while we may base scientific predictions on laws, we cannot (as every cautious statistician knows) base them merely on the existence of trends. A trend (we may ... take population growth as an example) which has persisted for hundreds or even thousands of years may change within a decade, or even more rapidly than that." 168

Popper further emphasises a significant opinion to remember.

"It is important to point out that laws and trends are radically different things. There is little doubt that the habit of confusing trends with laws, together with intuitive observations of trends (such as technical progress), inspired the central doctrines of evolutionism and historicism - the doctrines of the inexorable laws of biological evolution and the irreversible laws of motion of society." 169

This is of direct relevance to the business world that has adopted the Spencer-Darwinian interpretation of evolution. The context of competition and the survival of the fittest has been applied to both the human-players in business and to businesses themselves. The adaptation of these ideas and others such as speed, track, course, or direction of social movement 170 (e.g. industrial development) is harmless as long as they are simply, as Popper wrote, "intuitive impression; but if used with anything like scientific pretension, they simply become scientific jargon, or to be more precise, holistic jargon." 171 When applied, in this case to the commercial world, as universal or natural laws (i.e. 'truths'), the confusion which has been discussed is created.

In the instance of economics and competition law, applications of an artificial model
such as the neo-classical (Chicago) theory to produce 'truths' may mislead or distort what may be termed as "...the general responsibility of the courts".\textsuperscript{172} At the same time, it is misleading to regard the laws of states as 'eternal truths'. One hardly needs reminding that laws are created and passed by governments; - people (political players) with their own ideologies; not from a divine science. The pursuit of knowledge and 'truths' is not necessarily a problem. Magee stated:

"Popper's notion of 'the truth' is very much like this: our concern in the pursuit of knowledge is to get closer and closer to the truths, and we may even know that we have made an advance, but we can never know if we have reached our goal." \textsuperscript{173}

To Popper it is the method that is a problem. In this instance, the glorification of ideas and their interpretation as 'universal truths' which are more ideologically presented is the problem. In recognising the deception two things may be accomplished. The first is in receiving ideas, discovering their relationships with past events and seeking to correct perceived flaws in the argument. The second is using the new understandings in an effort to avoid previous errors, but also recognising and accepting the fallibility of ideas and their implementation. This then allows for easier flexibility or acceptance in correcting new legal problems which arise. Judicial decisions are then more adaptable to the needs of society of the time. The problem under present social acceptability, is the elimination of the certainties and the predictions of actions such as court results which artificial modelling allows for.

As unfashionable as it may seem, the course this appears to take the analysis back to the origins of competition law. The chapter began with a synopsis of the origins of competition law. Of the United States' antitrust history, Flynn wrote:

"No one can read the legislative history of the Clayton Act, for example, and reach the conclusion that the purpose of that statute was solely to control
mergers, jeopardising economic 'efficiency' as that technical concept is defined by neo-classical theorising. The Supreme Court's reading of the legislative history of the statute in Brown Shoe Co. v United States and its finding that the Act was designed to stop economic concentration in its incipiency for a variety of economic, political and social reasons is an accurate one." 174

Although efforts have been made in changing the judicial interpretation of antitrust cases,175 social and political objectives as well as economic ones need to be administered. That is to say, while economics provides greater creditable analysis (or a means) than a simple instinct, it does not exist in isolation. Baker stated:

"Markets rarely exist in a political vacuum. Indeed, the more important a market is seen as being, the more likely that it will be subject to special political intervention." 176

Recent political trends especially in the United States and United Kingdom (but not necessarily exclusively), have been towards the political 'right'; towards values of greater individual independence and less government intervention. Given the history and values of the United States, it should not be surprising that any effort to eliminate government intervention is regarded as a positive one. This ideology continues and its application to telecommunications has been called for by some observers of the industry. An example of this philosophy and its relation to telecommunications is found in the words of Gasman.

"All public policy should aim at two primary goals: to maximise economic efficiency, and to leave individuals as free as possible to do as they wish as long as they do not impose undue costs on others .... The second goal is seldom given much thought, possibly because there are wide (and widening) philosophical differences about what constitutes freedom and what individual
rights are and are not. Communication policy probably seems only marginally relevant to the questions about individual freedom..." 177

In Gasman's opinion:

"Current telecommunications policy falls dangerously short when measured against the goal of either economic efficiency or individual freedom."178 Although American telecommunications legislation has changed since Gasman wrote this statement, it is nevertheless an important reflection of an ideology applied to a specific industry.

These thoughts seem to follow suit with the neo-classical view. With this political-economic philosophy and the pursuit of liberty in American history, it should therefore not be surprising that under the guise of science, the logical economic analysis of antitrust intervention (or even the argument for a reduction of antitrust legislation) has been accepted. Freedom of the marketplace, regulated only by the free choice of the individual consumer is especially compatible with American ideology. It is interesting to note, large industry was regarded to be a threat to such liberties and therefore government intervention was deemed necessary and acceptable. Such is the paradox which has been experienced during the past century of competition laws. According to the logic of Chicago School theory, big business is not necessarily bad.179

Possibly after having either experienced or observed the extreme ideologies' influence on developing antitrust theory, as in the United States, a new learning and a new balance may be developed. Questions must first be asked in order to achieve a positive new balance, rather than simply reacting to fashions of ideologies. If Popper's premise that it is not possible to know the future, least of all accept the future will be much like the past, the question which requires addressing asks; how
does one predict the future and influence control over it as best as one can? One answer may lie in questioning the methodology used to predict. It is not economics which is the primary problem; nor is applying economics to competition law the issue.

The problem lies in how it is used. It has been said that economic theory is now quite sophisticated beyond the use and understanding of the layperson. However the economics on which competition theory has been based is more basic. The theorists at the time had not envisaged other complications that distort the theory. The distortion of perfect competition raises the question, why should it be relied on beyond a simple guide? An additional problem lies with the false expectations assigned to the legal system, as well as ignoring the non-linear approach affecting aspects of law. In other words, law reflects the values of contemporary society. In doing so, it may also (or even should) consider where problems existed in the past in either achieving those values or if they were to be achieved. A further question may be asked. Is one model, for example the neo-classical economic model, realistically acceptable to cover all aspects of commercial society? Or is one model more suitable at one level of the economy and another model for another level? The liberalisation of telecommunications to the marketplace - philosophy may not only benefit from such consideration, but it also presents some contradictions to the pure free-market approach.

3.6 Competition Legal Theory Applied to Telecommunications

The rules of competition law "...should be construed in the light of the objectives..." of the EC. One objective is to prevent the distortion of competition while another is to promote national market integration and the prevention of private barriers or interference with the goal of a borderless market. However, there are industries that, by their historic political nature, have not been entirely receptive to these
fundamental objectives. Telecommunications has been one such example. The focal point of the problem may be described in the following manner.

"The close association of competition law with issues of national power and competitiveness creates tensions in shared values of competition and economic interdependence." \(^{183}\)

Remaining strictly within the context of the EC objectives, some states have been reluctant to surrender their control over telecommunications within their territory. Yet there is a wider necessity that this is done, otherwise the true meaning of a common market is not only distorted but essentially fails due to the nature of modern economics. In the Green Paper concerning Telecommunication Services and Equipment, it was stated:

"The strengthening of European Telecommunications is one of the major requirements for improving the competitiveness of the European Economy, strengthening Community cohesion and achieving the completion of the Community-wide market for goods and services..." \(^{184}\)

The philosophy of the EC is thus summarised and tied to a degree to a successful and organised telecommunications sector.

Secondly, there is little reason for such national control to exist. In removing the obsolete government control over the industry from consideration, there are two means of anticipating the future of the industry. In turn, the law may be appropriately applied. These means are the \textit{Idealist} model and the \textit{Strategic} model.\(^{185}\)

\textbf{3.6.1 The Idealist versus Strategic Model}

The \textit{Idealist} and \textit{Strategic} terms are useful for labelling two perceptions about how competitive the telecommunications market will be, and the best means of regulating competition.
The Idealist model is the opinion or philosophy supporting the existence of "...a mature and fully articulate competitive market." This is the classical (and later neo-classical) economic market envisaged by Adam Smith and others. It is or as close to being, the perfect competitive situation with a large number of sellers each offering identical products. The buyers have perfect or sufficiently perfect knowledge allowing them to make rational and informed decisions and thus ruling the marketplace through their purchasing power. This model also envisages the lack of barriers to entry or exit. The forces of market competition through the buyer's power and the necessity for continuous innovation prevents the domination by any seller. Applying this to the telecommunications industry, it translates to mean the liberalisation of the industry and complete deregulation will ensure through such a competitive-based market that any "...monopolisation control of the telecommunications infrastructure and services...." will be eroded.

The Draft Interconnection Directive intended to further the Telecommunications Service Directive (90/388/EEC) refers to "...an environment of open and competitive markets". It is in short, a common goal for telecommunications shared apparently not only by the EC and the United States, but among many states around the globe. This is demonstrated by simply observing the number of states liberalising their telecommunications markets towards such a general goal. Some examples are China, Malaysia, the Philippines, Mexico and Eastern European countries including Hungary. The goal of January 1, 1998 is set for all EC states with a few exceptions like Spain, for liberalisation to be completed. This goal of an environment of open and competitive markets has been criticised as not being clearly expressed. It is widely recognised that one does not exist even in the more liberalised states such as the United Kingdom and the United States. However, it is questionable as to how detailed an expression of this goal needs to be defined.
The interpretation of how open and competitive markets are, can be, or should be, is subject to continuous debate. Although in competition law theorists (e.g. from the two principal schools of differing thought) might begin with the same or similar position (e.g. recognising the efficiency of competition, anti-competitive effects and misallocation of resources of monopolies), their approach to analysis and therefore conclusions can be different.

Returning to the antitrust debate in the United States for guidance, the difference between the Chicago School and the Post-Chicago School is in the analytical approach to preserving and/or promoting an open and competitive environment. In the Chicago School as explained by Sullivan; "...analysts who focus on antitrust tend both to start and stop with deductive analysis based on a sequence of truisms expressed through highly abstract models of reality."

In contrast, the Post-Chicago philosophy according to Sullivan; "...digs into empirical material in an effort to fathom the significance of observed distinctions between the classical models and the configuration of the particular market under examination." There is the potential for being less of an Idealist model per se than the Chicago School. In applying the Idealist model to the telecommunications industry, Mansell wrote:

"In this model the diffusion of an advanced telecommunications infrastructure and the entry of new service providers means that no single supplier can dominate the market sufficiently to foreclosure entry or to discriminate unjustifiably among customers. Telecommunications supply is treated like any other competitive commercial activity."

This type of non-intervention economic policy supports that economic efficiency will be maximised and individuals will be left "...as free as possible to do as they
wish...". It will be the marketplace which governs the individual freedom of the seller, and the buyer will have the liberty to choose. There are demands to be met that are in a more complex and sophisticated environment than the simpler marketplace of Adam Smith's writing. Nevertheless, supporters of this model argue the basic principles are the same and are applicable. They argue 'demand drives the market' as does the need to keep and attract customers. Therefore, innovation will develop an efficient telecommunications infrastructure.

According to Mansell, "...the Idealist model insists upon the effectiveness of competition and technical change in eroding monopolistic control of telecommunications development...". By contrast, the Strategic model "...shows the strengths and weaknesses of the forces of competition". Mansell further stated:

"Where competition does exist, it displays signs of superficial product differentiation, effective service competition in certain submarkets, and closure of network access at key interfaces in the network infrastructure."

The Strategic model envisions a market that is imperfect. Monopolisation of markets within the industry and rivalry between firms that are deemed oligopolistic are the distinguishing feature of this approach. The obstructions to achieving more perfect competition are both technical and non-technical, and often result in some form of a barrier to entry. In this approach the firms are few in comparison to the Idealist situation. There exist dominant firms, either in the form of incumbent operators or new firms to the market. If the Idealist model was accepted, this issue of dominant firms would be regarded as less of a problem than to the Strategic approach. The Idealists would argue the telecommunications industry should be treated like any other market open to competition. An acceptance of the position put forth by the Strategic interpretation would lead to recognising a need for some form of law to be applied. The purpose would be to prevent certain behaviours or
activities from occurring. In other words, the anti-competitive effects in this imperfect marketplace would be addressed.

Contemporary antitrust thinking in the United States (i.e. Post-Chicago) is generally compatible with the Strategic approach. Yet, in contrast to and more interesting than the Chicago theory, the Post-Chicago environment does not contain an united front concerning the answers or solutions to the problems of anti-competitive activities. In describing Post-Chicago, Sullivan wrote:

"It is far less likely to yield definitive conclusions than is Chicago's use of more universal, less particularised and empirically informed antitrust models." 199

The telecommunications industry in its contemporary form and in light of its transition is affected by many of the issues the Post-Chicago theorists argue require more consideration. Although the Chicago School influenced opinions about issues shared by Post-Chicagoists (such as predatory pricing, conspiracy inferences as well as vertical restraints), and which are also of importance in telecommunications, the latter theorist-group's concerns extended further into behaviour. One policy area, Sullivan wrote; "...concerns strategies for exploiting power in a market vertically related or complementary to the market where power reposes."200 While Chicago theorists are likely to agree with one another about the conclusions or solutions, Post-Chicago theorists are not necessarily going to be as unified. Sullivan explained:

"[P]recisely because Post-Chicago thinking ... does not rely on broadly applicable deductive models that are insensitive to observable empirical differences, any set of litigious facts leaves ample reason for analytical debate, not just between Chicago and Post-Chicago thinking, but also among post-Chicagoians themselves."201
The newest 'learning' in competition thinking leads away from the methods subscribed to by Popper. The Post-Chicago thinking by using induction, is using the method Popper argued against for achieving scientific status. Popper's opinion was that for social sciences to achieve a greater likeness to science, the deductive method was the proper route. Although writing about American antitrust history, Wise described the central problem to antitrust thinking. The basic message though may be applied generally to any contemporary thinking concerning competition laws.

Wise wrote:

"American antitrust law is an advanced case study of the law's self-denying aspiration to model itself on, and incorporate the authority of science. Two generations of antitrust lawyers have been taught that their subject must be rooted in the modern science of economics. That was the lesson Edward Levi and Eugene Rostow in the 1940s, and that was the lesson of Richard Posner and Robert Bork in the 1970s. What professors call 'modern economics' changes, of course. But what remains unchanged is how antitrust practitioners understand and use the advice to be scientific." 202

Wise further states an important point of observation.

"The century of effort to apply science through law, or rather, to do law in the image or shadow of science, teaches that science in law, like everything else in law, is rhetoric." 203

It is by acknowledging the wisdom of these words that philosophy perhaps comes closest to its goal; the pursuit of truth. In recognising law, science and the relevant social studies for what they are rather than what the experts of these fields desire them to be, could provide for greater problem-solving.
3.7 Summary

Competition theory and its legal application to the marketplace has reached a point where strong parallels may be drawn with the situation in the previous century. Competition questions have arisen with the changes in emphasis entailed on the move from an industrial-based to a information-service-based society, similar to the change to the industrial society a hundred years before. These questions require some foresight as to how these changes will affect the market, competition and the general shape the market and (telecommunications) industry will take.

In applying competition policy and law to the new telecommunications, there must be a philosophy supporting the argument for the course of action and the approach taken. The experience of two extremes of legal thought can prove beneficial. Lessons may be learned from their strengths and failings in application, as well as in determining what problems persist. While one interpretation was more social, political, and less-predictable in nature at times, the other scientific method towards a more neutral, predictable and 'rational' approach could not account for human involvement nor the social-dissatisfaction with some results.

The enthusiastic adoption of scientific practices to other fields, particularly of a social nature, has left an impressive mark. With approaches which suggest conclusive answers, and at times seem indisputable 'truths', scientific applications risk misleading policy-makers and regulators; hence an alchemy of legal science. Yet, the methods applied have value. The problem is twofold; One is the application of scientific principles to an imperfect environment of social behaviour. Although predictions may be made, the human involvement in the system distorts the scientific results, reducing them to predictions rather than definitive known conclusions. Thus the second part to the problem, is the usage of scientific methods. Since scientific methods are highly revered the expectation is to have the ultimate answer to any
given situation. Altering this misuse of scientific methods could enhance the ability and decisions of policy-makers and regulators. Accepting that there are in fact a number of interpretations that use such methods, resulting in seemingly conclusive answers, and using scientific methods as a tool rather than an all-knowing leader might enhance the quality of legal debate. The removal of the glorification of "science" as a near-infallible guide and applying its various insights in a more pragmatic manner, might liberalise legal (competition) learning; facilitating the reaching of more rational conclusions. This would benefit the development of competition law and the success of an enduring and sustainable competitive telecommunications market.
ENDNOTES


5. Ibid., p.501.

6. Ibid.

7. See R. Whish, Competition Law, London: Butterworths, 1993 for further discussion and English Common Law examples of historical cases.


14. A new Competition Bill was expected in the 1996-1997 session of the British Parliament. This failed to materialise, but at the time of writing continues to be discussed, including adopting a more Article 85 and 86 (EEC) philosophy.


17. Ibid.

18. Ibid., p.54.

19. Ibid.


22. Waller, p. 57.


27. Ibid. p.106.

28. Ibid., p.104.

29. Ibid., p. 104.

30. see Weiman and Levin op. cit. for an analysis.

31. Ibid.

32. Morgan, op. cit., p. 564.


34. Neale and Goyder, op. cit., p. 475.


38. Ibid.


40. Ibid.

41. Ibid, p. 358.


43. Ibid., p. 2.

44. Ibid.


47. Ibid., p. 107.

48. "In a sense all mainstream American politics fits within the historical liberal tradition ......" Correia, op. cit., p.106.

49. "By contrast with classicism - the overwhelming bulk of the contributors to which were British - insights of fundamental significance to the formal treatment of neo-classical problems were generated by nationals of many countries. While the fertility of the English tradition was undiminished, important schools of neo-classicism emerged in Vienna, Lausanne, Sweden, and in the United States. Each played its own variations on the classical theme: the analysis of allocative properties of a market system. In the world of neo-classicism, economics became more universal and more scientific in its claims - and less dismal in its conclusions." W.J. Barber, A History of Economic Thought, London: Penguin Books, 1991, p. 167.

50. Morgan, p. 564-565.

51. Ibid., p. 565.

52. Ibid., p. 568.


55. Ibid., p. 371; also note p.399.

57. Schumpeter, Capitalism, Socialism & Democracy, op. cit., p. 77-78, especially p. 75; also see comments by R. Swedhely, introduction, p. xvii.

58. e.g. Adams and Brock, op. cit. (et al).

59. e.g. J. Liesner and D. Glynn, 'Does Anti-trust Make Economic Sense?', [1987] ECLR, Vol. 8, p. 355; also Audretsch, op. cit.; et al.


63. Tye, op. cit., p. 2.


65. see above.


67. e.g. ITU, GATS: see Chapter Six of thesis

68. Waller, op. cit., p. 57.


70. Horsman and Marshall, op. cit., p. 95-96; also see later in Chapter Six.


73. see Chapters One and Six.


75. Hawk, op. cit., p. 54.

76. Waller, op. cit., p. 58.


82. Van Cise, op. cit., p. 994-995.

83. Korah, op. cit., p. 222.

84. Ibid., p. 223.


86. Ibid.

87. Korah, op. cit., p. 223.

88. Ibid.

89. Liesner and Glynn, op. cit., p.348.


92. Ibid., p. 671 and 681.

93. also see Flynn, op. cit., 714-715.

94. The presumption of perfect competition (e.g. see Flynn, op. cit., p. 726; also Ellig, op. cit., p. 865; *et al*) conflicts with the problem of the existence of imperfect information (e.g. see R. Lande, 'Beyond Chicago: Will Activist Antitrust Arise Again?', *The Antitrust Bulletin*, Vol. XXXIX, No. 1, 1994, p. 7-8.

95. Flynn, op. cit., p. 714.


99. Ibid., p. 741-743.

100. e.g. Adams and Brock, op. cit., p. 239.


102. Ibid., p. 717-718.

103. Schumpeter, *History of Economic Analysis*, op. cit., p. 34.


105. Ibid., p.18

106. Ibid.

107. Ibid.


109. Magee, p. 27.


112. Ibid.

113. Ibid.

114. Wise, op. cit., p. 719,

115. Ibid.

116. e.g. see Neale and Goyder, op. cit.; Sullivan, *Antitrust*, op. cit.; *et al.*


118. Wise, op. cit.


120. Flynn, op. cit., p. 726; also Ellig, op. cit., p. 865.


122. Ibid., p. 4.

123. Ibid.

124. Ibid.

125. Burke, Genn-Bash, and Haines, op. cit., p. x.


128. Ibid.


130. Ibid.

131. Ibid., p. 66.


133. This is a common position found in both economic texts and the Chicago School argument.
134. Ibid.


136. Whish, op. cit., p. 5.

137. see for example: Audretsch, op. cit., p. 143-144: including citations from Bork, op. cit., p.33 and 178.

138. Ibid.

139. Whish, op. cit., p. 6.

140. Flynn, op. cit., p.714.

141. Schumpeter, *The History of Economic Analysis*, op. cit., p. 34.


143. Schumpeter, *The History of Economic Analysis*, op. cit., p. 34.

144. Flynn, op. cit., p. 714.


146. Ibid.


148. Ibid.


150. Ibid.

151. Ibid.

152. Ibid; also Round and Siegfried, p.763.

153. Kay, Ibid.

154. Ibid.


157. terms used by Kay, op. cit.


160. Ibid.


163. Magee, op. cit., p. 27.


165. Ibid., p. 21.

166. see Popper, *The Poverty of Historicism*, op. cit.


170. Ibid., p. 114.

171. Ibid., p. 114.


173. Magee, op. cit., p. 28.


175. Again, this has been a predominately American-led exercise.


178. Ibid, p. 117.
179. Liesner and Glynn, op. cit., p. 345-346; also Lande 'The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust' op. cit., p. 437.


184. COM (87) at 20.


186. Ibid, p. 5.

187. Mansell, op. cit.

188. also see G. Edmonson, K. L. Miller, 'Europe's Markets are Getting Rewired Too' *Businessweek*, 8 April 1996, p. 53.


194. Gasman, op. cit., p. 117.


198. Ibid, p. 28

200. Ibid., p. 670-671.

201. Ibid, p. 671.


203. Ibid.
CHAPTER FOUR
Concentrations and the Future Strategic Telecommunications Industry

4.1 Introduction
The focus of this chapter is upon the problem of concentrations in markets, particularly telecommunications. Among the problems include the need and strategic attraction at times for alliances between rivals. Both the current trend in the telecommunications industry of alliance-formations and the competition problem of corporate-convergence are addressed. These also raise another competition problem which is addressed: the challenge of oligopolies.

Having set out in previous chapters the state of the telecommunications industry, as it was at the time of this thesis, the state of the EC's telecommunications policy and lastly addressing a fundamental point of the theoretical foundation of competition law interpretation, this chapter progresses the thesis through a practical analysis. The methodological structure of this chapter is a study of events with policy, forming a practical assessment of the competition problems in the industry. The chapter begins by introducing some of the competitive obstacles to market competition and then addresses the matter of strategic alliances. The first half of the chapter is devoted to the rise of alliances, with examinations of some significant alliances between telecommunications firms in the EC. These examinations cover the European Commission's Decisions about these alliances, leading to a discussion about mergers, joint ventures, concentrations and the problem of oligopolies in the second half of the chapter. This part covers the EC's established law that will oversee joint ventures and concentrations in telecommunications.
The interest of strategic alliances is twofold. On the one hand it contradicts pure competition through the co-operation or union of (in some cases) competitors. On the other hand it can reduce the number of competitors, thereby affecting the competitiveness of the market. Industries, markets and state-economies have become more concentrated.¹ In contrast to the perfectly competitive market model, only a few corporations either exist or a few are in such a dominant position in a market that other considerably smaller players effectively demand relatively little or no consideration. This trend not only contradicts the perfect market model espoused by neo-classical economists, but also is a risk to the competitive process. It could also be an example of Schumpeter's theory of competitive destruction.² Concentrations may lead to an oligopolistic situation. The nature, importance and threat of oligopolies present strong opposing arguments. These may equally have valid comments and analysis despite polar conclusions.

4.2 Anticipating Structural Developments of the Marketplace

This thesis is as much about anticipating the future state of a marketplace (in this instance telecommunications) as it is about the present state of competition matters. The anticipation in the telecommunications sector is most interesting because it is also a large problem for developing a suitable regulatory framework. In an industry and market which is visibly changing at a pace that encourages the use of the term "revolutionary", the opportunity is present for competition law to address certain problems. These problems are to do with the way in which industries or markets have resulted, such as being highly concentrative instead of perfectly competitive.

There is a major division of opinion over oligopolistic market structures relative to other structures such as a monopoly, because of its ambiguous character. Oligopolies lack the clarity in definition and understanding compared with such other market structures. The range of possible opinions is illustrated by the vague definition of the phenomenon itself – a market or industry containing few firms. Beyond the question
of definition, oligopolies are not necessarily the same from one industry or market to the next. So one side of the (polar) opinions about oligopolies could have greater relevance and validity in some industries or markets than in others.

The central issue of the oligopoly-debate is that of the effect, if any, which oligopolies have upon the competitiveness of the industry or market. If a market or industry is highly concentrated, is competition strengthened or weakened. Also, are the added values associated with competition such as efficiency and consumer welfare improved or impaired? There is the problem of measuring both dominance and concentration. Is this appropriately accomplished by establishing the per cent of market share, by profits, by numbers of other competitors (and perhaps potential competitors), or by a mathematical formula such as the Herfindahl-Hirschman Index (HHI) in the American system? Is the issue of concentration concerned with behaviour or structure of the industry (or market)? Which of these two are to be addressed by legislation and the courts - if public intervention is deemed acceptable? These are some of the issues in the debate addressing oligopolies and concentrations as a whole, which require greater attention in a reconsidering the approach to competition law.

There is also the continuing problem as to whether common answers are suitable for all or certain industries. In an industry such as telecommunications, the need for interconnection may be important enough that greater co-operation or corporate integration is more acceptable than in other markets. Competition law would then have to make allowances and judge competition separately rather than commonly among markets. The risk is that such co-operation could lead to concentration and to collusion which do have negative effects.

More frequently than not, judicial and legislative decisions occur after the damage is done. It would of course be improper to state X is to be found guilty because X will
commit Y-crime in the future. Of course the action must occur before it is judged. It is nevertheless essential in policy development in the present telecommunications market to anticipate problems and take measures upon the evidence available to avoid the emergence of unacceptable conditions in the industry. The current situation in the telecommunications industry provides the chance to anticipate, consider and as best as one reasonably can, take measures to avoid the development of anti-competitive behaviour and structures.

If one accepts the more neo-classical argument that big does not mean bad, larger firms would be accepted as possibly being more efficient. This is better for the consumer. Oligopolies could then be accepted to be competitive. Intervention may in this light either not be acceptable at all or rarely be so. Alternatively this view could come to be discounted, just as the idea that the telecommunications sector is a 'natural monopoly' has been disregarded.

Then there is the method of addressing any problems. Generally speaking, American antitrust law has historically been more 'structuralist' in its original approach than EC law. The Clayton Act was used to address industry and market structures through judicial intervention in mergers. The (younger) EC law approached competition from a more 'behavioural' position, judging the abuse of a dominant position, based on its market-integration principles. Nevertheless there is the valid argument that EC law has structuralist elements since one of its principal concerns is with agreements affecting trade between Member States. The significant difference until recently has been the EC's lack of a sufficient and effective mechanism to control mergers. Coincidentally, the laws concerned with concentrations (mergers) became available in the EC at the time of the beginning of the transformation of the telecommunications industry. Not only did the Commission begin the process of liberalising the telecommunications market and industry within the EC, but the industry also began a structural transformation initially through 'strategic alliances'. If
a market is to be and to remain competitive, present and future relations between strategic alliance members are important.

The situation in telecommunications is interesting for three reasons. The first is the unique quality (in common with other 'utilities') of its basic form (i.e. traditional telephone and network provider) in that the market is already established - unlike a situation in which one firm creates an innovation which others copy and enter the new market. It is also unique because there are a number of ready-made competitors. To use a simple image, the former telecom monopolies within the EC are at the starting line together waiting for the 1998 competition flag to wave the beginning of the race. Therefore, in theory, the rules of the game may be established before the race begins rather than somewhere further down the track. In reality, the practice is not as simple as the image. The 1998 deadline is when all (but for a couple of exceptions) must have entered the race. Others have already started, as will become clear later.

The second reason is the fact that the future of the market is less clear. The telecommunications industry is no longer simply concerned with the provision of telephony and data - transmission by its original definition. Even the term 'telecommunications' may soon be regarded as archaic as 'the wireless' and 'the moving - pictures' or 'the talkies' are today. Technology now allows for other services, products and other industries to be involved in the development and the transmission of modern communications.

The third reason is concerned with the interesting legal aspects of the telecommunications sector. It is the inherent need for interaction and co-operation between firms to network for the provision of the communication services. Where this has been done by international agreements by state-owned and operated telecom firms, the competitive market and expansion of firms through subsidiaries and
alliances can theoretically fulfil this task. The need to connect, to have a presence in other markets, and to provide a variety of services and functions can encourage the formation of alliances. The needs and types of needs vary between firms, but the risk of alliances (in the broadest meaning) to the market is the actual reduction of the number of competitors. The closer the alliance, the greater the risk of reduction or concentration. In telecommunications, instead of competing as individuals and simply relaying the communication - service from one firm to another, there is the risk of the firms uniting together. The risk is that this could result in only a few representatives remaining in the market, which would be not too dissimilar to the pre-liberalised market situation.

The attitude taken by governments and the Commission about competition and liberalisation in the telecommunications industry is similar to that of the Netherlands. It was stated by Mansell and Davies:

"Government policy is proactive in encouraging competition as a response to global developments in the telecommunications market and to demand by customers in the national markets."  

Within similar policy and statements about the future of the industry much of the rhetoric suggests a fully competitive market will evolve while the present stage is one of transition.

A fully competitive market follows the neo-classical economic thinking, and as much as this market may be desired it is (for the time being at least) an Idealist model. The Idealist model, as outlined in the previous chapter, would have the following outcome. There would be, according to Mansell and Davies, permeable seamless networks, ubiquity (i.e. universal service diffusion), demand-led telecommunications industry, open systems, common interface standards, co-operative partnerships, transparent network access, and minimal regulation to achieve efficiency and equity.
Also, product differentiation would be strong as would service competition. Although the industry is in transition, there is no guarantee or possibility to accurately predict an outcome of the Idealist model. Some of the elements may exist, but a more suitable description of the industry in the immediate future may be the Strategic model. Mansell and Davies stated:

"If the Strategic model is a more appropriate description of the political and economic incentives in the market, a continuous process of rivalry will need to be assessed in terms of its social and economic benefits."  

In contrast to the Idealist model, the Strategic model's characteristics include: fragmented networks, reduced ubiquity in service diffusion, supply-led industry based on multinational - user pressure, weak stimuli for co-operation, monopolisation and rivalry with non-transparent network access and increasing regulation. Product differentiation and service competition would be superficial. Access and control of the network would be closed to selected suppliers and users. Yet this too is not a guaranteed result of changes in the telecommunications industry, but it is a threat and an obstacle to achieving something closer to the Idealist model.

The movement away from an openly competitive market to a concentrated market through alliances and in some cases mergers is not a prediction. It is happening. The final result of only a few players remaining is expected. With such expectations, the opportunity for the referees of competition to have some influence over the development of a new form essentially from the start is available, but such an opportunity can not last.

The EC Commission does not want state telecommunications monopolies to be replaced by a private domination, claimed competition officials in the EC Commission. Some in the EC have recognised efforts to liberalise EC telecom markets might serve to develop cartel-like domination by the private sector, thus
eliminating effective competition. Such power would be great because of the inherent co-operative feature in contemporary telecommunications, the network and infrastructure. An important concerned is the control of infrastructure, because the behaviour of the supplier will affect the service and competition. The supplier could be anti-competitive with regard to network access and distribution. Control of the information gateway is a control over the market. The importance of this is further emphasised by the growing reliance on communication(s) for the new information-service based economies of states.

Alliances may not only increase product availability and a seamless infrastructure, but depending upon the type of alliance, they reduce the number of competitors. Horizontal alliances have such a risk. Conglomerate alliances may be more beneficial in the primary stages of the transition in so far as providing an increase in services such as financial or entertainment to the communication - consumer. The risk is also of a vertical element in conglomerate and especially in the result of horizontal alliances. The risk is vertical foreclosure barring competition. In telecommunications an important anti-competitive element is the foreclosure of access to infrastructures for other firms. This may not only eliminate existing competition, but creates a serious barrier to entry to potential competitors. Therefore the Idealist model would fail and not be achievable.

4.3 Strategic Alliances

4.3.1 Definition

Strategic alliances in the telecommunications industry have been an increasing phenomenon particularly in recent years. The major telecommunications firms in the 1990s have been preparing for the legislative and industrial changes that will affect the industry in the next century. The term "strategic alliance" does not have a precise definition. It may be understood as "...a wide arrangement between companies which does not reach the level of a full merger of all of their activities but
does go beyond a limited agreement to do some activities in common (i.e. a distribution agreement)." Another variation of the term is:

"A coalition of two or more organisations to achieve strategically significant goals and benefits that are mutually beneficial. [It] does not imply equality of benefits, but each party receives benefit roughly in proportion to its contribution. The stability of the alliance is a direct consequence of the benefits outweighing those of alternative arrangements."  

Strategic alliances may also be suitably defined for the current trends in telecommunications as, "...alliances (going beyond mere super-correspondent relationships) between carriers in order to create regional, intercontinental or global networks with a clear purpose of attracting traffic from major business users."  

An underlying concern about strategic alliances in telecommunications is their effect upon change in the structure of the industry in the long term. There is also a question about their form. Are they loose relationships filling voids and compensating for weaknesses of the partners, or do they form a group which is similar in nature to a conglomerate? In other words, will the uniting of firms which previously had little if any reason to be associated with one another become more than an allies, but dependants? Furthermore, if the 'new' communications industry consists of alliances will member firms within the alliances be at liberty to leave their respective alliance? One concern is that their dependence on the other firms will be too great due to the nature of the industry's structure. This risk may be because of the necessity to be allied, whereas if one is not allied or can not find an alliance the firm's success may be in jeopardy.

One observer of strategic alliances stated:

"Mergers and acquisitions are not alliances, because at least one of the parties to the deal is not at liberty to leave."
Therefore it could be assumed that strategic alliances are more casual in their relationship. However, are they at risk of amounting to be a merger (or acquisition) because of the complex technical nature of the market? The lack of definitiveness in the meaning of strategic alliances causes uncertainty about what specific features may either be condemned or condoned absolutely, like for example with mergers. Whereas mergers are a formal unification of legal entities, strategic alliances may or may not involve such bonding. The problems of defining strategic alliances arise because there are different types of relationships. Their impreciseness may not fall foul of the law, but their result may offend the principles the law was intended to protect.

In general terms these connections are for example, between firms within the telecommunications industry or between a telecom firm and a non-telecom firm. Examples of non-telecom firms are computer and entertainment companies. Three occurring trends in the industry have been found. The trends may be labelled as 'network alliances', 'multimedia alliances', and 'commercial and capital support alliances'. The first is to create geographical networks. The second is concerned with creating multimedia ventures. This means linking voice telephony, data communications, video communications and entertainment into one network. The third trend concerns financial and commercial partnerships to link both fixed and mobile telecommunications between the developed and the developing countries. Common to all of these categories are two types of strategic alliances. One may establish a legal entity such as a joint venture. The other may consist of companies pooling resources without establishing a legal entity. Also common to strategic alliances is the alleged continuation of competition between companies forging the alliance. The competition though is "...between the partners in other fields". Firms for example, may be allies in the provision of services but competitors in the equipment market. This does not excuse the potential elimination or serious threat to competition as the alliances may affect a market.
4.3.2 Purpose for Establishing Alliances

Broadly speaking the purpose for telecom firms in establishing an alliance is twofold.\textsuperscript{28} Firstly, it is for survival as internal markets open up allowing for a greater global or simply regional (e.g. the EU) market. Smaller and/or weaker national providers in the EC are uniting with one another to compete with the larger and stronger firms. Examples of the larger and stronger firms include at present, British Telecom, France Telecom and Deutsche Telekom, or even non-EC firms such as AT&T. Similarly, they are uniting with such larger firms for strength and self-preservation. Secondly, it is for basic commercial success. In one respect the market may be understood to be driven by demand. In simple economics, failure to be able to meet the customers' demands means loss of business. Firms may form alliances for a number of reasons. The members of the one alliance may not have the same reasons as the other member(s). Two important influencing factors for firms to seek an alliance may be termed 'economic' and 'geographic'.

Economic reasons could include a desire to increase market share or power, to offer additional products and/or services, or for access to resources or to share risky investments. A reason may also be "...to accelerate return or investment by putting an asset or skill to use more quickly".\textsuperscript{29}

Geographic reasons have been equally influential in recent years. With the liberalisation of markets, opportunities previously closed to foreign firms have emerged. In the case of the European Union, liberalisation has been occurring at an uneven rate. Where firms have found the markets closed, but have the knowledge that the market is due to be opened in the near future, it has been popular to establish ties with a local communications company (normally the state telecommunications operators (TO)). This evades trade barriers and provides for a 'backdoor' to a share of the market, while in many cases continuing to benefit from closed markets in their 'home' market. (This is also the case for countries [non-EC]
where the market remains closed for an unknown length of time). Alliances are a means to prepare for full market participation when the barriers have been removed.

Three other motivating characteristics could be attributed to individual firms' seeking to form alliances. These include 'adventure' which is where "...firms pursuing a policy of vigorous expansion, or which see themselves as pioneers, may use alliances to bring about change and make an impression...." 30 Another is known as a 'Follower' which is simply joining because it is popular to do so. The third 'Fear' resulting from a threat of arrival of stronger competitors and/or from uncertainty of the industrial structure emerging from the changes.31 Alliances provide shelter, strength and reassurance for smaller, weaker firms. 'Traditional' TOs that are often inefficient, find safety in alliances to protect their markets.

The importance of many alliances being established may be summarised as to include, "...a possibility of evolution in accordance with market changes". 32

"They are mostly answers to a progressive, very substantial and quick change of the conditions and characteristics of the market(s) in which incumbent operators operate in terms of technologies available, scale of operation and geographical coverage required and/or the existing regulatory framework." 33

The changes in the industry as analysed in this dissertation have been described to be "...of such a magnitude that even puts into question the survival of traditional operators in the medium term." 34

Consequently, competition law is put to the test in its anti-trust application. Some recent pressure has been from the demand side of the market-equation. The demanding consumers in this case are a minority percentage of the whole market, but provide the most profits for telecom companies.
4.3.3 Examples of Market-Demand

Multinational corporations in many instances are representative of consumer-led motivating forces of change.

"Corporate telecom managers are now demanding reliable and seamless international networks. And they know that if their national operator cannot provide what they need, they can go elsewhere." 35

The multinationals in some cases have begun to apply additional pressure on the telecom firms to provide the service they demand.

In 1994 some of the largest companies in Europe established the European Virtual Private Network Users' Association to pressure telecommunications firms to improve service and meet the customers' demands. The corporate consumer demands 'service quality'. This means the ability to transfer information whether its voice, data, video or all three simultaneously quickly, directly and smoothly. In many cases the transmissions are not always direct from A to B. They often would be routed through other countries usually to reduce cost. Secondly, delays may often occur due to the inability by telecom companies to meet the demand of traffic. Thirdly, there is the poor quality of the transmitting of information which can be a problem. A fourth concern is billing. At present there are moves towards fulfilling the demand for what is called 'one-stop-shopping'. The consumer (again mostly corporate) will receive only one bill and will in future be able to operate through one company that will provide all the communication (including multimedia facilities) the customer requires for their business. Finally companies need the ability to communicate as the global exchange of information increases. The barriers to these issues are twofold. First there is the problem of infrastructure. Secondly there is the obstacle caused by politics and regulations.

Telecommunication companies had not constructed modern systems to meet these demands either because of the high cost or the lack of technical know-how. There is
also the problem of physically keeping up with new developments. A further infrastructure problem is "...differing standards and signalling protocols across country borders". This becomes the second barrier, the political obstacle. Different standards, a lack of international co-operation and regulatory matters obstruct the flow of communications. It is widely recognised that there is a great imbalance in telecommunications in the world. Yet it is not only a 'first world - third world' imbalance. The imbalance is presently within the EU. The President of AT&T (UK) observed:

"It is inevitable that the competitive advantage of a company seeking global markets is a reflection of that company's national market base." 37

A few examples of many of the major users and benefactors of such alliances between communications firms include multinationals such as Unilever, Proctor and Gamble, General Motors, and Ford. There is also the financial sector that needs to transfer 'money' internationally, e.g. Lehman Brothers International. An executive director of this company provided a beneficial example of a situation applicable to many firms.

"Originally, in common with other US Investment Banks, our European offices were simple sales outlets with a basic connectivity requirement back to New York (or London) main frame to process a sale. Not only have we experienced a growth in the volume of business but the nature of the business within these locations has itself changed with complex trading teams, and all of their associated advanced technology, being established over incredibly short timescales." 38

Companies and industries have changed commercially and also structurally. Branches have formed which (such as Lehman Brothers' London office) are no longer 'outposts' representing the head office (e.g. in New York), but have greater equality and semi-independence to conduct more business.
Similar examples may be found elsewhere such as the automotive industry. Ford has been designing a "world car" through its European, American and Australian design centres. Information may be exchanged more efficiently and simultaneously through a single network.\(^{39}\) One final example to demonstrate the market's demand on telecom firms comes from the AT&T (UK) President.

"A company that designs microchips in Spain and buys software in India and assembles its final product in Mexico for distribution in South America ... is ...[s]uch a company [that] has a clear need to move and manage information efficiently." \(^{40}\)

While alliances do provide service and technical benefits to the consumer, they do reduce the number of the wider market players to a mere few. This can create a risk that market barriers will form which the EU's competition law was established to prevent. It may be beneficial to consider the usage of the term 'Strategic Alliance' as one that is over-used and possibly abused, and therefore needs clarification.

4.3.4 Alliances, Partnerships and Corporations

Two important points need addressing. The first concerns the interchanging use of 'strategic alliance' and 'strategic partnership'. The second point of concern is over the difference between 'network alliance' and network corporation'. It would be helpful to distinguish between agreements among companies, which may be termed 'alliances' from those that may be called 'partnerships'. This could provide a means to separate acceptable unions of co-operation from those with a long term and more permanent position. Such distinctions could be used to determine whether or not the agreement of co-operation is judicially acceptable.

An 'alliance' may be more beneficial to the competitive system particularly in terms of market entry and market exit. 'Partnerships' which, although they are not proper
mergers or acquisitions, may been seen as having the effect of a union and being to a large extent functionally convergent. By establishing partnerships the union is more permanent and potentially evasive of regulation governing mergers. This may affect market share, power and threaten the pursuit of a competitive market by removing actual players from a position of competition.

On this basis a Strategic Partnership may be defined as one where an investor acquires a large share of equity from another and invests "...commercial awareness, management expertise, technology expertise and investment capital into the more moribund ... enterprise". A Strategic Alliance may be said to be an arrangement between telecom operators usually of different countries to work together in carrying traffic from one to the other. One motive is to provide their clients with a seamless service that would in an ideal relationship cover regions or preferably be capable of covering the globe.

4.3.5 Network Alliances

'Network alliances' are between telecommunication firms to create links both regionally and globally. On the one hand it is a business-survival strategy. On the other it is the commercial prosperity which is attractive to join forces with 'potential' rivals. The fundamental question to analysing the present and future development of the industry concerns who is leading whom. Is it the supply or is it the demand that is forcing firms to make changes and the industry to be restructured?

Network alliances not only provide an international link (where traffic has grown between 15-20 per cent a year despite periods of recession in domestic economies), they also allow telecom firms to enter the national markets of others. This entry is a type of backdoor and enables the foreign firm to prepare as much as possible for the day when the national market is liberalised. With liberalisation of the market further access may then be obtained, but the early preparation will give a competitive edge
over others who have not previously gained some form of access. It also allows for
greater survival potential against the established domestic firm(s). Since the
government review in 1991 of opening the market in Britain, there have been 150
companies licensed to compete with British Telecom. Network alliances also allow
for greater access to markets for smaller and newer telecom carriers competing with
the larger and older firms despite the latter having established their own alliances.

New carriers of international traffic are reported to have added volume to the
market. In some instances, new carriers out-perform more established firms. For
example, Mercury had the highest per cent of international call revenues, surpassing
major established rivals including British Telecom, Deutsche Telekom and AT&T. Again, the question about the appropriate use and hence the appropriate
understanding of 'alliances' is raised.

Mansell uses the term "network corporation". In some instances this may be a
more appropriate term. Although she does not use the term interchangeably with
what many prefer to call 'network alliance', it may be of value to establish a
distinction between the terms. The difference between the two is relative, but
nevertheless possibly significant. 'Alliance' seems to maintain separate entities but
sharing a common purpose. 'Corporation' suggests a much closer bonding and a
more permanent arrangement. Another means to see the difference between the two
terms is to ask whether or not the alliance members are individually able to exit the
relationship or are there barriers.

The "network corporation" has been explained as follows:

"[It] is based upon 'inter-company alliances of technical, production, financial
and marketing competencies across national boundaries'. The network
corporation depends increasingly upon the public and private
telecommunication infrastructure to achieve its goals. ... It is characterised by
formal and informal co-operative agreements among its subsidiaries, sub-contracting organisations and customers, as well as with other corporations."^{49}

The importance of establishing a distinction between the term alliance and corporation helps in determining the future shape of the industry. A concern is that these connections between the firms "...can become a bottleneck to economic growth and development."^{50} In turn it would defeat the purpose of liberalising the industry. As one official from the EU Competition authority (DG-IV) stated:

"It is possible to say, on the one hand, that the Commission's efforts to liberalise the telecommunications sector will serve no purpose if cartels were allowed to develop, eliminating competition in liberalised markets..."^{51}

In order to further this analysis, it would be best to describe some of the major alliances occurring. They may be assessed in relation to the issue of alliance proximity and the impact on the competitive system.

4.3.6 Network and Alliance Players

At the time of writing, the largest and also most important of the popular alliances are; 'World Partners', 'Concert', 'Phoenix', 'Global One', and 'Unisource' (and also a joint venture between Unisource and AT&T called 'Uniworld'. This became AT&T-Unisource in 1996). Concert, Phoenix, Unisource and Global One are more important with regard to the EU. One that has particular significance to the EU is called Global One (formerly known as 'Atlas'). In order to develop a picture of both the shifts in telecom companies' interests and the web of communications being formed, it would be best to break down the telecommunications industry into simple sectors. From this preliminary base the connections may begin to be formed and the proximity of telecom firms' relations may be better understood.
These alliances are 'telephone-dominated' alliances. Other alliances exist in other tele-communication exchange sectors and they may be labelled as 'cable', 'cellular', and 'other' (which combines new participants not previously regarded as among the telephone company status quo). It is not unusual for telecom firms to also have interests in other sectors. For example, the British company Cable & Wireless Communications (CWC) (formed through merger in 1997 between Bell Cablemedia, NYNEX, and Cable & Wireless plc 's Mercury) has interests in 'telephone', 'cellular' and is developing interests in the 'cable' sector. Some telecom operators also have interests in more than one alliance of the same 'sector'. To further complicate the web, the interests overlap into multimedia.

The alliance called Unisource is an European alliance consisting of Swiss Telecom, Telia of Sweden, the Dutch firm KPN, and until July 1997 Telefonica of Spain. All of these firms have equal ownership of the alliance. The ideal result from the alliance may be seen in the following way: A call to Sweden from a Dutch mobile phone in Spain could be made through one company. In this European example, it might be through a company formed through an alliance of established telecom firms under the name, Unisource. The ambitions do not end with a trans-Europe, regional service.

4.3.6.1 Unisource, Uniworld, WorldPartners/WorldSource and AT&T
Unisource intended a joint venture with the largest American long-distance carrier AT&T: this was called Uniworld. The idea was stated that it would be an integrated telecoms network meeting the demands by large firms operating across Europe (European VPN Users' Association - EVUA), and presumably between Europe and the United States. (Uniworld later became a more permanent venture under the name AT&T-Unisource). Unisource and AT&T-Unisource required EC approval, which was duly received in October 1997. In particular, Unisource's links with AT&T were scrutinised by the Commission. The Commission reported:
"Given the importance of these partners on the telecommunications market and in order to ensure a fair and balanced scrutiny under the EU competition rules of all alliances in this sector, the Commission has at its own initiative launched an examination of the arrangements regarding Unisource as well as its links with AT&T."55

Most arrangements of this nature do in fact require the scrutiny of the Commission. The reason is similar; concern for market domination.

AT&T is an example of a firm with an interest in more than one alliance and this multi-alliance interest should be kept in mind when considering market dominance. AT&T's intentions are clear: global connections to be a global firm. It is also a firm with both signal carrying and equipment manufacturing interests.

AT&T has a quarter of its revenues from business beyond its country of origin, the United States. It anticipates half of its business will be from outside the United States within ten years.56 Perhaps this is an under-estimate. This company's international interests ten years ago were limited. By way of example only 60 people employed by AT&T worked outside of the US. In 1993 there were 56,000 employees57 of AT&T working outside the US "...and virtually all of them are citizens of the countries where they work."58 Its success at becoming a global company depends very much, at this stage, on acceptance by national regulators for alliances as well as establishing the company in non-US markets. For example, Britain only recently gave AT&T a licence to operate in the United Kingdom.59 A couple of examples of AT&T's involvement in the UK include its intention to provide domestic switched voice and data services, private line service and international re-sale service. It has established an agreement with COLT Telecommunications to provide the latter with international network access, while at the same time having access to COLT's network in Central London. In other European states, AT&T began to provide businesses in France with Internet access and support. In Germany it has provided
Deutsche Telekom with fibre optic cable. While direct and formal establishment in Germany's telecommunications market has remained largely closed, AT&T used its calling-card system (AT&T U.S. domestic and international long distance calling, AT&T USADirect and AT&T World Connect Services) for many customers to avoid using DT. This shows a few of the numerous ways in which firms have been creating a presence in closed or semi-closed markets.

Apart from AT&T-Unisource, AT&T has had other alliance-interests. One was called 'WorldSource' (earlier it was 'World Partners'). This alliance is a joint venture between AT&T, KDD of Japan and Singapore Telecom. The purpose of the alliance has been described as one that offers "...seamless voice and data services designed to efficiently meet the needs of multinational corporations. The offering is designed to address these companies' requirements for a single source of telecommunications capabilities across international boundaries." It can be seen as AT&T's extension into the Asian market. In theory a consumer connected to AT&T or one of its partners could communicate through any of the services offered by the partners between Asia, the United States and Europe. An exchange of information such as video conferencing could take place among people somewhere in each region, as a simple example. This is where AT&T, or for that matter any firm in such a position, finds creating Asian alliances and European alliances advantageous so as to offer a complete, global package. AT&T, ROSNET (Russian Telecommunications Network) and INTERCON International USA Inc. created a joint venture for operating a national public data network in Russia. The joint venture (ROSNET International) will purchase products and services from AT&T and ROSNET, while marketing will be under INTERCON. However, this is an opportune moment to demonstrate overlapping and interconnection of alliances.

In the mid-1990s Singapore Telecom was not only involved in a joint venture with AT&T, it was also involved with a rival of AT&T in another alliance. The Infonet
alliance involved the Singapore firm as well as European firms France Telecom, Telia (Sweden), PTT (Holland), PTT (Switzerland), Telefonica (Spain) and Belgacom (Belgium), which also encompassed Unisource. However, Unisource itself had a 31.2 per cent stake in Infonet. AT&T's long distance rival MCI (the second largest long-distance US carrier) also had 25 per cent stake in Infonet. Deutsche Telekom was also involved indirectly through its alliance with France Telecom in the 'Atlas' venture (see below). Within this web was another threatening rival of AT&T; Concert through MCI, which incorporated BT.

British Telecom held a 20 per cent stake in MCI, and the two firms established the network-alliance called 'Concert'. Concert was further enhanced through BT's share in Spanish, Italian and links with Nordic telecom firms. BT, for example, has established an alliance with Telecom Finland, TeleDenmark and Norwegian Telecom. It was connected to Europe through a major player (BT) and also to America through BT's relation with MCI.

Although BT's relations with MCI have since soured, with speculation during the summer of 1997 about the future of the merger and hence of Concert, the principles of this arrangement are a matter of interest and precedent in relation to EC competition policy in the contemporary telecommunications industry.

4.3.6.2 Newco/Concert

In 1994 BT and MCI notified the European Commission about their agreements forming an alliance, on the basis that the co-operation was a concentration under the Merger Regulation 4064/89. According to the notification the BT/MCI alliance (called at this time, Newco) was "... for the provision of enhanced and value-added global telecommunications service to multinational carriers". Secondly, BT acquired 20 per cent of MCI. BT became the largest shareholder of MCI.
The Commission decided the acquisition of the shareholding in MCI did not fall within the scope of Article 85(1). This was because the drafting of the agreement would not allow BT: "...the ability to seek to control or influence the company and, furthermore, both American corporate and anti-trust law would impede any misuse of (or even access to) any confidential information of MCI by BT." In the decision by the Commission the issue of restrictive practices and shareholding was addressed. It was stated:

"Although, as a general rule, Article 85 (1) EC does not apply to agreements for the sale or purchase of shares as such, it might do so, given the specific contractual and market contexts of a particular case, if the competitive behaviour of the parties to the agreement is to be co-ordinated or influenced." 

The reasoning given for the purchase of BT's equity in MCI was "...to ensure a common interest expressed by the parties to go global to better serve (and keep) their existing customers and to better address new areas of the market." 

This rather vague explanation fails to define the necessity of BT's purchase of 20 per cent of MCI, and not for example, a mutual exchange of equal shares if such an exchange was necessary. An explanation for the purchase of shares comes in inference to investment in MCI, implying a form of cash injection from BT into the American firm. The result of this investment was the creation of the joint venture ('Newco').

"[T]he creation of Newco and the investment of BT in MCI are steps taken by the two parent companies to pre-position themselves for when full liberalisation is in place, steps that are being followed by many telecommunications operators who are creating sets of products comparable to those of Newco."
The purpose for Newco was better explained in the Commission's Decision. It was stated:

"Although national borders are still in place as regards the provisions of most telecommunications services, strategic alliances like the present one are being created now in anticipation of a market situation where national boundaries will have substantially disappeared. In addition, both the services that Newco is going to offer, ... and the customers it intends to serve are by nature international; consequently Newco will not be involved in the provision of services within one country only." 68

The alliance and formation of a separate company for a more global role was not established by two equal firms. MCI provided BT with greater access to the American market. Although BT had access to 35 per cent of the American market, it could not provide consumers with voice and data.69 MCI did not have as great a presence in the multinational market as BT.70 Together, BT and MCI were able to fulfil each other's weaknesses and establish a company (Newco - later called Concert) to compete with one of the largest carriers AT&T. An analyst explained:

"MCI and British Telecom got a jump in global networking because Concert is a single company. This has allowed them to come out with integrated service offerings faster than AT&T." 71

More than 20 per cent of shares ($4.3 billion) was exchanged. It has been reported that senior-level executives were exchanged which "... helped the companies get to know each other better".72 This calls into question the practicality of the restriction of influence and confidential information outlined earlier regarding Shareholdings. If such an exchange did occur, beyond the establishment of a board of directors for Newco,73 the actual relationship between BT and MCI might warrant review.

Interestingly, a third aspect of the alliance was the commitment by BT and MCI.
This was:

"...not to engage in the core business (public basic telecommunications services) of the other party in its territory; this reciprocal non-compete obligation effectively amounted to a territorial protection dividing the world market between the Americas (territory reserved for MCI) and the rest of the world (territory reserved for BT) in respect of activities which remain outside the scope of activities of the joint venture." 74

This included acting as exclusive distribution for Newco's products.75 The Commission's agreeing to closing the EC (including the European Economic Area) market to potential competition (MCI) is interesting. It would seem in principle, to go against Article 85(1); prohibiting agreements and other practices which distort competition and which could affect trade between Member States. The reasoning given for allowing territorial exclusiveness included licensing provisions.

"Newco sublicenses BT solely for the 'territory' and MCI solely for the Americas to use the combined technology it has received from its parent companies in the distribution of Newco's products." 76

Thus, in a manner of speaking, the child permits the parent to act. By excluding one another, BT and MCI benefit through the creation of a third company. Newco is used both for marketing and creating a global firm, but also gaining access to each alliance member's territory while overtly being denied access to compete.

Furthermore:

"[E]ach parent company (or distributor) receives directly from the other a non-exclusive licence to use and licence the trademarks of the latter within its own territory. Thus BT grants MCI such a licence for the trademark of BT but limited to the Americas ... and vice versa." 77

This allows two things. First the product can be sold under the name of the other firm, but secondly the market remains controlled in so far as BT or MCI competing
with one another. Although creating the benefit of selling (presumably where profitable) the others name, it effectively eliminates the other firm from becoming a true competitor.

Nevertheless, the prohibiting agreements and exclusive licensing arrangements are permitted under Article 85(3) concerning exemptions to Article 85(1).

"The general rule is that restrictive practices which affect inter-State trade are not allowed, and undertakings engaged in such activities will be ordered to stop doing so as well as running the risk of being fined by the Commission." 78

The exemptions to this principal are permitted "... if the harmful affects of restrictive agreements or practice are sufficiently counterbalanced by a number of beneficial elements". 79

BT and MCI argued the arrangement protects valuable intellectual property rights they have contributed to the Newco joint venture against an outsider, and also each other. Importantly:

"In this context, both parties have stressed that they have not found a more efficient manner of organising the distribution of the products in a balanced way." 80

The Commission accepted BT and MCI's reasoning. In the Decision it stated:

"Taking those facts into consideration, together with the high level of competition that the parent companies will be facing (as distributors of Newco) and the substantial bargaining power of customers, the exclusive distribution arrangement for BT (including here those provisions in the intellectual property agreement that enforce it) can be accepted as being
indispensable to the positive effects (in particular the distribution of the products in an efficient manner) resulting from the restrictive clauses ...."

A condition was attached to this acceptance stating there was to be a possibility for passive sales available for customers in the European Economic Area (EEA). By 'passive sales' it was explained that EEA customers should be able to receive Newco products through MCI without BT's intervention or support distribution. The Commission concluded that:

"... any potential European customer, with activities in at least two Member States, but no presence in the United States of America, can contract with MCI (instead of BT, the exclusive distributor for the EEA) the provision of Newco services in the EEA only."

The Commission makes an interesting effort to further establish Newco as a separate firm. This is done in connection with the right of the customer to contract with MCI in the EEA. This conclusion of sale will not involve breaching the licences agreed between MCI and BT. According to the Decision:

"MCI ... will then ask Newco to procure all necessary use of remote networks (third-party networks) on the most competitive terms available."

This may involve BT, however the Decision insists it "... will always be obliged to obtain supplies on a competitive basis." This attempt to maintain a strong degree of separation or independence between MCI and BT and Newco is interesting in so far as the latter statement has parallels to law concerning procurement by public-owned firms.

The Decision by the Commission is now only guidance and a source for debate like any Decision or caselaw, because just over two years after the Decision was
published in the Official Journal, BT and MCI announced their merger in November 1996. 87

4.3.6.3 Atlas/Phoenix (Global One) Alliance

Deutsche Telekom and France Telecom formally announced on December 7 1993 their alliance. Both companies at the time were state-owned monopolies. Discussions between the two firms were public knowledge, and the possibility of an alliance between the two was controversial. One commentator wrote:

"It is hard to imagine a scenario more grotesque than a merger of France Telecom and Deutsche Bundespost Telekom (DBT). Europe's largest state-owned telecommunications companies enjoy 100% monopolies in the provision of telephone services in their respective markets. ... But wait. It gets worse. In Paris and Bonn, the conception is to include a third partner in this unsavoury deal: AT&T, America's largest telephone company." 88

This alliance presents a number of characteristics and issues of interest to the regulation of competition. One is the increasingly common 'need' for alliances in order to provide service demanded by consumers (mostly multi-nationals). An observer explained:

"The heart of the alliance will be a state-of-the-art European 'backbone network' providing companies with international private network and high-capacity data communications across the continent...." 89

Marcel Roulet, chairman at the time of France Telecom, stated the alliance would be a global player for Europe.90 This second point raises the question of the relevance of promoting firms (especially where competition may be affected) under the guise of nationalism. Nationalism (in this instance under the flag of the EC) was further used by Roulet when he also stated:
"We think that the Brussels authorities are aware that it would be somewhat paradoxical if their rules led them to block a partnership between large European players from different continents."  

This raises the point about the paradox of national favouritism and a government policy of intervention that may distort or conflict with a policy of open market and competition. The European Commission too is an example of having such contradictory policies. The White Paper concerning the matters of growth, competitiveness and employment could be interpreted to promote Euro-telecom alliances for the social and commercial benefit of the EC. Roulet voiced criticism that the alliance between the two European telecommunication firms might be scrutinised while, he claimed the BT-MCI alliance formation announced earlier in the year might not be examined. This led to speculation that EC authorities might support an alliance between France Telecom and Deutsche Telekom and AT&T in light of the BT-MCI agreement.  

An alliance between FT-DT is also for reasons other than providing a European telecommunications organisation to meet 'foreign' rivals and provide the EC with commercial benefits. The alliance could potentially obstruct competitors from gaining access to the domestic markets of France and Germany. There is the risk of such large and monopolistic organisations forming a cartel that would dominate Europe. It must be remembered that EC telecom markets were not open at this time, although the legislative process had begun. The deadline (1998) was still just over a few years away at the time. Thus it could be regarded as a defensive move by the two telecom monopolies in an effort to secure as much of their national markets prior to the inevitable market liberalisation.  

Alliances not only create cross-border benefits (such as one-stop-shopping) to sell to their customers, but it also increases their position and power among the global
telecom firms. At the time of the alliance, Deutsche Telekom was regarded as the second largest and France Telecom the third largest carriers. Together they were only behind AT&T - the world's largest. British Telecom was also their only European rival (in terms of competitive strength), which was placed as the world's fourth largest telecommunications carrier. A FT-DT alliance would then make them three times larger than BT. This alliance may have been encouraged by the BT-MCI alliance announcement, which could have threatened FT and DT's strengths.

Sprint replaced AT&T in the global strategy FT-DT alliance (called 'Atlas' at the time), particularly in connecting European traffic with the American market. Although Sprint was small in comparison to FT and DT with regard to turn-over, operating income, employees and subscribers, Atlas gained access to Sprint's multinational corporate customers, modern data network and brand-name. Significantly, it was the American market access that benefited Atlas's one-stop-shopping strategy. Similarly the alliance of the three companies benefits from the credibility of FT and DT and the sum total of their financial strength. Therefore there is a strong attraction for new customers. In comparison though, Atlas only achieved a third-best partner since AT&T, the largest long-distance provider did not enter the alliance and BT united with the second best (long-distance) American telecom firm MCI.

Other telecom firms objected to the alliance-agreement between Deutsche Telekom and France Telecom: beyond the obvious rivalry. The disapproval centred on the problem of the closed nature of Germany's and France's telecommunications market. BT called the arrangement, "...the biggest telecommunications monopoly in the world." Although the complaints from rivals of DT and FT such as AT&T and BT could also be used to disrupt the competition, the objections may also contain some validity. MCI later joined the list of complainants sharing the 'closed markets of France and Germany' argument.
According to the EC's Directorate-General for Competition, there were several problems with the Atlas venture. First, the alliance did not appear to be able to meet the needs of multinational corporations. Secondly, the venture seemed to be more suited to providing services (data) to the domestic companies of Germany and France and less capable of doing so within Europe and globally, and through the alliance the parent companies had agreed not to operate in each other's territories. Furthermore, the percentage of market share was also high which would further hinder any prospects of sustaining competition. Thirdly, 45 per cent of the EC's data communications services were provided in France and Germany.

The arrangement with Sprint went under the name of 'Phoenix'. At the time it appeared that there would be two, separate alliances even though each had two of the same firms in the partnerships. Phoenix was described as a joint venture between Atlas and Sprint. During the investigation process leading to a Commission approval, DT and FT agreed to keep their data transmission subsidiaries separate from Atlas until the open market date 1998. Atlas and Phoenix were to provide data transmission services to major corporations. The approval process extended beyond the letters of the law into politicking. The Commissioner received agreements from both the German and French governments that alternative telecommunications networks were allowed to compete with the state-owned telecom firms prior to 1998.

"The European Commission warned the French and German state telecommunications giants ... that their Atlas project would not get EU approval until their national telecommunications markets had been opened to competition."

Alternative networks included other potential telecom providers such as rail and energy firms. These alternatives were important because competitors of DT-FT
could effectively be squeezed out unless other networks were available, argued Van Miert. An absence of alternative networks would mean DT-FT competitors would have little option but to deal with the state-monopolies for network access. Access to other networks is important if open competition in a liberalised market is not entirely obtainable. This, in theory, prevents the domination and even destruction of a potentially competitive market. It was feared such a deal between two large state monopolies could protect the closed market. This was argued by both BT and AT&T. Ian Vallance, chairman of BT at the time of the Atlas agreement, was quoted stating:

"It should be a matter of deep concern that the commission has been pushed into a position where it has to defend the basic tenets of the Treaty of Rome, that there should be open and free competition across Europe, rather than the phone companies having to defend why they should enjoy a continuing monopoly."  

AT&T argued, particularly in reference to Sprint's involvement with a DT-FT alliance, the deal should be blocked unless both France and Germany opened their markets to competition before the 1998 deadline. The French and German markets were described by one AT&T source as "...two of the most closed markets in the world for telecoms service and equipment." John Hoffman, a senior vice-president at Sprint, stated the opposition to the deal by AT&T was "hypocritical". He claimed:

"They have already entered into alliances with companies in some of the most locked-up countries in the world without any regulatory approval at all..."  

Although the alliance between Deutsche Telekom, France Telecom and Sprint was accepted in the middle of 1996 and now operates under the name Global One, it is not simply an agreement of pooling resources that can cause alarm. The issue can be
extended beyond an agreement to the act of an alliance. The next step could involve exchanging equity stakes and thus expanding the alliance. Such an extension could proceed to a merger between the two. This is a further cause of concern for protecting competition. This scenario happened between BT and MCI.

An important problem faced by competition authorities in opening state-controlled markets in particular, was presented in the example of the Atlas alliance. Karel Van Miert stated:

"[T]he elimination of competition on national markets is aggravated by the fact that the parent companies of Atlas at present enjoy monopolies for the provision of infrastructure, the necessary building blocks for service providers competing with Atlas; in the absence of alternative infrastructure allowing competing service providers to build up their own networks at competitive prices, competition will suffer a set-back precisely at the time action taken by the Commission to liberalise all telecommunications services except basic voice services should begin to bear its fruits for the benefit of users."  

4.3.7 Beyond the Alliances

Although the corporate motives are interesting as they provide guidance about the evolving structure of the telecommunications industry, the legal and political problems emphasise the difficulty the industry presents to achieving the ideal of (perfect) market competition. One problem faced by competition authorities in the EC is the different speeds and levels at which the various players and potential players are. Within the EC, there is a division between powerful telecom operators with experience in competition such as BT, and weak national monopolies and powerful monopolies who lack competition experience (at least within their own state-territories). Then there is the problem of liberalising the EC market so that non-EC players can be rightful participants. While the latter, comparatively speaking,
may only be important in politically assisting EC firms accessing non-EC markets, the issue faced by competition authorities is preventing one monopoly replacing another. In other words, while the telecommunications market in the EC is being opened and thereby breaking the individual state monopolies, there is the risk of allowing alliance formations dominating and in effect monopolising the market. One spokesman from the Commission stated:

"As long as there are monopolies in place, we don't want to reinforce them... Once access to the markets is liberalised, then we may be more indulgent in granting approval to alliances." 114

While on the one hand, there is the risk and concern that alliances could form cartels or dominate the market, there is another argument that favours supporting alliances. Historically telecommunications (as has been previously cited) has been divided by national boundaries. Liberalisation leads to some restructuring and, it has been argued trans-border restructuring is natural.115 This could lead to an elimination of the 'frontier-effect', i.e. lower the cost of calls because territorial borders have been removed. There is also the (previously noted) benefit of further services offered to the corporate customer.

The focal point of accepting alliances may centre around the argument that alternative cross-border, trans-EC networks and infrastructures may be established and also be in competition with other alliances. One commentator stated:

"Rather than blocking such link-ups and so losing the potential benefits of cross-border restructuring, Europe's competition authorities must seek to make alliances work in the public interest." 116

This, it is argued, is best done by allowing infrastructures to provide telecommunications services. Furthermore, liberalisation must extend beyond basic voice services to allow the private sector to build a competitive market and thus a
separate infrastructure. This pro-market approach could contrast with one Commission - spokesman's comment:

"Liberalisation has to do with more than just getting rid of a monopoly, it has to do with helping all European industry compete."

However, a pro-marketer might agree with this statement adding that the best way to help European industry is by liberalising telecommunications to include infrastructure. An alternative approach is allowing selective competition while governments (and/or the Commission) are involved in overseeing the infrastructure directly (such as state-owned and operated) or through monitoring a private infrastructure (such as Railtrack in the UK with regard to the railway network). The issue of infrastructure and networks is an important and potentially obstructive, contradictory, but essential feature to a competitive telecommunications industry. Alliances may solve the problem, at least in the short term, by providing an integrated European network and involving some competition in the industry. In the case of the BT-MCI merger, this example qualifies for the definition stated earlier which finds Concert now outside of the definition of strategic alliances.

Once inter-connected, what happens to the competitive process? Firms become dependent, and develop and invest in their alliance network. Where is the freedom to enter and exit alliances and networks? The term 'competition' then becomes one of many meanings, subject to qualifications such as oligopolistic-competition, complementary-competition, or (ambiguously) co-operative-competition.

If, rather than following a model based on the presumption of open market competition, alliances consolidate the telecommunications industry into one of few players, the problems of oligopolies and proper regulatory powers are raised.
4.4 Industrial Concentrations and Their Control

4.4.1 Oligopolies

"It should be the aim of competition policy to prevent situations arising which form a hotbed for tacit collusive behaviour." ¹¹⁹

The term 'monopoly' is one that is understood and plainly defined. Oligopoly is not as straightforward and is a term that contains paradoxes, ambiguities and dichotomies, and therefore confusion. This grey area of contention among competition authorities is therefore one of great interest. Whereas 'monopoly' may be condemned as either the ultimate failure or the ultimate success of an end-game in the competitive process, 'oligopoly' creates uncertainty in so far as understanding its position within the philosophy of competition. Galbraith once wrote about monopolies:

"In the English language only a few words - fraud, subversion and sodomy - have a greater connotation of non-violent wickedness." ¹²⁰

The problem with the concept of oligopoly is its vague position within economic theory.¹²¹ While in perfect competition profit-maximising firms will produce an optimum level of output at the lowest price thus efficiently allocating resources through the economy, monopolies produce less at a higher price and therefore resources will not be efficiently allocated. The latter is deemed undesirable.¹²² However, oligopolies may contain elements from both monopolistic and competition concepts. The consequence arising from the devilish term is uncertainty in the minds of regulators - be they lawyers, government officials, or philosophers - as to whether or not there is justification to intervene in the marketplace. It is helpful to consider a few definitions from the writings of other observers and experts.

One legal expert on competition, Whish, stated:

"An oligopolistic market is one which is characterised by the presence of a
few suppliers, none of which individually is in a position of market dominance, but each is relatively large." 123

Some other definitions come from the writings of Burke, Genn-Bash and Haines. They claimed:

"Oligopoly refers to a situation where there are a few producers. There is no longer complete freedom of entry into the industry. Instead entry barriers exist and help to explain why only a few firms are present in this market. Supranormal profits can not exist in both the short and long run." 124

and also:

"Oligopoly is a market situation in which firms realise that their actions are interdependent, i.e. that a change in output by one firm will alter the profits of other firms, which will induce them to alter their outputs. This reaction alters the first firm's optimal output, which again causes the other firms to alter their behaviour and so on." 125

An economist Sloman wrote:

"Oligopoly occurs when just a few firms between them share a large proportion of the industry. There are, however, significant differences in the structure of industries under oligopoly and similarly significant differences in the behaviour of firms." 126

American legal expert Sullivan also provides a definition that is noteworthy.

"An industry is oligopolistic when so large a share of its total output is in the hands of so few relatively large firms that a change in the output of any one of these firms will discernibly affect the market price. It is not essential that there be no small firms that individually cannot affect market price. There can be a vast number of them; so long as there are two or more large firms, each of which is conscious of its individual power to affect price, oligopoly prevails. The profound effect of oligopolistic structure is consciousness of interdependence. Each of the few large firms will assume that the amount which it can sell at any given price will depend on the prices set by its larger
rivals and that the amount they can sell will in turn be affected by the given price it sets.” 127

These few definitions show there is some consensus about the meaning of oligopoly. However, more significantly, these definitions highlight a number of (potential) contradictions. Whereas the term 'monopoly' is understood by nature of its meaning (one) and therefore refers to a one-firm industry or market, and while perfect competition is understood as the polar opposite to monopoly, oligopoly is less definitively placed. Sullivan's definition is an important one because it includes the possibility of some small firms within the industry or market. It appears many others writers either dismiss such a possibility or simply ignore them because of their lack of influence.

The similarities between the definitions include the fact that there are either few suppliers or producers. Size is important so long as there is more than one large firm, neither of which dominate the industry or market. As a result, it seems to be generally agreed that interdependence exists as the actions of one firm would normally affect the other(s). It was suggested there is no complete freedom of entry into the market. This seems acceptable otherwise, according to economic theory, others would enter and thereby reduce or eliminate the oligopolistic situation. However, the less than perfect freedom of entry could have to do with regulatory restrictions as opposed to the natural laws of economics.

Within the comparative context of the definitions some dissension appears in Sullivan's writing whereby a number of other firms may exist in the market or industry, but the importance lies at the centre of power. Thus in an oligopolistic situation, the existence of smaller firms is less relevant because they can not affect the market but only be affected by it. In other words the flow of influence is in one direction (downwards) to smaller firms.
Thus, the 'evil' of oligopolies stems from the existence of some form of barrier to entry, domination of a few firms over the market, and interdependence. A further 'evil' often associated with monopolies was raised; supranormal profits. Nevertheless, Sullivan warned:

"To characterise a market as oligopolistic is rather to claim to exercise an experienced judgement. Most economists who have studied oligopoly visualise a continuum moving from the most highly concentrated markets where three or four firms control 100% of output, to the least concentrated which might still stimulate some awareness of interdependence .... The extent of awareness of interdependence will vary not only with the number of larger firms and extent of concentration among them, but also with the number of firms which produce the remainder of the output."  

Oligopolistic markets may be said to in fact distinguish themselves from other types of markets because both monopolistic and competitive states may exist simultaneously. This ambiguity may be the source of confusion and difficulty about market problems. Whish stated an interesting observation that may be the centre of the debate affecting antitrust methodology.

"In reality few markets are perfectly competitive and many are oligopolistic, and the general trend in recent years has been towards an increase in industrial concentration."  

An increase in industrial concentration by its very nature reduces the number of competitors in the given market. Through the reduction of competitors is the increase in likelihood of an oligopolistic situation. The existence of only a few firms in an industry means that, according to the definition of oligopolies, interdependence becomes a factor. The reaction of firms to a situation of interdependence may vary. Collusion with rivals could occur if public policy or law permits, or if the players believe they could risk getting away with it. Collusion could provide stability, joint
profit maximisation, or either as a defensive or offensive measure against another (or each other) rivalry in the oligopolistic situation. In effect a monopolistic situation emerges from acts of collusion. Formal or informal agreements may set quotas, fix prices, limit production promotion, limit product development, or restrict market entry or competition between its members.

The benefits from such collusions include profit gains from avoiding waste or advertising, price cutting and even competition if agreed. A formal agreement of collusion establishes a cartel. It is determining the informal agreements of collusion that cause regulators difficulty. Yet while this describes what an oligopoly is and some of the behavioural issues which may arise under such circumstances, an important question asks can this situation be avoided? Furthermore, is it the oligopoly that is undesirable or is it only the potential anti-competitive behaviour that is the problem? These are two separate topics. One could claim oligopolies are undesirable because it is essentially against the ideology of competition. That is to say it is unacceptable that a few firms dominate the industry and/or market. The second issue goes beyond the problem of formal collusion. It is the problem of tacit collusion that is where the pricing decisions of sellers are interdependent and the firms cannot fail to recognise their interdependence. The oligopolistic situation and thus tacit collusion is explained well by Sullivan:

"Oligopolists will be less focused on their own demand and cost curves than on what rivals are doing and are likely to do, as well as on preserving or improving their respective shares of the market. They know they are part of a group; they perceive, just as one looking from the outside so readily does, (1) that if any barriers exist (or can be erected) which will slow entry appreciably, for them to engage in aggressive price competition would depress the profit of all without necessarily allowing any firm to increase its market share; and (2) that a strategy of maintaining prices at industry-maximising levels and expressing their rivalry for shares by other means -
advertising or product strategies, for example - will be to the benefit of all.\textsuperscript{134}

The result of the situation can be best found in the words of Whish. He stated:

"The main argument against oligopoly is that the structural conditions of the market in which oligopolists operate are such that they will not compete on price and will have little incentive to compete in other ways; furthermore the theory of oligopolistic interdependence asserts that they will be able to earn supra-competitive profits without entering into the type of collusion agreements generally prescribed by competition law. ... Thus the theory runs that in an oligopolistic market rivals are interdependent: they have a heightened awareness of each other's presence and are bound to match one another's marketing strategy. The result is that price competition between them will inevitably be minimal or even non-existent. Oligopoly produces non-competitive stability." \textsuperscript{135}

This then begs the question; "to what extent will the market structure allow oligopolists to behave as a single monopolist?"\textsuperscript{136} Through competition-avoidance, market power is shared and these few players in the industry will effectively obtain monopolistic profits.\textsuperscript{137} A problem with approaching the subject of oligopolies is that there are many theoretical models; each based on different assumptions and therefore hold different conclusions.\textsuperscript{138} As Sullivan stated in explaining the extreme opinions about oligopolies:

"There may be those who would make oligopoly the whipping boy for every social and economic ill, those who, armed with righteous conviction, seem ready to break up firms in any industry in which concentration ratios exceed the danger point .... At the other fringe are the naysayers who are profoundly convinced that we know nothing untoward about oligopolies that would
warrant intervention, and that anything we may think we know from any
other source may be discounted as sheer prejudice and suspicion." 139

If, as it was stated earlier, concentrated industries are not uncommon and if
oligopolies and concentrated industries may by definition be accepted as one (or
nearly one) and the same, what can or should be done about the situation? One
answer might be to accept 'the laws of economic nature' and, despite the lack of
perfect competition, accept that the situation (by another name such as workable
competition or contestable competition) is inevitable. This begins to cast doubt
though, on some of the neo-classical assumptions and arguments. However it is not
the purpose here to either assess all oligopolistic industries, but rather only consider
the telecommunications industry. As the telecommunications industry undergoes a
transformation from its traditional public utility role through the political and
technological changes previously outlined, to a modern, service and broad consumer
communications-goods provider, the tools in a) regulating a competitive oligopoly
(if policy deems it desirable) or b) attempting to prevent an overtly concentrated,
oligopolistic industry from forming, can be assessed. Again, it appears coincidental
yet convenient that a competition managing tool in the form of the Merger
Regulation was established during the initial stages of the EC's telecommunications
liberalisation policy.

4.4.2 Mergers 140

It has been said that controlling mergers has been a weak point in EC law. The
absence of any concentration control was suggested to have been deliberate on the
part of those states who drafted the Treaty of Rome. 141 Neither Article 85 nor 86
EEC specifically refer to mergers and their use proved unsatisfactory. During the
1970s and 1980s there were four failed attempts to establish merger legislation. The
Continental Can 142 case determined Article 86 could be used, 143 because the Article
prohibits the abuse of one or more undertaking with a dominant position from the
acquisition of most shares in a potential competitor. Pathak explained this weakness of EC competition law:

"In the absence of merger enforcement legislation, the Commission was powerless with respect to mergers and acquisitions under Community law unless, exceptionally, the transaction was regarded as an abuse of a dominant position prohibited by Article 86 ...." 144

In 1987 the ECJ agreed to consider Article 85 in regard to a merger case. In British American Tobacco Co. Ltd. and R.J.Reynolds Industries Inc. v Commission 145 the Court agreed to review a merger application through the use of Article 85 in some instances of shared acquisition. However the uncertainty and potential future conflicts which were furthered by the Court's decision in this case, added emphasis to the need for merger legislation. As Craig and De Burca explained:

"It was in part the uncertainty generated by the BAT decision, and in part the need for a comprehensive merger regulation in the light of the impending completion of the Single Market in 1992, that led to the first promulgation in December 1989 of Regulation 4064/89 which became operative in September of the following year." 146

The adoption of merger regulations occurred in time for the changes in telecommunications.147 Examining merger regulation is of relevance in light of the 'strategic alliances' which have been occurring between telecom firms. Alliances in telecommunications may continue to occur and closer ties may also evolve from initial (looser) alliances. In particular, mergers are expected to continue to be topical for the foreseeable future, as telecommunications and other communication-related industries converge.148 In the XIXth Report on Competition Policy the importance of regulation in sector reform is stated, and this statement is appropriate to use in association with the telecommunications industry.
"The process of restructuring European industry has given rise and will continue to give rise to a wave of mergers. Although many such mergers have not posed any problems from the competition view, it must be ensured that they do not in the long run jeopardise the competition process, which lies at the heart of the common market and is essential in securing all the benefits linked with the single market." 149

Applicable to all industries and markets though, are the three types of mergers: horizontal, vertical and conglomerate. Common to American and EC laws are the intentions to prohibit specific behaviour in mergers which changes industrial structure. 150 However, the differences between state laws about antitrust exist depending upon policies and their degree of acceptance (or not) of the three types of mergers. Sullivan in writing about merger law stated:

"The concerns which shape it and the analytical concepts which inform it relate directly to those affecting other aspects of antitrust law. Public policy about horizontal consideration should be consistent with that about cartelization, oligopoly and monopoly." 151

Opposition to mergers is frequently concerned with the effect and impact the merger would have on competition. The three types of mergers affect the industry or market they are involved with in different ways. Horizontal mergers are between firms that produce the same product. Vertical mergers are between firms that operate at different levels of the same product market. 152 There may be a connection or relation in distribution. In the example of telecommunications, it has been known for one company to control communication laboratories, network connections, and equipment manufacturing. AT&T, BCE and BT are a few of many examples. Conglomerate mergers are those between companies with no product or market relation. Of the three, horizontal mergers can be the most damaging to competition. 153 This is because the number of competitive players is reduced and the
The effect may be substantial if only a few originally existed in the market. However, on the opposite side of the proverbial coin, mergers may be beneficial by improving efficiency and/or cost-reduction for the consumer. Craig and De Burca elaborate on the term efficiency. This may come in the form of economic efficiency under which economies of scale, distribution efficiency and managerial efficiency are found. The risk though, is market domination or at an extreme, monopolisation. Merger Law is intended to avoid such stages being reached where competition will be affected either in a negative manner or against a form of what the government deems to be in the public interest.

EC Merger Regulation 4064/89 (hereafter 'the Regulation') distinguishes mergers from joint ventures. Article 3(2) paragraph 1 excludes joint ventures from the Regulation, except it stated under the second paragraph:

"The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to co-ordination of the competitive behaviour of the parties among themselves or between them and the joint venture, shall not constitute a concentration within the meaning of paragraph 1(b)."

Two important terms are used in this paragraph, concentration and joint venture.

4.4.3 Concentrations

The use of 'concentration' is in fact in the full title of the Regulation rather than the term merger. The proper title is Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, but is referred to even by Commission officials as 'the Merger Regulation'. The use 'concentration' in the title has been determined to be "a term of art". It is a term used in a broad and general manner referring to both hostile and friendly takeovers and political mergers. Concentrations are defined under Article 3(1) of the Regulation.
"A concentration should be deemed to arise where:
(a) two or more previously independent undertakings merge, or
(b) one or more persons already controlling at least one undertaking - or one
or more undertaking - acquire, whether by purchase of securities or assets,
by contract or by any other means direct or indirect control of the whole or
part of one or more other undertakings."

It is important that Article 3(1) is read with Article 3(3). The latter reads:

"For the purposes of this regulation, control shall be constituted by rights,
contracts or any other means which, either separately or in combination and
having regard to the consideration of fact or law involved, confer the
possibility of exercising decisive influence on an undertaking, in particular by:
(a) ownership of the right to use all or part of the assets of an undertaking;
(b) rights or contracts which confer decisive influence on the composition,
voting or decisions of the origins of an undertaking."

Although a concentration activities may breach the principles of EC law, they can be
exempt under the regulation. Article 2 is concerned with appraising concentrations.
This is relevant and important to subjects contained within this thesis, namely
strategic alliances. Hence, it is worth noting Article 2(1) in particular.

"Concentrations within the scope of this Regulation shall be appraised in
accordance with the following provisions with a view to establish whether or
not they are compatible with the common market.
In making this appraisal, the Commission shall take into account:
(a) the need to maintain and develop effective competition within the
common market in view of, among other things, the structure of all the
markets concerned and the actual or potential competition from undertakings
located either within or outwith the Community; (b) the market position of
the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to suppliers or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition."

Article 2(2) and (3) are respectively concerned with those concentrations and the strengthening of dominant positions "...as a result of which effective competition would be significantly impeded in the common market".160 Two features are important; determining 'dominance' and determining 'significant impediment'. One legal practitioner examined the tests of dominance.

"Although Article 2(2), in reading the 'creation of dominance', is broader than Article 86 of the EEC Treaty (which may only prohibit the 'abuse' of dominant position), it is clear that the jurisprudence under Article 86, in addition to specific case law under the MCR are highly relevant as to the existence of dominance and to the determination of the relevant product and geographical markets." 161

Fine found Article 2(3) of the Regulation to be like Article 86 (EEC) with regard to geographical references; meaning a 'substantial part' of the EC market had to be affected.162 Furthermore, economic dominance he claimed, was not restricted to market-shares alone.163 Fine refers to an important case where the ECJ defined 'dominant position'. In United Brands v Commission the Court stated:

"The dominant position referred to in this Article [86] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the
power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." 164

The United Brands dominance test was re-enforced in Hoffman-La Roche v Commission. The ECJ further stated:

"A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying the dominant position the conduct of the undertaking which derives profit from the position is to a great extent determined unilaterally. The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors highly important one is the existence of very large market shares." 165

The alterations or adjustments made within these definitions compared with an earlier case are important. The 1972 Continental Can case defined 'dominant position' as follows:

"Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their economic partners, but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behaviour, even if
there are differences in intensity in their influence in the different partial markets." 166

Whish's observations about this case are noteworthy. He reported:

"The question before the ECJ was whether mergers could be prohibited under Article 86. One argument against this was that Article 86 was designed to prevent the direct exploitation of consumers and not to deal with the more indirect adverse effects that might be produced by harming the competitive process." 167

Korah interpreted the definition from the Continental Can case focused on prices, market decisions controlled by competition, and the need for capital and innovation technology. These are the very determinants that an economist would use. 168 Korah claimed that in later cases, such as in United Brands, the emphasis by the Commission and the ECJ shifted away from the economic influence of competition power over price. The new approach was a legal concept 169 that suggests a less economic and more political approach to interpreting market dominance.

"Given the fluidity of the other indications of dominance, it is not easy, especially for jurists, to determine how dominant a firm may be, and both the Commission and the Court have failed to make clearly and cogently reasoned decisions." 170

Thus from Hoffman-La Roche the derivation of dominant position "from several factors" 171 may be regarded as problematic from a position on general competition (antitrust) law. Alternatively, the New Zealand Court's approach (in a telecommunications case) may be more practical. 172 Rather than confining the term 'dominant' to a technical meaning, its ordinary definition may be more suitable in allowing flexibility where necessary and dependent on the particular circumstances of the case before the courts. The attempt is to recognise structures only function
through the actions of people, and as argued in the previous chapter, it is the behaviour of the market participants that matters.\textsuperscript{173}

The implications of defining a dominant position are important, because the understanding of the term will affect the interpretation of the analysis of mergers in question under the Regulation. Whereas Article 86 is more concerned with the 'abuse' of a dominant position, the Commission's enforcement of the Regulation is to analyse, according to Picat and Zachmann, "... the foreseeable strength of the entity resulting from the merger and its impact on the competition structure of the market in question."\textsuperscript{174}

4.4.4 Joint Ventures

Joint venture is a broad term, because of the many purposes for which such alliances are created. Craig and De Burca stated:

"[T]he term is not one of art and cover a wide range of business arrangements, from the establishment of a new corporate entity by two competitors to a joint purchasing scheme or joint research and development."\textsuperscript{175}

Therefore the range of possibilities, combinations and types of joint ventures is a problem for competition enforcement.\textsuperscript{176} The problems include type of corporate exchange, unity and involvement. This is identifiable in the definition stated by Czinkota, Ronkainen and Moffett.

"A joint venture can be defined as the participation of two or more companies in an enterprise in which each party contributes assets, owns the entity to some degree and shares risk. The venture is also considered long term."\textsuperscript{177}

The problems for competition authorities may depend on the type of market, especially with regard to the number of players and entry barriers. In a market of
many and with limited or no barriers to entry, the effect of joint ventures may be minimal. It has been stated that such joint arrangements may be beneficial in furthering the efficiency of firms. The term 'joint ventures' has been divided into three purpose-based types. One type is for government or legislative "suasion". A second type is to fulfil the other(s)' needs or assets. A third is to fulfil missing or weak skills. Whish explained:

"Firms wishing to co-operate, for example, for research and development may do so simply by meeting to discuss matters of common interest; they may agree by contract to pool information and share out research work; they may form a committee to oversee the work. They may go further and establish a joint venture to which the work in question is entrusted and over which they will exercise joint control; the joint venture the feeds back the fruits of its endeavours to its parents. Firms might even go beyond this and merge their research potential and retire from the market. The same possibilities exist in relation to other types of agreement, for example on production and specialisation." 

This explanation provides for a good understanding of the broad to the narrow an close inter-firm relationship joint ventures may take. As with strategic alliances, joint ventures may form for one company to enter another market or state. Similarly resources may be pooled. In effect a joint venture is a form of a strategic alliance, but depending upon the type the joint venture could leave or fall outside the definition of strategic alliance if Czinkota's (et al) explanation is used.

"A strategic alliance ... is something more than the traditional customer-vendor relationship but something less than an outright acquisition."

An acquisition is often associated with a take-over. In a relationship between two firms though, where one is larger and/or stronger than the other, the effect could be more of a take-over. The question 'is a merger really a take-over?' creates
potential for some re-examination of traditional corporate structure and behaviour.
Whish stated:

"As a general proposition the form in which collaboration takes place ought not to affect the application of competition law: in each case the important issue should be the effect that the co-operation might have on competition rather than the form in which the co-operation manifests itself. However form does in some circumstances have an important impact in particular because some joint ventures are treated under cartel laws and others under merger laws." 184

EC law has been criticised for its lack of a coherent policy regarding joint ventures. 185 The EC competition system has been interpreted to be inconsistent with regard to Commission policy declarations and policy implementation. Furthermore reasoning in decisions by the Commission have been described as "bewildering and unpredictable". 185 This apparent confusion may be due to some uncertainty about whether or not joint ventures should be considered on behavioural or structural merits. 187 This is the heart of the problem with EC law (and perhaps others). The general purpose of Articles 85 and 86 is for the regulation of business behaviour more-so than market structure. 188 Since the introduction of the Merger Regulation 189 the Commission has been able to consider joint ventures under either the said Regulation or Article 85. The Commission attempts to seek to distinguish between a concentration and a co-operative joint venture. This approach has been promoted further in the Commission's Notice on Concentrative and Co-operative Joint Ventures (hereafter the Notice). 190

The Notice recognises there are various types and purposes of joint ventures, but as a result of these differences the Commission concludes: "...it is impossible to make general comments on the compliance of joint ventures with competition law." 191 The Commission separates joint ventures in both the Notice and the Merger Regulation
into co-operative and concentrative: The former exists where it is not the latter. The
definition of joint venture is in Article 3(2) of the Merger Regulation:

"The creation of a joint venture performing on a lasting basis all the functions
of an autonomous economic entity, which does not give rise to co-ordination
of the competitive behaviour of the parties amongst themselves or between
them and the joint venture, shall constitute concentration." 192

The Notice clarifies this definition in so far as stating a joint venture is an
undertaking under the joint control of other undertakings. A concentrative joint
venture satisfies two conditions, according to the Notice. The positive condition is
where the joint venture is in a lasting basis and is an autonomous economic entity. It
must act as an independent operator in the marketplace, and must be able to pursue
its own policies and not act as an instrument of its 'parents'. 193 The negative
condition is where the joint venture does not have as either its effect or object the
coordination of competitive behaviour of otherwise separate undertakings. 194 A
problem with this Notice is its broad definition. Pathak claimed:

"No attempt is made to distinguish between structural changes which invoke
an integration of substantial resources of the parents and camouflaged
cartels. Rather, the Notice distinguishes between structural changes where
the parents exit the market of the venture, that is exit at least the
geographical market if not the product market (or concentrative joint
ventures), and camouflaged cartels and structural changes where the parents
remain in the market of the venture (or co-operative joint ventures). 195

If a joint venture does not meet the definition of a concentration under the Merger
Regulation, it may then be regarded as a co-operative joint venture. 196 The rule of
law which then follows is Article 85 and national competition laws (provided they
are not contrary to the principles of EC competition law). Article 85 applies where:
1) the parents of the joint venture are competitors, 2) the joint venture creates
foreclosure to competition or affects other markets, 3) non-ancillary restrictions exist (e.g. long or broad non-compete clauses), 4) the joint venture has a significant effect on trade and competition.\textsuperscript{197} A problem emerging from this is the 'long-term basis' requirement for a joint venture to be recognised. What minimum amount of time would satisfy this? Under pre-Merger Regulation law six months or a year would be accepted as a co-operative joint venture.\textsuperscript{198} Under the Notice this may not be the case.\textsuperscript{199} Pathak stated:

"The 'long-term basis' condition for co-operative joint ventures not only makes the Merger Control Regulation's concentrative joint venture test of 'performing on a lasting basis' more difficult to apply, it makes the distinction between co-operative joint ventures and concentrative joint ventures even murkier. One may reasonably ask, for example, what relevance the 'long-term basis' condition has for cartel arrangements, since a cartel is normally unlawful whether it is long term or short term. ...[T]he application of Article 85(1) should be limited to the assessment of arrangements which are disguised cartels and non-ancillary restrictive agreements accompanying the formation of a joint venture." \textsuperscript{200}

Case law which has emerged since the Notice indicates that for a joint venture to be concentrative, the duration is most-likely to be defined as long enough for lasting structural change.\textsuperscript{201} Such a definition remains vague and perhaps too much for those who require concrete predictability. While time periods may be fluctuating, a stronger indication of intention and structural effects may be permitted from the direct and indirect contributions and control of the joint venture by the parent companies. In the joint venture between 	extit{Brau and Brunnen AG and Cadbury Schweppes} case\textsuperscript{202} the joint venture was decided by the Commission not to be concentrative. Instead it would be applicable to Article 85(1) and therefore co-operative because the parents, Brau and Brunnen and Cadbury Schweppes, had not abandoned the product market. Under the joint venture licences had been transferred
for the production and sales of beverages under Appollineris and Schweppes trademarks. The parent companies remain competitors, despite Schweppes transferring its German and Austrian business to the new joint venture. The withdrawal from these markets did not eliminate the "realistic option to re-enter the German market". While this decision appears to validate a concentrative joint venture, sufficient assets were contributed and a functional autonomous entity seemed to exist. Furthermore, the parents were not exiting the market and therefore an absence of market sharing satisfied the Commission. A more recent case and one that finds a more developed approach in comparison with the Schweppes case is the Atlas case. The Commission defined the arrangement in the following manner:

"The Atlas joint venture is structural and co-operative in nature." 

The original venture had Atlas benefiting from products from its parents Deutsche Telekom (DT) and France Telecom (FT), while developing its own research and development. DT and FT would have acted as exclusive distributors in their respective markets, while Atlas would have certain services transferred to it in third countries. Atlas would also have independently developed services while combining DT and FT activities in Europe-wide and third country markets. Two important conclusions by the Commission were: Firstly, "DT and FT will remain potential competitors for Atlas services and other services in neighbouring and upstream (transmission capacity) markets." Secondly, "[t]his venture entails two major changes in the structures of DT and FT on two undertakings with very limited presence outside their respective home countries." To elaborate:

"The Atlas venture eliminates actual and potential competition between DT and FT both in Germany and France and Europe-wide." 

"In creating Atlas, DT and FT each abandon their own activities in the relevant markets for cross-border and ultimately Europe-wide telecommunications services."
"The elimination of competition between the parents is substantial as the Atlas venture is created by two internationally active TOs and covers the joint development and provision of services throughout the European Economic Area." 211

This joint venture provided a further twist to the issue of time constraints.

"The Commission usually accepts ancillary provisions for a limited period of time only. In this case, however, given the particular features of the market in which Atlas will operate, notably the substantial investment, the Commission accepts both the anti-competitive clause and DT and FT's obligation to obtain all provisions for Europe-wide services from Atlas as ancillary restraints for the entire duration of this exception Decision." 212

The Commission applied the same policy to another, but closely related alliance. In the Phoenix/Global One case213 the Commission also referred to the arrangement as a structural co-operative joint venture.214 Whereas DT and FT each had 50 per cent share in the Atlas joint venture, the involvement of the third company, Sprint, with DT and FT to form Phoenix (now Global One) provides for some interest. In this instance DT and FT acquired shares in Sprint. The following restrictions were imposed, presumably to control FT and DT from using the alliance as a take-over mechanism of Sprint. Firstly, neither DT nor FT could dispose of its shares in Sprint for five years, after which the transfer of large shares are restricted with Sprint allowed the right of first refusal. Secondly, FT and DT could each acquire further shares in Sprint up to a holding amount of 10 per cent, but could not acquire additional shares for 15 years after the initial closing date that would increase their aggregate voting rights to more than 20 per cent. After this period, further shares may be obtained but not to increase their aggregate voting rights above 30 per cent; Neither could they undertake activities towards taking control of Sprint.215 The
Phoenix/Global One joint venture's relation with Atlas was explained by the Commission in the following manner:

"The Phoenix joint venture is co-operative in nature, since Atlas, which takes over FT's Europe-wide Transpac network, and Sprint (jointly referred to as the 'parents') are potential competitors for the provision of Europe-wide services and certain global services offerings within Phoenix's envisaged offerings portfolio ..., namely customised packages of corporate telecommunications services. Prior to this transaction, Sprint was an actual competitor of DT in Germany and of FT in France." 216

"Phoenix combines Sprint's as well as DT and FT's joint activities in a range of Europe-wide and global markets for non-reserved telecommunications services.... This venture entails major changes in the structures of DT and FT, undertakings with very limited presence outside their respective home countries, and of Sprint whose international presence was limited for a lack of strong regional partners. Through Phoenix these three undertakings pool a significant number of assets in connection with the provision and marketing of non-reserved corporate telecommunications services." 217

Similar to Atlas, Phoenix (GlobalOne) was approved with the restriction and exclusive distributorship by DT and FT in Germany and France respectively. However, and importantly, one of the purposes of the joint venture as a means to eliminate competition was found unacceptable. As a joint venture to co-operate and eliminate competition in the relevant markets and affect trade between Member States, the Commission would not give negative clearance for such a request as found in the parents' of Phoenix application. 218 The Commission stated:

"On the grounds set out under recital 38 of the Atlas Decision, Atlas and Sprint were competitors for the provision of outsourcing services. DT and
FT and Sprint were also competitors for the abstention of large customers' telecommunications 'hubs'. Sprint ... also competed with FT ... for the provision of non-correspondent services, notably Europe-wide and national packet-switched data communications services with limited global connectivity, under licences in several European country. This competition is eliminated by the creation of Phoenix.\textsuperscript{219}

The relationship of Atlas and Phoenix/GlobalOne is of interest as DT and FT are the major parents in both alliances. Just as Atlas allowed DT and FT to refrain from some competition, similar provisions including research and development, cross-licensing, and intellectual property agreements were allowed under Phoenix/GlobalOne. The Commission's acceptance of this joint venture was explained:

"DT and FT and Sprint each have the financial and technological capabilities required to enter the relevant markets on their own. DT, FT and Sprint are among the world's largest telecommunications companies in terms of traffic. While DT and FT are dominant in their respective home countries, Sprint is the third-largest long-distance carrier in the United States. Creating Phoenix is therefore not DT, FT and Sprint's only objective means to enter the market for international non-reserved corporate telecommunications." \textsuperscript{220}

This explanation was further developed:

"The combination of Atlas and Sprint's technology will allow Phoenix to offer new services with global 'connectivity' at lower cost and better than either Atlas or Sprint are capable of providing alone given their current business. Combining different platforms and product features will still require a considerable investment of time and money. Like BT and MCI's Concert and like Atlas at the European and national level, Phoenix will add value to leased line capacity by implementing own homogeneous network elements
such as switches, software platforms and signalling systems to provide seamless international telecommunications services." 221

This alliance connects the EC and the United States under a joint venture umbrella much as BT and MCI do through Concert. It also benefits the parent companies individually like Sprint. The Commission noted it would take Sprint longer to become a global-supplier and longer to meet the needs of the increasing number of multinational companies.222 Here can be witnessed the influence of direct industry policy on competition rulings. It also seems to be accepted to provide a creditable competitive alternative to the Concert alliance.223 While a form of industrial policy is active in the decision-making, the Commission sought to impose antitrust measures to regulate against discrimination and obstacles for other competitors. Commissioner Karel Van Miert stated the Commission recognised the continuing domination of some incumbent telecom firms after the 1998 liberalisation deadline.224 According to Van Miert, the Commission particularly wishes to have avoided discrimination by incumbent telecom operators towards firms requiring network access. Van Miert stated:

"In cases involving incumbent TOs, continuing dominant positions will be an essential element in examining whether a concentration leads to the strengthening of a dominant position, as required under the merger control rules." 225

The acceptance of joint ventures by dominant and incumbent firms such as DT, FT and even BT creates such a risk of strengthening their powerful positions. Although the Commission has taken steps in its rulings on Atlas, Phoenix/Global One and Concert to ensure to its satisfaction that the alliances are co-operative or structurally co-operative, it affects the competitive system. The Commission recognised in both Atlas and Phoenix/Global One Decisions that a potential competitor had been removed.226 The Commission accepted that there was a new, global
telecommunications-provision market. It ruled that FT and DT were prevented from integrating their nation-wide networks before at least two other competing nation-wide carriers were licensed.\(^{227}\) The Commission allowed the continuation of the divestiture of indirect subsidising Info AG in Germany\(^{228}\) among some technical provisions.\(^{229}\) The Commission encouraged investment towards a trans-European network. This originated in the acceptance of the BT-MCI joint venture forming Concert,\(^{230}\) and re-enforcement in the Phoenix/Global One Decision. The Commission stated in this Decision:

"Two years after the Commission's BT-MCI Decision global markets are still only emerging..... BT and MCI's Concert was the first player to enter that emerging market, with a head-start over its competitors. Phoenix is set to become a competitive player once the substantial required investment is made and a reliable seamless backbone network created..... The Commission...sees no elimination of competition in the emerging global market." \(^{231}\)

In recognising and defining a new market, the emerging global market, it could be seen that the Commission regards the joint ventures not so much as a consolidation of corporate power but as a (structural) co-operative joint venture in entering and developing this consumer-demanded\(^{232}\) new market. These arrangements are, despite the removal of at least one competitor (e.g. Sprint and perhaps DT and FT's direct involvement in each other's market), acceptable provided the domestic markets are not closed.\(^{233}\) The alliances fail to meet the criterion for defining concentrative joint ventures because no parent has withdrawn from the market because it (the global telecommunications market) previously did not exist.

These cases are examples of a combination of competition law and direct industrial policy. Some would argue this should be left to the marketplace.
Bensaid, Encaova and Winckler suggested, the practice of a rigid test for concentrative joint ventures is becoming obsolete. Whereas the test for long-lasting basis and the withdrawal by both parent-companies from the market determined a concentrative joint venture:

"The Commission now considers a joint venture to be concentrative whereby only one parent withdraws from the relevant market, provided the other parent effectively plays the leading role in determining the industrial behaviour of the joint venture." 234

In this latter modification is the industrial leadership doctrine. This has the effect of a joint venture being regarded as under the control of one parent company while the other is merely a financial partner. 235 Another and slightly more recent observation of the Commission's approach in this regard suggests further changes. Brown explained:

"The signs are that the Commission is now moving away from its industrial leadership doctrine. The Commission expressly acknowledged in the Joint Ventures Notice...that co-ordination between a parent and the joint venture is relevant only if it reinforces co-ordination between parent companies. Since the Notice was adopted...the Commission has relied on the lack of co-ordination between the parents, rather than trying to explain away the lack of co-ordination between the dominant parent and the joint venture." 236

Criticism of the EC approach to joint ventures through forming a distinction between co-operative and concentrative has been made. One authority on competition law stated:

"The concentrative - co-operative distinction serves a mainly jurisdictional function. It assigns a particular joint venture to different substantive and procedural systems. As a jurisdictional rule, the distinction is woefully
inadequate. Jurisdictional rules must provide quick and predictable outcomes." 237

Hawk believed the distinction made by the Commission "exaggerates" the significance of the economic distinction between structure and behaviour. 238 He stated:

"The solution is not to continue to engage in the metaphysics of refining and re-refining the co-operative - concentrative distinction. The best solution is to provide a unified analysis of joint ventures that include both behavioural and structural considerations." 239

Dissatisfaction about the approach to joint ventures is noted through complaints regarding the lack of predictability, and the lack of clarity of those which are structural in nature and more applicable to Merger Regulation, compared to those which are more behavioural and suited to examination under Article 85. 240 Brown concluded:

"The distinction between concentrative and co-operative joint ventures continues to cause difficulties and constraints. While many joint ventures clearly fall into one or other category, the classification remains far from straightforward...." 241

4.4.5 Vertical Mergers

Vertical mergers or alliances (as opposed to agreements between continuing autonomous firms) are developing that include telecommunications firms. While mergers can have an impact in competition, a merger between firms within an oligopoly (such as two of three firms in a market) can have a serious effect. 242 Of the three types of mergers (horizontal, vertical and conglomerate), Whish states the horizontal ones "... have the most significant effect upon competition." 243 Some antitrust treatment of vertical mergers has been controversial. 244
One of the principal difficulties about vertical mergers has been in determining anticompetitive effects. There are strong arguments favouring vertical mergers primarily because of efficiency benefits. The Chicago School has criticised some of the earlier American cases that opposed such mergers, and favoured a more permissive approach. Vertical mergers may benefit competition by improving brand promotion or may result in encouraging inter-brand competition. Furthermore, efficiency may be gained for example through distribution or production improvements. In general, co-operation between firms in a vertical relationship may be more efficient than in an horizontal one. Encouraging efficiency has been an important principle in competition theory. Efficiency derived from vertical mergers according to Riordan and Salop includes; co-ordination in design and production, the elimination of free riding through internalising incentives, rationalising input usage, eliminating double mark-up costs. A consequence of a vertical merger though can be foreclosure to competitors. Costs for a competitor may increase. Costs in this case may include not only price but quality and the ability to deliver the goods or service.

One example of a vertical merger is the American case famously known as Brown Shoe. This case has been the test for 'substantially lessening competition'. The purpose was to stop a trend before any of the firms achieved oligopolistic size. The plaintiff was the fourth largest shoe manufacturer with per cent of the market and the third largest retailer with 6 per cent of that market. The firm it was purchasing was twelfth largest (5 per cent) of the manufacturing market and eighth in the retail market at 2%. In this case both horizontal and vertical types of mergers were involved. In this instance of a vertical merger the importance of the percentage of the market being foreclosed was emphasised. The court stated, if the trend within the industry was vertical mergers and if not checked the result would be substantially less competition. Criticism of this case by the Chicago School was best summarised as follows:
"First, the mere fact that a vertical merger forecloses rival firms' access to the supply of inputs produced by one input supplier does not mean that the net supply of inputs available to rival those firms has been reduced. When the rivals lose access to the input supplies produced by one firm, they are likely to gain access to the input suppliers that previously supplied the merging supplier's downstream merger partner. In that case, according to Chicago School theory, the vertical merger does not reduce the net supply available to rivals. Instead, it merely realigns purchase patterns among competing firms. Second, the Chicago School utilises an oversimplified microeconomic model to conclude that vertical mergers carried out by a monopolist cannot enhance monopoly power. The idea is that there is only a 'single monopoly profit' that can be earned by the monopolist, whether or not the monopoly power, the only economic motive for vertical merger is to reduce costs by achieving synergies." 

Thus the two prominent motivating factors behind a vertical merger are efficiency and power. Neoclassical economists deny the latter. Perhaps this is due to a weakness in the basic model used, which cannot account for power unless there is a 'rational' economic explanation. Further is the explanation of 'market realignment' suitable for all markets. Do such opportunities exist in oligopolistic ones? In telecommunications these topics are important. Some examples of course could be found to support the Chicago theory since the industry is broad and the term 'telecommunications' is becoming more general. Yet there is one crucial element in the structure of the industry that can call into question the validity of Chicago theory: This is market foreclosure to the infrastructure and network. There are two aspects to the telecommunications industry and market in the United States that emphasise concern about vertical mergers, and these can be applied to the EC. Although the examples are not perfectly fitting, the principles behind them are relevant. Klass and Salinger stated:
"First, many telecommunications infrastructure are highly concentrated. In most areas there is only one provider of local telephone service and one cable television system operator. ... Second, many telecommunications services require the interconnection of two or more networks. For example, a standard long-distance call requires the interconnection of two local networks and one long-distance network. Such interconnections are vertical arrangements. 250

In applying these principles to the context of the EC, the examples require some modification. With regard to high concentrations, the service providers have been few in number in each member state. In most cases there has been only one, the state's telecommunications operator. Even where competition has been introduced such as the United Kingdom, the choice was mostly limited to BT for local providers (except Hull which has its own monopoly-service). In the late 1990s, despite advances in furthering competition, places beyond London were only beginning to receive a viable competitor to BT in the form of a cable company. In the second example, competitors to the incumbent telecom firm require infrastructure access, and in some cases it may seem logical to use the existing network because of the time it takes for other networks to be constructed. In the instance of the United Kingdom, where a cable service had not existed, users of Mercury for long-distance and international calls still had to be connected to BT for basic service access. Thus Mercury fits the American example.

Broadening the scope of this example, there are a variety of reasons why telecom firms 'need' alliances. For example a need would be a seamless connection. This example is applicable at both an EC-level and a global level. One is only required to look at the Atlas/Global-One arrangement and at BT's ambitions (via Concert) to find such interconnections. Although many alliances between telecom firms like Deutsche Telekom, France Telecom and Sprint, and BT and MCI are horizontal
mergers, such alliances nearly always include a vertical component.\textsuperscript{251} This component invariably is access to infrastructures, networks or service. These are "...indispensable for the development of the competitor's activities." \textsuperscript{252} The consequence does not match the policy rhetoric of competitive telecommunications markets.

"High concentration and complex vertical interdependencies are just the sort of conditions under which both the outcome and the nature of the competitive process are not likely to look at all like perfect competition. When markets are concentrated and entry is difficult, the viability of each competitor can be essential to the extent of competition. If the competitive position of each competitor in turn rests crucially on its vertical relationships, then any structural change that affects those relationships can have consequences for the extent of competition." \textsuperscript{253}

It would therefore be inappropriate to accept the Chicago School philosophy's approach to vertical mergers, at least in the initial stage of telecommunications liberalisation. Even in the long term the neoclassical argument's validity has been cast into doubt.

"Recent academic literature on vertical mergers has shown that the results of the older models, which were based on assumptions of perfect competition and single-product monopoly, do not generalise to models based on structural assumptions that are closer to those in which antitrust typically arise." \textsuperscript{254}

Klass and Salinger elaborated:

"This means neither that the old conclusions are wrong in all or even many cases nor that it is improper to apply the older models in many situations - for example, those where competition is vigorous." \textsuperscript{255}
Therefore the questioning of the appropriateness of the applied model to the specific, given situation should be considered. Furthermore, is the model to narrow for the required application? Theory has begun to move beyond the Chicago thinking.

"Post-Chicago industrial organisation economics accepts, as a starting point ... criticism of pre-Chicago foreclosure theory. However, it has extended the economic models to more realistic assumptions that reach a more refined understanding of foreclosure ... In these post-Chicago models, some vertical mergers can be anticompetitive, although others are procompetitive." 256

An important example of a merger in the new telecommunications is the one announced in November 1996 between BT and MCI.

4.4.5.1 BT-MCI (Concert) Merger

The initial alliance between BT and MCI establishing the joint venture Newco (later Concert) had six categories of services for offer to customers with global telecommunications demands. In the Commission's Decision concerning the alliances, it defined the requirements for a product to be considered 'global' and to separate it from similar products. The characteristics are: "to provide ubiquitous service across multiple borders, to promote consistent service levels and feasible delivery schedules, to make time-zones, languages and currencies irrelevant, to overcome inadequacies of local infrastructures, to make customers assume service is local when it is actually being promoted from the other side of the world." 257

According to the Decision the requirements for telecommunications by large companies are, 'one-stop-shopping' and 'end-to-end' or 'seamless' service. This includes cross-border service between companies and customers, and speed and access of information. 258 In spite of the existence and development of such demands, one opinion was that many large corporations "...already look unfavourably at the alliance of Global One and AT&T Unisource". 259 It was said:
"Business customers ... don't consider those entities to be very secure. Customers do not know who to contact and see the groupings as transitory marketing agreements" 260

The BT-MCI merger was one of significance as it was the first of the large telecommunication corporations to go beyond the 'strategic alliance' stage and unite. The result of this latest stage in telecom relations has possibly begun the process towards the anticipated conclusion of only a few firms to globally dominate telecommunications. The BT-MCI merger was called "...an international telecommunications 'power house" 261 Another colourful description of the significance of the merger was stated before it received approval.

"If the deal does go through the once bloated British Telecoms monopoly is set to become the Heathrow airport of international telephone traffic." 262

Although businesses and business reporting may be prone to exaggeration and excitement either about events such as corporate relations, or new technologies and their possibilities, it is reasonable to assume analysts have a fair idea about the significance of this particular event. It may be an event akin to an observation of a Chairman of the Federal Communications Commission in the United States, who once wrote:

"What may be called 'defining events' come to every field. International affairs provide stunning examples: Nixon in China, the fall of the Berlin Wall, and the Rabin-Arafat handshake. Historians, as well as ordinary people, mark time by such events. Once these events occur, nothing it seems is ever the same. In communications, the benchmark for a decade had been the AT&T divestiture decision." 263

Read then claimed the new defining event was the Bell Atlantic - Tele-Communications Inc. merger. The significance of this merger, according to Read,
was that it should help motivate the changing of dated communications laws.\textsuperscript{264} It will probably not be surprising to see new defining events arise over the next few years with regard to telecommunications. The 1996 BT-MCI merger appeared to be such a 'defining event' and quite possibly of the decade. In such a case it could be as symbolic as the AT&T divestiture has previously been to communications observers. However, events may move beyond this interpretation. Following disagreeable financial reports in the early summer of 1997, BT began re-evaluating its relationship with MCI - despite Concert's approval from regulators. A bidding war began with the American company WorldCom over MCI. A change in partnerships not only disrupts the corporate plans of BT, but increases speculation about the shape of the telecoms industry and leading players in it. Nevertheless, the formation and approval of the trans-Atlantic company Concert was significant in so far as it was among the first alliances and the first to take the step towards a full merger.

4.4.6 Converging Telecommunications Providers

Sir Ian Vallance (BT's co-chairman at the time of the BT-MCI merger announcement) symbolically claimed the merger was not merely a pebble being dropped into water but a rock.\textsuperscript{265} This colourful imagery continues to reflect popular opinion about the significance of the event. Rivals have attempted to portray a relaxed image in their responses to the deal. Richard Brown, chief executive of Cable & Wireless was claimed to be "...neither surprised nor 'frightened' by the merger between BT and MCI."\textsuperscript{266} Deutsche Telekom's Ron Sommer claimed to be "relaxed" about the merger.\textsuperscript{267} However, according to the Financial Times;

"The company may have good reason ... to play down the implications of the new global partnership."

Others were less publicly reserved. AT&T claimed any acceptance by regulators of the deal should be questionable.\textsuperscript{269}
With mounting debts there is the risk of investors not wanting to make further stock purchases of the recently floated Deutsche Telekom. The BT-MCI merger in addition to other alliances in the telecommunications industry may cause DT to increase its spending to remain competitive.\textsuperscript{270} This is an effect of the consequence of competition law. More importantly in this particular instance, it is an effect which should be of concern when attempting to begin competition within a market. Although the health of a company should not necessarily be of concern to competition law, it should raise some questions about the permissiveness of the law with regard to mergers and other alliances in the early stages of liberalisation.

BT's public admission that it is ambitious to be a global supercarrier\textsuperscript{271} is the source for BT's scramble for partners, and the cause of worry for weaker rivals. BT is also seeking partnerships in France, Germany, the Netherlands, Spain\textsuperscript{272} and Asia. The European ventures "...attack the state-controlled monopolies...",\textsuperscript{273} while Asia would add significant strength to BT's global character. BT nevertheless would have benefited by MCI's 40 per cent claim to US-Asia telecom traffic.\textsuperscript{274}

Earlier in the year, BT had sought a deal with Cable & Wireless. This deal would have helped fill the weak Asian link in BT's global ambitions.\textsuperscript{275} Cable & Wireless, claimed Richard Brown is the "...one truly global telecom..." with coverage of at least 55 countries.\textsuperscript{276} However, one observer claimed regardless of BT's relationship with Cable & Wireless, BT would have had to merge with MCI.\textsuperscript{277} It was suggested that it would have been better for BT if it had first merged with Cable & Wireless.\textsuperscript{278} With Asia as the current weak link in BT's global chain (network), another alternative is a deal with Japan's largest telecom firm NTT.\textsuperscript{279} The attraction of Asia is twofold. First it is a piece of the global network BT and others need to fulfil global ambitions. Secondly, local Asian telecom companies are reported to be weak, creating a general advantage for market power for firms like BT or AT&T. The collapse of relations with MCI, threatens the company Concert, and also BT's
ambitions. With MCI removed from BT's plans, other partners would be required to fill its place.

In comparison with Cable & Wireless' claim above, the merger would have created a telecom firm operating in 70 countries, providing a range of services to appeal to multinational corporations. The benefits to BT and MCI of the merger extended beyond connecting political boundaries into the local market of the United States. This was not just an additional market, but was another component to producing a seamless 'one-stop-shopping' telecom service provider for the user. There was even the suggestion that some of the traditional local telecoms in the US might have been tempted to join BT-MCI. NYNEX and Bell Atlantic (which merged to form Bell Atlantic in August 1997) were suggested to be the best match.

Connections are, though an important part, only one aspect of the wider telecommunications game. The ability to provide Internet and data services is also important. They are demanded by the corporate consumer.

As strategic alliances and mergers between telecommunications form, covering weak areas and links, connecting countries and the international market with local markets into single entities, competition between the alliances and mergers should - in theory - reduce prices and increase efficiency. A decrease in prices, should, again in theory, encourage usage. Increase in usage then encourages innovation and demand for more service. Despite the fact that prices have fallen over time, especially in the long-distance market and also especially in the United States and Britain (since competition was introduced in the 1980s), prices have not fallen low enough to meet the natural cost of a call. This disrupts basic classical economic theory. According to AT&T's Merrill Tutton, the cost of a long-distance call is 1000th of the cost in the 1950s. Prices however, have not fallen as much. He cited the example that a call between London and New York is cheaper than between London and Paris or
Frankfurt and London - the latter two are obviously closer in proximity than the first example.\textsuperscript{282} This, he argues, is because competition has not been introduced.\textsuperscript{283} This is a common criticism from AT&T of the EC's market.\textsuperscript{284} The reverse of the coin is that competition and potential competition may be under threat by such strategic alliances including Unisource and Uniworld.

Cable & Wireless's Richard Brown is quoted as saying:

"I don't think the world is well served by five or six telecoms companies. There will be many and there will be rich expertise in various niche markets and capabilities and this will be good. No one shoe fits all."\textsuperscript{285}

This was said in response to the suggestion that only a few telecom firms will remain in the form of mega-mergers. Other people concerned with the industry believe otherwise, as stated earlier. The question that will only be answered with time, is what kind of pressure has resulted from the BT-MCI merger.

France Telecom and Deutsche Telekom have claimed their Global One alliance with Sprint will not result in a merger because of a different structure from Concert.\textsuperscript{286} One opinion was that Global One lacks "... the same degree of coherence..." in their strategy.\textsuperscript{287} It was been suggested that members were "...pursuing their own international agendas".\textsuperscript{288} Such alleged variations of structure and strategy will no doubt determine the fate of the alliances and even the firms; yet at what risk is competition? If the trend becomes one of mergers or tightly-knit alliances that may be regarded as quasi-mergers, then there is the risk of competition being short-lived. As Brown is quoted stating above, the world would not be well served by a few firms. What he appears to be suggesting is a recognition for a need of alliances, but with some independence. Under such a scenario, competition is maintained. One question though is, how feasible is cohabitation? The marriage of BT-MCI was to ensure MCI would not find a more attractive partner and defect to another alliance, as a German partner of BT did in October (1996).\textsuperscript{289}
The merger required approval from American, EC and UK regulators. This decision was not expected until the autumn of 1997 but in fact was given in late spring. Whether or not it will still be regarded as a 'defining event' which affected the direction of the telecommunications industrial structure is at present a matter for speculation. One can still expect the United States to demand UK and EC markets to be opened more than they have been. Yet, American authorities should be expected to give greater openness in return. As Noam wrote at the time of the merger announcement:

"It would be hypocritical and counterproductive for the United States to oppose the MCI merger after pressuring other countries to lower their barriers to American telecommunications investments."

It was ironic that the marriage was between a former monopoly and a monopoly-buster.

4.4.7 Oligopolies Under EC Law

The formation of the Merger Regulation should provide greater clarification for the rules of Articles 85 and 86 concerning competition. Those Articles are more 'behavioural' oriented than the Merger Regulation, which is concerned more with market or industry structure. This is evident in the development of two separate concepts; the concept of concerted practice and the concept of joint or collective dominance. According to one lawyer:

"The concept of concerted practice is now, through a substantial amount of case law developed by the European Commission, the European Court of Justice ('ECJ') and more recently the Court of First Instance ('CFI'), well established and reasonably well defined. However, that of joint dominance is still at its earliest stages of development and inevitably lacks clarity: indeed, it would appear that two distinct forms of joint dominance analysis are developing...."
One form is purported to fall under Article 86 in connection with the abuse of a dominant position. The second is applicable under the Merger Regulation regarding control of concentrations. In practice the behaviour as opposed to structure of oligopolies (or more precisely the subject of collective dominance) was regulated by EC authorities. The EC (i.e. the Commission and the European Court of Justice) has not had a history of a developed concept of collective dominance. The application of collective joint dominance under Article 86 has been limited and is still in development compared with the concept of concerted practice under Article 85(1). The Nestle/Perrier case was the first occasion in which collective dominance was applied under the Merger Regulation.

"The Commission determined that Article 2(3) allows a concentration to be declared incompatible with the common market where a collective dominant position is created or strengthened, as a result of which effective competition would be significantly impeded. The case marks a departure from the early practice under the Merger regulation in which the countervailing power of other suppliers in narrow oligopolistic markets was cited as a ground for not finding dominance."

The concept 'collective dominance' according to Winckler and Hansen, "...does not have a specific significance in economic literature. It is a concept developed from analysis of behaviour in oligopolistic markets where a limited number of firms are able jointly to exercise market power". The definition of a dominant position in the Hoffman-La Roche case formed a distinction between "parallel courses of conduct which are peculiar to oligopolies", emphasising there may exist an interaction within the nature of oligopolies, and "an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position". This is a conduct test - a behaviour test, separating the action of a firm in a position of dominance and abusing such power from a firm in a position of
dominance on the basis of the oligopolistic structure of the market or industry. The ECJ in *Hoffman-La Roche* held that an oligopoly (with non-collusive parallel behaviour) fell outside of Article 86. While the definition in the case was more single-dominance oriented than joint/collective dominance two other pre-Merger Regulation cases are interesting in so far as the EC's approach to oligopolies. Schodermeier summarised:

"In the Flat Glass case, the Commission relied on a structural link-up between the oligopolists in order to find joint dominance while in the Magill TV Guide case it put the emphasis on the fact that the dominating enterprises did not compete with each other and that third parties therefore found themselves in a position of economic dependence." 

Inspite of these two cases which, separately, recognise a distinction between structural and non-structural oligopoly, the Merger regulation which followed "...does not contain a legal presumption of the existence of a collective dominant oligopoly as soon as certain companies attain a certain combined marketshare ...." 

This case specifically brought into question the notion of collective or oligopolistic dominance and the Merger Regulation's interpretation of it. The ECJ ruled that to presume an existence of collective dominance through the application of the Merger Regulation would reverse the burden of proof. The Commission (the plaintiff) must prove effective competition would be impaired because of "structural grounds between the leading companies in a highly concentrated market." Morgan encapsulated the importance of an effective merger regulation regarding oligopolies. She stated:

"The main aim of the regulation is the maintenance of effective competition. Economic theory suggests that competition can be jeopardised not only by the market power of a single firm but also by the avoidance of active competition by two or more oligopolistic firms... If the control of mergers
involving oligopolistic dependence is judged outside of the scope of the EC regulation, it would leave a gap in European competition policy." 

Morgan uses what she called "an extreme example" to prove her point. "[T]his would apparently leave the Commission unable to act in the face of a merger between two firms with 26% and 24% of the market respectively if the other company had a 51% share; the merged entity would not dominate the market because it would not be the largest supplier yet its position would raise severe concern about the effect on competition." 

Thus the question raised asks, if there is a provision (e.g. through the Merger Regulation) to object to oligopoly-formation, what means is best for oligopoly interpretation? Ridyard noted:

"[T]he compatibility test contained in Article 2(3) of the Regulation allows the Commission to object to mergers of and only if they create or strengthen a dominant position, the most natural interpretation is that the regulation exists to prevent single firms from achieving a position of market dominance. ... [H]owever, that a merger control that was confined strictly to this narrow objective would contain a serious blind spot when it came to mergers in highly concentrated oligopolistic markets." 

There are three different approaches which may be applied. One is the American system of the Herfindahl - Herschman Index (HHI), the German concentration presumption and the United Kingdom's 'public interest' declaration. Future oligopoly tests will be affected by the Nestle/Perrier case which was an effort by the Commission to overcome the blind spot. Nestle/Perrier was the first case to be challenged with oligopoly concerns since the Merger Regulation's implementation. As Juan F. Briones Alonso independently wrote about this case while he was in the Commission:
"The first merger case on oligopolistic domination offers useful insights on how the Commission intends to apply this concept." 315

The Commission used this case to widen Article 2(3)'s position about dominance to include oligopolistic dominance. Although this was also used (though unsuccessfully) in Alcatel/AEG Kabel, the Nestle/Perrier case was the first case in which the term was used where the merger was declared incompatible with the Common Market. As one EC Commission official stated:

"In its Nestle/Perrier Decision, the Commission explicitly decided to incorporate the analysis of oligopolistic markets into its merger control system. ...Subject to a possible sentence of the Court of justice to the contrary, oligopolies are now an established feature of the Commission's policy." 316

There is however, uncertainty among commentators about how successful the Commission and the ECJ will be with their new collective dominance doctrine. Despite the apparent landmark case Nestle/Perrier is with regard to oligopolies,317 the lack of some form of codification in the form of guidelines or checklist of factors for assessing oligopolies318 leaves questions about reliability and predictability about the 'qualitative' standards which have been used.319 One reason given for the under-developed means for prediction and certainty is given by Winckler and Hansen:

"This may be due to the relatively recent adoption of the Merger regulation and the novelty of the collective dominance doctrine in EC merger control. The difficulty in reconciling the many decisions under the Merger regulation may be due to the 'learning by doing' process the Commission is going through." 320

The current principle the EC authorities follow is that;

"...there is no presumption of dominance built on threshold's of supply concentration or any other parameter. This acknowledges the fact that oligopolistic structures of supply are consistent with both competitive
markets and dominance, and that no single parameter will allow one to be
differentiated from the other." 321

In other words the burden of proof rests on the plaintiff (in most cases this has been
and will probably be the Commission) as the case cited above, Alcatel/AEG Kabel.
In addition to this approach is the Commission's analysis of cases individually with an
examination of the specific market conditions. This approach acknowledges different
markets and industries have different factors regarding competition.322

4.5 Summary

The restructuring of the telecommunications industry is an opportunity to re-examine
and indeed seek to correct the failings of competition law with regard to the aversion
of anti-competitive practices. Competition theory seems to suppose the existence of
(near-) perfect markets, yet there is often in practice a trend towards either
concentrated or oligopolistic markets. Why then are the laws not more focused
towards the real rather than the ideal marketplace? True, there are laws regulating
the abuse of a dominant position, and agencies such as the EC Commission or the
FCC (US) which give approval to merger and other such alliances. However the
assumption of perfect market conditions might mislead judicial interpretations. The
problem is perhaps how to adequately deal with oligopolies: for not all oligopolies
are necessarily anti-competitive, while others are. So, instead it is perhaps easier to
assume idealistic market conditions in order to regulate, as well as to regulate
towards achieving such an ideal situation. Although oligopolies are not only
interesting, but also a concern for a system based on competition, the problem may
not entirely lie with the fact that oligopolies exist. Rather, the problem can be about
how such a situation arose in the first place; Was it natural, or could something have
been done?

This is an interesting area, especially in regard to telecommunications. First, there
seems to be a need for alliances between firms to cope with the technological,
political and consumer-demand changes. This might also be socially desirable because of the changes and demands placed on these firms. Secondly though, there is the matter of consequences. How loose are these alliances so as to maintain the competitive-potential? Do closer relations such as mergers unnecessarily risk leading to an ultimately oligopolistic and even concentrative industry, whereby earlier intervention or discouragement might have avoided such a situation? Then there is always the argument that in the long term the market cannot sustain the existence of a number of firms, and therefore an oligopolistic situation is more efficient and preferable. This returns the focus of the question back to asking why are perfect markets assumed or preferred in the first place. Also, there might be the argument that telecom firms as we have known them will naturally evolve into entirely new entities, with some separation in the long term of corporate activities such as infrastructure and services, because of economics.

These are all matters of debate in the changing telecommunications environment in conjunction with legal problems that need addressing. On the one hand, if everything was left to their 'natural' course, the result could be unfavourable in regards to the competitive system many societies espouse. Alternatively, can the law be expected to predict much of the future? Recent (neo-classical) competition legal theories sought to address this problem. This leaves the law as a mechanism to influence events in order to prevent undesirable consequences. To achieve this, a greater understanding of mergers and other alliances, and particularly oligopolies, interwoven into the foundation of legal principles would benefit judicial review of markets. This then begs one to question if the EC's presumption against sector dominance is a viable approach, and is a matter which should be part of a competition law and policy review.
ENDNOTES


3. The emphasis is on the term historically, because the laws were founded on the concern over dominating trusts in nineteenth century America. (Also consider within the same context endnote 4).

4. Behaviour is used to distinguish between the more social and value - oriented EC approach, compared with the US. Furthermore, the principles of an open and integrated market and is a fundamental principle of EC competition law. Furthermore, 'fairness' has been a consideration in EC law and this would complement 'behaviour' as opposed to the economic-centric approach and the concern about the competitive system and not the competitors (and therefore structure) in the US marketplace. (see B. Hawk, 'The American (Anti-trust) Revolution: Lessons for the EEC?' [1988] ECLR 53, p. 56-57.)

5. see endnote 4; also Hawk, op. cit.


8. also see Ibid., p. 26.


10. Ibid.


12. Ibid., p. 27.

13. Ibid.


17. Ibid.


20. Ibid., p.22.


25. Alt., op. cit., p.9.1, 9.3


29. Johnson et al., op. cit., p. 20.


31. also see Johnson et al, op. cit., p. 24.


33. Ibid.
34. Ibid.


37. Ibid.


40. Tutton, op. cit., p. 10.1.


42. Alt., op. cit., p. 9.1.

43. Ibid.

44. A. Cane, 'How the Local Loop Becomes a Devastating Weapon' Financial Times, International Telecommunications Survey, October 1995, p. 17

45. Alt, op. cit., p. 9.1


50. Ibid.

51. Pena Castellot, p. 2.

52. Telefónica of Spain was an original member, but has departed the group to establish a connection with Unisource's rival Concert and the company BT.

54. Ibid.


57. (AT&T reported this figure to be 48,000 at the end of 1995 - AT&T's Global Presence:An Overview http://www.att.com).

58. Ibid.

59. AT&T began providing services in 1996.

60. 'AT&T in Europe', http://www.att.com


62. 'AT&T in Europe', http://www.att.com


64. Ibid.

65. British Telecommunications plc and MCI (Case IV/34.857), [1995] 5 CMLR 285; op.cit., also see Ibid.

66. Ibid., p.291.

67. Ibid.

68. Ibid., p. 291-292

69. interview with Tim Cowen at BT, 22 January 1996.

70. Ibid.


72. Ibid.


76. Ibid., p.315 para 59

77. Ibid.


79. Ibid.


81. Ibid., p. 315, para 59.

82. Ibid.

83. Ibid., p. 315-316 para 60.

84. Ibid.

85. Ibid.

86. Ibid.

87. see below.

88. 'Euromerger Would Create Euromonster', Sunday Times, 14 November 1993, p.2 Sect.3.


90. Ibid.


92. Ibid.


97. Ibid.


99. Ibid.

100. R. Rudd, op. cit.


103. Phoenix evolved to become Global One.


105. Ibid.


108. Ibid.


112. Such an expansion though, at least in the early years of telecoms liberalisation, would create a telecoms company of two incumbent EC TOs; A "Euro-champion" would be created, yet also raise concerns over dominance as DT and FT are among the largest telecoms companies in the EC at the time of writing.

114. B. Netzer op. cit., citing Helmut von Sydow.


116. Ibid.

117. Ibid.

118. Netzer op. cit., citing Helmut von Sydow.

119. Cited in Winkler and Hansen CML Rev 1993 Vol. 30 No. 4 p. 791-792


121. It is vague in the sense that it is not placed in a definitive position such as a monopoly, and it has conflicting attributes; in effect the term is a dychotomy which may result in ambiguous situations.


125. Ibid.


130. Burke, Genn-Bash, and Haines, op. cit., p. 54.

132. Ibid.


137. Ibid.

138. Ibid., p. 118-119.

139. Sullivan, op. cit., p. 344

140. The EC Commision published a Green Paper for the review of the Merger Regulation proposing discussions concerning procedural, threshold, notification and calculated turn-over aspects. It has been decided that analysis on these topics extends beyond the frame of this thesis largely because, and generally speaking, the decisions concerning this matter are politically arbitrary. This should not affect the thesis's examination of principles, theories and their application. The Green Paper requested all comments be submitted by 31 March 1996.


143. 'Memorandum on the Problem of Concentration in the Common Market' Competition Series, Study No.3, Brussels, 1966 - claimed Article 86 was applicable to merger control in certain circumstances. also see: Brittan (below) p.27).

144. Pathak op. cit., p. 119.


147. The two are more coincidental than related.
148. see for example the opinions in Johnson, *et al*, op. cit.


151. Ibid.

152. see Craig and De Burca; also Sullivan op.cit.

153. Craig & De Burca, p. 979.

154. Ibid., p. 980-981.


157. Ibid.; also see Whish op. cit. p.664.

158. Craig and De Burca, op. cit., p. 983.

159. also cited by Craig & De Burca, op. cit., p. 983.


162. Ibid.

163. Ibid.


167. Whish op.cit. p.273. Furthermore, Whish's opinion of this particular case is of interest (if not, entertaining). "The ECJ's judgement ... is a classic example of EEC jurisprudence. Whether one agrees with it or not the reasoning and conclusions are
remarkable, particularly to the English lawyer attuned to the inductive shifts of the Common law."


169. Ibid. p. 57.

170. Ibid.


173. Ibid. at 276.


175. Craig & De Burca, p. 984

176. Ibid.


179. Czinkota et al., op. cit., p. 460.


182. Ibid., p. 455.


186. Ibid.


190. Notice of the Commission on Concentrative and Co-operative Joint Ventures [1990] OJ C203/10, 16 February 1993; The Notice is not binding but it is a document beneficial for further understanding and interpretation of the Commission's philosophy.

191. Ibid. para 5.


194. Ibid., para 20-36; also Whish, op. cit. p. 712.


197. Ibid. 241; also see Commission Notice on Concentrative and Co-operative Joint Venture op.cit.


199. Ibid.

200. Ibid.

201. Brown, op.cit., 245; Brown cites Volvo/Atlas where the shareholders agreement was valid for five years, after which it could be renewed on a three year basis: at footnote number 33.


203. Ibid., para 8.

204. Brau und Brunnen AG and Cadbury Schweppes plc (Re Joint Venture between...) (Case IV/M093), [1992] 4 CMLR M78, 24 June 1991; also Pathak 182.

206. Ibid., part II sect.1.

207. Ibid., para 36.

208. Ibid., para 37.

209. Ibid., para 38.

210. Ibid., p. 39.

211. Ibid., para40.

212. Ibid., para 42.


215. Ibid., para 27, section 2 number 2(a).

216. Ibid., para 168 Part II section B(1).

217. Ibid., para 47.

218. Ibid. at 170 Part 2 B(2).

219. Ibid. para 48.

220. Ibid. para 50.

221. Ibid. para 57.

222. Ibid. para 58.

223. Ibid. para 67.


225. Ibid. at 838.


228. Ibid. para 68.

229. see Ibid. para 70.

230. Ibid. at 50.


233. see above at *Case IV/35. 617 Re Phoenix/Global One: The Agreements between France Telecom, Deutsche Telekom AG and Sprint Corporation* 96/547/EC. [1997] 4 CMLR 147.


235. Ibid.


238. Ibid.

239. Ibid., p. 55-576.


241. Ibid.


243. Ibid.


249. Ibid., p. 516-517.


251. Pena Castellot, op. cit., p.3.

252. Ibid.


254. Ibid p. 671.

255. Ibid., footnote #12.

256. Riordan and Salop, op. cit., p. 517.

257. 94/579/EC para.6.

258. Ibid., para.7.


260. Ibid.


264. Ibid.

266. 'The Pressure Mounts on Rivals to React', *Financial Times*, 5 November 1996 p.28.

267. Ibid.

268. Ibid.


270. Ibid.


272. Ibid.

273. Ibid.

274. BBC Radio 4 op.cit.

275. A. Cane, 'A Telecom Titan on the Line' op.cit.

276. BBC Radio 4 op.cit.

277. Ibid.

278. Ibid.

279. www.ft.com; also www.reuters.com


282. Radio 4 op.cit.

283. Ibid. also see: 'Wake-Up Call', *Businessweek*, 20 December 1993, p.40.

284. Ibid.


286. Ibid.

288. Ibid.


290. This is reported to be the earliest for at least one of the regulators to make an announcement. See: Eric Reguly, 'US May Holdup BT Merger', The Times, 6 November 1996 p.25.

291. Moss, op.cit.


295. Ibid.


299. Ibid.

300. Winckler & Hansen, op.cit., p. 788.


302. Ibid.


304. Schodemeier, op.cit., p.28.


306. Ibid. also cited by Winckler&Hansen.

308. Ibid., footnote #17.


311. Morgan, op. cit., p. 213; Ridyard, op. cit., p. 258.


313. Ridyard, op. cit., p. 258.


320. Ibid. p. 827.


322. Ibid.
CHAPTER FIVE

Safeguarding Competition in Modern Telecommunications

5.1 Introduction

This chapter addresses the EC's approach to protecting competition in telecommunications and responding to the structural contradictions which the industry presents to a truly competitive market. Attention has already been given in this thesis to the formation of alliances, including joint ventures and mergers. In this chapter, the emphasis is placed on the behaviour of companies and the threat to competition in the telecommunications industry. The particular nature of telecommunications raises some problems for ensuring a competitive system in the telecommunications market. This is especially the case at a time when the market is very much in a stage of transition: a change from nation-wide monopoly to competition, and from basic communication to a multi-communication fabric of modern society and industry. During this period, there are ample opportunities to disadvantage and exclude new competitors by those already established (e.g. former Public Telecommunications Operators) in the market.

Among the areas discussed are infrastructure, its control, access and alternatives. There is also the matter of universal service, originally a reason for allowing a monopolistic regime for telecommunications. Now it is something that has become a part of public policy and quite possibly regarded as a 'right' along with other Western-based liberties including freedom of speech and expression.

These practical conflicts incorporate legal concerns about the domination and control of infrastructures and network access, including entry barriers and predation.
There are also the continuing problems with regard to the interpretation of competition law. Among the criticisms of EC law is an examination of arguments favouring an American style approach to EC law through *per se* rules and rules of reason. These would allow technically anti-competitive behaviour because of the actual benefit(s) such actions would have, in this case, for the telecommunications industry and the developing information society.

The chapter's structure begins with Article 85, which is one of the EC's legal tools in regulating competitive behaviour. Following this, areas in telecommunications in which behavioural problems can occur are addressed: namely in infrastructure and network competition. Among these include matters of entry barriers, the theme of essential access, predation, tying and lastly alternative telecommunications providers.

### 5.2 Article 85: Managing Competitive Behaviour

Article 85 (EEC) has been described as; "...the principle weapon to control anti-competitive behaviour..." The Article states:

"The following shall be prohibited as incompatible with the common market:
all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, technical development, or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other
parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."²

Both competition law Articles 85 and 86 were referred to in the Green Paper that initiated the liberalisation of telecommunications. The 1987 Green Paper³ for a common telecommunications market in services and equipment proposed:

"(H) strict continuous review of operational (commercial) activities of telecommunications administrations according to Articles 85, 86 and 90 EEC....

(J) strict continuous review of all private providers in the newly opened sectors according to articles 85 and 86, in order to avoid the abuse of dominant positions...."⁴

The Commission outlined its intentions in the Green Paper which were further supported by the Commission publishing a *Notice on Telecommunications (Antitrust) Guidelines*.⁵ The Commission explained these Guidelines were principally concerned with the application of competition rules to undertakings; thus forming a distinction between the competitive markets being established and the special privileges permitted by way of Articles 5 and 90(1) & (3). The competition rules applicable to undertakings in telecommunications are those which apply to competitive markets that are not concerned with the telecoms sector (i.e. the standard Articles 85 and 86 EEC).⁶ The Commission through its Guidelines stated:

"Articles 85 and 86 apply directly and throughout the Community to all undertakings, whether public or private, on equal terms and to the same extent, apart from the exception provided in Article 90(2) ... Therefore Article 85 and 86 apply both to private enterprises and public telecommunications administrations and recognised private operating agencies...."⁷
Article 85 does not define the term 'undertaking', nor does the EEC Treaty. However, the term may be understood from a number of sources. Whish wrote:

"Given the policy of Article 85 it would seem in principle that any natural or legal person, of whatever juridical character, capable of carrying on some commercial or economic activity in the goods or services sector should qualify as an undertaking...." 8

Korah stated the term was a broad concept and as in Article 86:

"It covers any collection of resources to carry out economic activities. It embraces a company partnership, sole trader or an association whether or not dealing with its members. Even inventors and artists have been treated by the Commission as undertakings when they are exploiting their inventions or performances. A trust company authorised to police a cartel was held by the Commission to be an undertaking." 9

In the case known as Polypropylene 10 'undertakings' was not narrowly limited to organisations having legal personality, but rather a broader understanding of it was used to include any entity which was engaged in a commercial activity.11 Thus a private individual to a state corporation or organisation is an undertaking.12 Importantly, case law shows that neither the Commission nor the ECJ have demonstrated any intention to adopting a narrow meaning of 'undertaking'.13

In comparison with American antitrust law, specifically Section 1 of the Sherman Act, Article 85 (EEC) "...reveals on the one hand a considerable degree of correspondence and on the other hand fundamental differences."14 Helmuth Schroter stated:

"Both provisions are roughly speaking, aimed at promoting competition, but the latter word no longer has the same meaning under the U.S. and EEC antitrust rules, because the respective policies have drifted in different
Although written a decade ago, differences between American and EC approaches continue. In the instance of the United States recent antitrust interpretation has been concerned more with economic efficiency. However as Korah wrote: "Even if economic efficiency defined in terms of consumer welfare be the only objective of antitrust, there are problems in applying the policy to factual situations." 16

The EC's approach has traditionally been more interventionist in so far as the stated aims of the EEC Treaty's preamble are concerned. Such aims are, in regard to recent American Chicago School legal philosophy, too vague.17 Article 85 is a competition rule to prevent restrictive trading practices obstructing a common market. This is to prevent private trading agreements resurrecting the commercial barriers defined by political boundaries the EEC Treaty aims to eliminate. This principle alone affects how philosophies such as the Chicago School's efficiency ideals can be adapted. By the very nature of this legislative intervention attempts to adopt the American efficiency ideals may conflict with EC law. However, the centre of EC competition policy, similar to the original nature of the American Sherman Act, is also to act against cartels.18 Secondly the abolishing of political boundaries and thereby form a common market also has the political motive to create a European market, as Korah stated; "...to obtain economies of scale similar to those achieved in North America, without creating unduly concentrated markets."19

Significantly, Article 85 may be breached if either the purpose or the effect of an agreement limits competition in the EC. This does not mean an agreement needs to be made in the EC, but the effect is in the EC for Article 85 to be used by the ECJ.20 The issue of 'efficiency' is an objective which is important.21 The differences between the EC and the US may be said to be as follows: "Europe is divided by legal and cultural factors in a way that the U.S.A. is not." 22
Thus the approach to competition law is different not only by simple philosophical ideals, but also by some very practical problems. In effect the EC is attempting a balancing act through, 1) developing a common market among established nation-states and 2) attempting to open markets such as telecommunications to the competitive process.

There is one comment made by Korah which could be argued to be important in the present and early stages liberalising telecommunications for both the EC and the United States. She stated in the context of the EC's policy towards competition enforcement: "Efficiency is...not the only or even the most important objective." In the context of telecommunications, telecommunications as an international industry and international corporations and business in general, this statement is also important if cartels are deemed anti-competitive.

The XIVth Report on Competition by the Commission states:

"[C]ompetition can be expected to perform three functions...: a resource allocative function, by encouraging better use of available factors of production, so that firms' technical efficiency is increased and consumers' wants better satisfied; an incentive function, by stimulating firm to better their performance relative to their competitors; and an innovative function, by encouraging the introduction of new products in markets and the development of new production processes and distribution techniques." 24

However, such a policy in the EC is subject to the goal of: "...the creation of a single market achieving conditions similar to those of a domestic market." 25 This goal of a single market as a whole (or in the particular context of this thesis, telecommunications), not only has contradictory elements when compared with other systems such as the American antitrust laws, but also contain specific concerns. An
important one, and one which could have development-potential with regard to telecommunications, is the interpretation of competition legislation. This is a subject of potential interest because of the ambiguous nature of telecommunications -or at least the social-political approach to the industry and regard of its importance. On the one hand liberalisation and competition are sought, while on the other exemptions are permissible in the interests of developing an EC-wide market and social objectives under the EEC Treaty and its successors.

5.2.1 Rule of Reason and Per Se Rule

There may be a valid argument for agreements, ventures or other restraints of trade. In some instances of co-operation or behaviour might result in efficiency or consumer benefits, but under competition law be technically illegal. This may especially be the case in telecommunications due to the technical, physical and practical nature of the industry and market. Some consideration of rules that permit actions or behaviour that might otherwise be illegal could be beneficial.

Two concepts in judicial interpretation of antitrust law (in the United States) are the rule of reason and the per se rule. These are relevant to EC law in so far as they could be considered as a means in altering the traditional interpretation of EC competition law. Some commentators have argued these should be introduced for a more efficiency-based law. Others have argued against such an adoption. In the United States some agreements may breach Section 1 of the Sherman Act per se. However, other agreements require the rule of reason test to determine whether or not they are anti-competitive.

The rule of reason, ("the guiding principle of Sherman Act construction") has been said to be difficult to define and its meaning has really been developed through case-law. Furthermore its interpretation has been both broad and narrow in its application over time, because different courts had different problems at different
times. Waller explained:

"The rule of reason in U.S. antitrust law is a rule of construction of Section 1 of the Sherman Act, which was developed to avoid the harmful and unintended potential for a statute which appears on its face to prohibit all restraints of trade. When read against the common law background of the Sherman Act would be interpreted to prohibit only those restraints which, on balance, unreasonably restrain competitive effect of the agreement under examination, and not whether collusion was reasonable in order to promote some other societal goal."

Article 85 however, is structurally different with the intention of weighing the effects of both pro- and anti-competitive agreements. Under Article 85(3) agreements may be exempted from anti-competition enforcement. This allows for greater predictability and especially a more uniform interpretation. Since Article 85(1) captures all agreements that are intended or have the effect of restructuring competition, Craig and De Burca note this creates two problems. The first is that all contracts by their very nature are restrictive in some form of competition and therefore would be caught by competition law. The second problem is that an agreement may not only restrict competition, but also enhance it simultaneously.

For example, X may enter a market and use Y for distribution. Y may want incentives and protection to cover the risk involved especially if it is a new product. Therefore a restrictive trade agreement could be established whereby X guarantees not to use any other distributor in that territory. While the restrictive nature of the agreement is obvious, the competitive element is the introduction of a new product and/or market. Others, if it is deemed profitable, will according to economic theory then be encouraged by the market to enter and compete. There is a third problem of ambiguity and this relates to efficiency. Restrictive agreements may be advantageous, particularly with regard but not exclusively to cost/price efficiency for the consumer and social benefits. Telecommunications is a market that readily comes to mind.
Strategic alliances, joint ventures and licences are some examples whereby it may be socially and social-economically beneficial for such selective and restrictive agreements to exist.

In the United States the rule of reason is used to balance anti- and pro-competitive consequences. In this country the courts use economic analysis to examine agreements, and agreements that appear to breach Section 1 of the Sherman Act could be held to fall outside the law. Korah has been critical of the EC Commission and the Court in so far as their lack or limited use of economic analysis. Korah stated:

"It is often difficult to reconcile the Commission's conclusions under Article 85(1) with those under Article 85(3). Various ancillary restrictions necessary to make viable a transaction that may even increase competition are held to restrict competition contrary to Article 85(1) because they restrict the parties' freedom of action and have significant effects on the market. Yet, when granting the exemption the Commission describes them as 'necessary and reasonable' to make the transaction viable.

These views are not consistent. It is of the nature of contracts to restrict the parties' freedom of action. The Commission's reasoning suffices to catch all contracts that have significant effects on the market, whether they increase, decrease or do not affect competition.""37

Korah further states in another source:

"There is fear that European firms that may have to compete in world markets may fall behind technologically or have to merge completely, so as to reduce the risk of collaboration. Market analyses are difficult, especially for lawyers and bureaucrats. But if such analyses are not made, agreements that may have overall desirable consequences should not be controlled. This
means that national courts will have to be strong in resisting claims that agreements are anti-competitive just because some competitor is harmed.\textsuperscript{38}

The inappropriateness or inability of courts to assess complex economic matters has not been used as criticism aimed solely at the EC authorities. It has been suggested that the American courts also have difficulties, which may account for the \textit{per se} rule.\textsuperscript{39} The \textit{per se} rule is, "a rule of construction" and rule of evidence.\textsuperscript{40}

"It may be said that every restrictive practice that significantly impairs competition is illegal \textit{per se} in modern antitrust; evidence challenging the desirability of unimpaired competition is scarcely ever admissible. When the courts have agreed in recent years that a practice is not illegal \textit{per se}, this had not meant that they were prepared to judge each instance of the practice by reference to its effects on the public interest; it has meant only that the practice might not in every instance have a significant effect on competition at all."\textsuperscript{41}

Neale and Goyder assist in defining the difference between the \textit{rule of reason} and the \textit{per se} rule by claiming there really is not a substantive inconsistency between the two today.\textsuperscript{42} They explained that some writers have suggested that these two principles conflict. The conflict though appears only if the rule of reason involved a distinction between justifiable and unjustifiable restraints of trade. But, they explained, the \textit{rule of reason} in modern antitrust law is exercised by discretion only through questions of fact.\textsuperscript{43}

Whish on the other hand suggested there is some distinction, whereby some agreements infringe the \textit{rule of reason} while others require the use of the \textit{per se} rule.\textsuperscript{44} The problem he acknowledges, is the lack of a fixed, rigidly defined boundary between the two tests. Nevertheless, Whish stated a distinction between the two
rules is "of central importance in US antitrust".\textsuperscript{45} To add to the problem is the recognition that, "...agreements formerly subject to \textit{per se} illegality may as a result of judicial assessment become subject to a \textit{rule of reason} standard; there are some cases in which the courts appear to apply a hybridised approach."\textsuperscript{46} Another influential commentator claimed that the American courts were moving away from using the \textit{per se} rule to the \textit{rule of reason}, but this latter rule continues to be problematic. The result has been to formulate truncated \textit{rules of reason}. This reduces or eliminates the requirement of courts to investigate market analysis in great detail.\textsuperscript{47} The Supreme Court has found there to be little distinction or significant clarity between the \textit{per se} rule and the \textit{rule of reason}.\textsuperscript{48} Hawk stated:

"Two principal conclusions can be drawn about...recent US decisions. First, the line between the \textit{per se} rule and the \textit{rule of reason} is increasingly blurred with courts applying 'quick look' \textit{per se} rules and 'quick look' \textit{rules of reason}. Second, the major issue in the cases surrounds the circumstances in which inquiry into market power and market definition can be avoided. This issue is frequently addressed...particularly the definition of 'naked' restraints and the question whether 'naked' restraints are the only exception to the rule that market power (and market definition) are essentially elements of the \textit{rule of reason analysis}."\textsuperscript{49}

Hawk condemned the position of the EC, despite the increasing recognition of problems with the American system. Even though there continue to be problems in the American system, he claimed it is more favourable than "...the near anarchy under Article 85 engendered by inconsistent Commission and Court interpretations of restrictions of competition under Article 85(1) and the bifurcation of what ideally should be a single anti-trust analysis into the double tests of Article 85(1) and Article 85(3)."\textsuperscript{50} Hawk concluded:

"This maudite bifurcation presents a more serious obstacle to predictable and coherent rules than the current doctrinal confusion in the United States which
maybe a transitional phenomenon."

Prior to adopting or accepting such criticism, it is nevertheless important to keep in mind the differences between the US and the EC. In regard to the *per se* rule, there have been similar classifications of agreements which are technically illegal under both the Sherman Act and the EC's Article 85(1). In both instances it is also enough for the authorities to prove an agreement exists and not its adverse effects on competition. There, the parallels effectively end. As stated earlier some analysts have called for the application of detailed economic analysis to EC rules to determine the anti-competitiveness of agreements. Others, including Whish, suggest otherwise. The adoption of such American approaches under the *rule of reason* has been criticised as "too formalistic".

The differences in agendas and fundamental purposes behind American and EC competition law could suggest the need for different terminologies. While the problems and issues of markets, competition and anti-competitive behaviour may be similar if not the same, it may be more appropriate to use different terms to avoid the confusion of purpose and intent of the laws. In their article 'Article 85 and the Rule of Reason', Whish and Sufrin rejected the adoption of an American style *rule of reason* and called instead for the discarding of the term from EC terminology. (They also suggested discarding 'ancillary restraint' and 'per se illegality'). While EC competition law has a broader usage-base into other areas of law (e.g. free movement of goods), an important reason to discontinue the use of the term *rule of reason* (and *per se* rule) is because "...it invites misleading comparison with antitrust law analysis in the United States." (In regard to economic analysis, Whish and Sufrin called for improvements to be made on the part of the Commission but these should not necessarily be entirely connected with *rule of reason* analysis.)

A recurring criticism of Article 85 by advocates of an American-style approach
concerns Article 85(3). As cited above from Hawk, there is claimed to be a double test under Article 85 involving paragraphs (1) and (3). Hawk stated:

"[T]he bifurcation of Article 85 is the principal cause of the confusion about the definition of a restriction of competition under Article 85(1). Much of the analysis under the US rule of reason is reserved in the EEC for the exemption stage under Article 85(3)." 

Horspool and Korah wrote:

"Unlike the Sherman Act, Article 85(3) provides for exemption for agreements or classes of agreements that lead to the improvement of distribution or production or that promote technical or economic progress, while insuring that a fair share of the benefit is passed down to consumers. For the agreement to meet exemption, the restrictions of competition must be necessary to obtain the benefits and competition must not be distorted." 

However, while agreements under Article 85(2) are void automatically if they breach 85(1), Horspool and Korah elaborated upon their concerns about Article 85(3) in relation to 85(2).

"The problems are exacerbated by the Commission's practice of finding that any important restrictions of conduct restricts competition even when it treats it as an ancillary restraint necessary to make viable some transaction and exempts it under Article 85(3)."

This signifies the difference between the EC and the US approach to competition law. Waller also pointed out this difference, suggesting the language of Article 85(3) goes further than the American (rule of reason) practice. The EC competition law interpretation takes into consideration the promotion of the goals of the Community or other social concerns.

This is a significant difference to remember. Waller explained:

"While Article 85(3) is most often applied to exempt anticompetitive
agreements that further the goal of community integration and the transcendence of national markets, there is also more than a hint of industrial policy in its application. Exemptions have been used to achieve the reduction of capacity in certain industrial sectors...and strengthen the competitiveness of Community producers relative to outside producers.\textsuperscript{60}

Yet, while the debate about the appropriateness of adopting American methodology will undoubtedly continue, there may be a further consideration. This could suggest the existence of an EC model; a form of a \textit{rule of reason} may in fact be developing. However, as Whish and Sufrin contended, the use of the term \textit{rule of reason} may not be a helpful one. It might rather be a misleading term and consideration for a more suitable one could be beneficial. A thorough assessment of this could be beneficial particularly to the telecommunications market and the ambiguity in it in relation to (pure) competition.

5.3 Infrastructure

The liberalisation of telecommunications has not been interpreted or approached in a universal manner. The significant differences can be defined through those that emphasise service-based competition and those that encourage network or infrastructure competition as well. Despite the trend to introduce liberalised telecommunications markets, there have been few countries in which the network infrastructure has been (fully) open to competition. Although this appears to be changing, it has nevertheless been a policy of controversy.\textsuperscript{61} Stehmann and Borthwick explained:

"The USA has led the way in liberalising both the network infrastructure and services while, apart from the UK, the European Community opted for competition in services alone. The Community's approach towards service-based competition will reach its final stage with the liberalisation of public voice telephony in 1998."\textsuperscript{62}
The technological developments which have also occurred during (and since) the initial political changes to operating the telecommunications industry have been described as having "...had a profound impact on the provision of telecommunications services". Mosteshar stated:

"This has led to a position where an increasing number of services can be operated independently of the operation of the network infrastructure, making telecommunications tradable in their own right. Furthermore, the provision of services, unlike the provision of telecommunications network infrastructures, does not require a physical presence of the provider in the geographical area where the services are provided."

A significance of this is that a common market may be created (within the EC for example) of such services. This also allows in principle for the separation of network infrastructure provisions from telecommunications services, thereby removing the need for the state to be involved or a monopoly over telecommunications as a whole. Exclusive or special rights granted for network infrastructure has not exempted it from EC Competition Law. Article 90 of the Treaty of Rome exists to control abuse of such privileged positions, particularly when other telecom firms wish to use or even have little choice but to use the infrastructure of the firm holding such privileged rights of control. With the introduction of competition and the liberalisation of telecommunications, the question why such exclusive or special rights should remain in telecommunications is an interesting one. Such an approach has not been uniformly adopted by liberalising states. The United States formally abolished network monopolies in 1982. Until recently, the United Kingdom has had a duopoly since a licence was granted to Mercury. The European Parliament stated:

"Unlike the United Kingdom Government, which regards network expansion enhancement (e.g. conversion to fibre-optic cabling) as a purely commercial concern for telecommunications businesses, the Commission takes the view
that the Member States should be responsible for providing an integrated and efficient network infrastructure, in both the short and long terms, as the basis for optimised Community and world-wide communications services. This principle is endorsed by the overwhelming majority of Member States; the trend is towards maintaining exclusive powers for a single telecommunications administration or a limited number of non-competing regional administrations.\textsuperscript{66}

The consequence of this approach is anti-competitive \textit{de facto} and \textit{de jure}, because Member State telecom firms could not establish rival networks in other Member States who choose to effectively retain a closed network market. National support for retaining exclusive control over the networks, again, can be understood as a purely political one in terms of power and revenue. Secondly there is the want to maintain the provision of universal service, supported by opinion that the state is better able to provide and guarantee universal service than a competitive market.\textsuperscript{67} A distinction needs to be made between public networks and private networks. Stehmann states there is not a common definition of public network.\textsuperscript{68} A private network may be defined as; "network composed of transmission lines leased from telecommunications operators (TOs) and switches provided by a party that uses this network (so-called value added services or VAS), such as electronic mailing services."\textsuperscript{69} Private networks are commonly used by corporations that contain much internal communications traffic and also between branches or other office locations. These networks can be linked to the public network. There has not been a formal definition of public telecommunications infrastructure. However the \textit{Service Directive} (90/388 EEC) did provide a definition stating it as one which;

"... permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means."\textsuperscript{70}
A problem with this, noted Stehmann, is the lack of a specific meaning for the term 'public'. This may be overcome if the following definition were adopted for Public Network:

"Any network on which services are made available to all users on a common carrier basis."\textsuperscript{71}

However, Stehmann observed further, the definition does not confine the public network to a particular type of transmission technology.\textsuperscript{72} The use of private networks was not only nor simply because of internal corporate use. It was part of a trend due to corporate dissatisfaction with the inability of the incumbent telecommunications operators to meet their facility needs.\textsuperscript{73} Mansell remarked on the subject of public network and competition:

"Although the players in the telecommunications market have different views on the optimal supply structure for the future public network, larger business users have been vocal in their advocacy of competition in the supply of services as well as the network infrastructure."\textsuperscript{74}

5.3.1 Universal Service

Regardless of whether or not the monopolistic structure of traditional telecommunications was actually based on the policy that it was the best method for providing a universal service, general opinion may be said to deem communications as a 'right'. Universal service may then be regarded as a right paralleled with other basic rights associated with democracy. Blackman explained:

"Universal service - a phone in every home - is one of the great and worthy pillars of telecommunications policy. The ability to make and receive telephone calls at reasonable prices is taken for granted - if not as a basic human right, than at least as necessary for full participation in a modern society."\textsuperscript{75}
The opinion supporting a monopoly for providing a universal service has come under attack with the general policy change towards a greater liberalised market. The historical position of traditional telephone monopolies has been called into question. This may be read in the words of an executive at Mercury, the first firm given a licence to challenge BT's domination of the United Kingdom's telecommunications market.

"The great power of ideology is to fix the way we think, to order the agenda, to transpose fact and fiction. Above all, ideology is a mechanism for moulding perceptions so that the differences between observed reality and perceived imagery appear in harmony when they are in conflict. ... The dominant idea in telecoms is that competition poses a threat, undermines or destroys the possibility of providing a universal service in the absence of an obligation to do so, and that competitors must compensate the monopolist for carrying this burden." 76

The question is; what is Universal Service? As cited above from Blackman, it effectively is a telephone in every home with the right and ability to make and receive telephone calls at a reasonable rate. Is this appropriate in the late twentieth century? Oliver Stehmann claimed since the 1970s there have generally been two concepts of universal service. Between the first use of the term in the 1907 Annual Report of AT&T and the 1970s it referred to the interconnection of local networks to a unified and more efficient system. 77

"Broadly speaking, two different concepts exist. One implies a high diffusion of telephone terminals within a country. Progress made as regards universal service then can be measured by the percentage of households connected to the public switched telephone network. ... The second concept goes beyond the first one in linking a high access rate with certain tariff principles as uniform access prices, disregarding the costs of joining the network. This would for instance, require the internal cross-subsidisation of rural areas by
Stehmann claimed the first concept "...does not determine the means of achieving a high access rate." 79

The recent and important legislation for the United States, the Telecommunications Act of 1996, lacks a substantial or specific, legal definition of universal service. It does call for a definition of service which is supported by the Federal universal service support mechanisms. 80 The Act sets out the 'Universal Service Principles' which could be the definitive elements of what is termed Universal Service. The closest the Telecommunications Act comes to a definition is as follows:

"In general: Universal Service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." 81

The recommended definition of services to be supported by Federal universal service support mechanisms include telecommunications services which:

"(A) are essential to education, public health, or public safety;
(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
(C) are being deployed in public telecommunications networks by telecommunications carriers; and
(D) are consistent with the public interest, convenience, and necessity." 82

The Universal Service Principles set out in the Telecommunications Act also provide insight into the American understanding of the term. It states policies are to preserve and advance universal service based on: quality of service and affordable, just and reasonable rates; access to advanced services for all regions of the Nation; access for rural and high cost (including for example low income) areas and regions of the
country; the provision of services on an equitable and non-discriminatory basis; access for schools, libraries and health-care; and also to allow for additional principles which are later determined necessary to protect the public interest.\(^{83}\)

These principles contain the hallmarks of maintaining the traditional understanding of universal service (although not necessarily by a monopoly), yet recognising the necessity of having flexibility to meet future unforeseen needs of society and technological advancement.

The economic rationale from the 'traditional' understanding of universal service combined with the importance of providing a telephone in every home has the risk of becoming a political tool to protect the existence of a monopoly.\(^{84}\) The private monopolist or the state operated Telecommunications Operator may use this reasoning. Stehmann stated:

"In EU member states the ubiquity of the telephone has appeared during a period when the network was provided by a publicly owned monopolist. For this reason it is often asserted that there is also a casual relationship between monopoly provision and the advancement of universal service, whilst competition would threaten this achievement. Competition would deprive the public operator of the financial means necessary to subsidise access. As a result, poor households and underdeveloped regions would be cut off from the network, leading to further marginalisation."\(^{85}\)

However examples of state monopolies (or recently former state monopolies) do not necessarily support the logic of arguments in favour of their protection. Inefficiency, high costs and poor service have become terms associated with state-operated or protected telecommunications.\(^{86}\)

The policy of the EC to have a telecommunications market that is based on competition, also claims universal service is one of fundamental importance.\(^{87}\) There
remains the question of its role and definition in the modern industrial society and its compatibility with a policy promoting competition. The importance of telecommunications in the modern industrial society can be seen in its effect on countries' national gross domestic product (GDP). For example, in the United States the visible telecom share of the American national GDP rose from 1.8 per cent to 3.2 per cent during the 1980s. Growth is also viable in the EC. The importance of telecommunications, communications technology and innovation, and an information infrastructure have become widely recognised. Not only have countries such as the United States, France, Germany and Japan begun to promote a national policy for an information superhighway, the EC governing bodies have recognised its importance.

In a period of liberalisation, privatisation and competition, such public policies that recognise the importance of every household having access to modern services are suggested by some experts as a redefinition of 'basic service'. Consequently 'universal service' is in need of a new or updated meaning. The American FCC's Telecommunications Act of 1996 recognises this, as cited above. The European Community's position is of interest.

The European Commission in its Background Report in telecommunications liberalisation made the following important statement:

"There is a general consensus within the sector that the current scope of universal service should be narrowly defined as being affordable access to basic voice telephony service throughout a Member State." This narrow definition, the Report explained, was needed in order "...to avoid creating barriers to effective competition, before it has even started." However, like the American Telecommunications Act, the European Commission also seeks to maintain some flexibility for changes and additions as technology and social-communications needs are interpreted to be changing. The Report stated:
"Additionally, flexibility must be shown as policy develops with regard to the information society. New services are not today part of universal service, but initiatives will continue to focus on promoting public access to new information society services (through schools, hospitals etc.)."95

It would therefore appear that two forms of universal service are evolving within the EC and the US. One is the traditional basic voice telephony service and the second is one for institutions which in some form affect and benefit the public. Nevertheless the basic questions, problems and debates remain which focus on the fundamental policy objectives of universal service. In a report to the European Commission, Cave, Milne and Scanlan identify four basic policy objectives which include; universal geographical coverage, universal residential access at geographically averaged prices, widely subsidised access arising through n access deficit and targeted phone subsidies.96

In considering a re-evaluation of what universal service covers, Cave, Milne and Scanlan find it should be reviewed with economic, social and technological changes. However, at present, extending obligations to include other services are not necessarily economically viable.97 The problem within the EC is combining competition and universal service obligation in the telecommunications market. In overcoming this apparent incompatibility there are some interesting ideas and models.

Three suggested methods are: 1) Universal Service Obligation (USO) through taxation; 2) USO responsibility for the incumbent telecommunications operator; 3) shared USO costs by all TOs. The first is where the cost of the universal service is met through taxation generally or by the telecommunications sector. This has been ruled to be not practical, despite examples of other social funding (e.g. the social security system).98 Cave, Milne and Scanlan best explained the other two.
"Traditionally, the costs of universal service obligations have been covered by cross-subsidy within the monopoly telecommunications operator. When competition has been introduced, in some countries a decision has been taken to continue to impose USOs asymmetrically upon the incumbent, in order to promote a new entry into the sector.

In the long-term, however, it may be necessary to share the cost of universal service obligations among operators, in order to ensure competition on equal terms. One method of achieving this objective is to estimate the net cost of USOs. That net cost can then be shared amongst operators. In practice, this will often be achieved by the inclusion of access payment in interconnection charges paid by long-distance operators seeking access to the local loop."99

A fourth method is putting USO up for tender or auction.100

Universal Service Obligation is, by nature, a non-competitive feature at best in a competitive telecommunications market. At worst it helps the incumbent maintain a hold over the majority of the basic market. In the United Kingdom BT, despite the introduction of competition, has managed to maintain 90% of the market share.101 So it therefore seems logical to have price and other controls over the dominant player's power. However it is important to contemplate other ways in which competition can be introduced, thus minimising the actual need for traditional 'natural' monopolies. Secondly, Universal Service even under the traditional monopoly has not achieved actual full service in most countries, namely a phone in every home. One example is the United Kingdom where only 91% of households had telephone connections in 1996. This was nevertheless an increase from 78% in 1984.102 One interesting observation is the increase in households having telephone in post-monopoly UK.
In achieving and fulfilling universal service in a competitive industry, a more precisely defined understanding of the term is required. BT suggested it should be regarded as; "...the provision of basic voice telephony service to those who could not afford to obtain it at market prices." Mansell and Davies have a slightly different approach; one which addresses a more specific problem in the understanding of the term. They wrote:

"The traditional concept of a basic public telecommunication service is beginning to lose meaning as far as commercial service are concerned. In a market with a very high penetration of voice telephone service, there are issues about how to extend network connections to any unserved population and ensuring that the penetration rate for this 'basic' service does not decline. This applies to subscriptions to cable systems and their extensions (or substitution by other technologies) to unserved areas. The decision as to whether to subscribe to services which have reached a high level of penetration could be affected by changes in subscription fees, connection charges and/or usage charges for local access networks." 

Thus it is more of a question of how to connect areas. Once connection is established, the question turns to focus on that issue of economical access. It is also a question of how to introduce competition and maintain competition with competitive rates and fees. USO calls into discussion subjects of pricing and compensation for the provision of access. Another question asks if USO will one day, within a reasonable and foreseeable future, be a probable candidate for extinction. Will the possibility exist whereby it becomes a dated, archaic policy? Given the current technology available and that being developed, it could be possible. However such development is also dependent upon policy and legislation to encourage and protect a competitive industry and marketplace, thereby avoid a return to a monopolised system - private or otherwise. The development of new services and transmission of these services as stated above, and the definition of
universal service require re-evaluation. As the Telecommunications Act (1996) in the United States and EC policy also supports, the additional right of information access risks confusing political and legislative shaping of a new communications industry and market. Mansell and Davies make an important point. They stated:

"A distinction needs to be drawn between basic access to networks at reasonable price and basic access to information."\(^{105}\)

Despite the fact that it has taken nearly a century to develop communications from a voice telephone network to a greater multimedia, integrated system, a dichotomy still exists within the EC. This is seen in an observation by a Principal Administrator in the European Commission concerned with Telecommunications and Regulation, who claimed:

"In several Member States, universal telephone service is not yet a reality because waiting times exist, penetration rates are low or access to telephone service in some form is limited. At the same time, the current rapid take-off and growth of mobile or wireless-based telecommunications now offers the prospect, in conjunction with the fixed telephone network, of mass-market development in personal communications. This in time will lead to substantially higher levels of telephone penetration than has been the case even in the mature or 'saturated' traditional telephone markets."\(^{106}\)

Universal Service is therefore essential at present for traditional reasoning. As Cawley further stated:

"Developments in integrated or multimedia communications services and the emergence of the Information Society raise the important question of access to such services for all citizens."\(^{107}\)

Martin Bangemann, European Commission member in charge of telecommunications, also stated the importance of this.\(^{108}\) The current policy trend
based on the language of government officials, businesses and legislation suggests a two-track, parallel course for a universal communication service. Implementing such a policy raises questions concerned with tariffs. Secondly, according to Mansell and Davies:

"With respect to access to networks, no country has succeeded in defining a universal service obligation for any operator beyond individual access to the network via analogue or digital switches for the provision of voice telephony."\textsuperscript{109}

While some countries (e.g. the United States) have attempted to encourage investment and/or the private sector to connect the public to greater facilities, others have decided to remain with a more traditional interpretation of universal service. The United Kingdom for example has regarded universal service to be individual access to voice telephony (analogue or digital).\textsuperscript{110}

With regard to basic access to information, this has been interpreted to be more complicated. The problems centre on who controls the access and gateways. Who controls the information, and who will be responsible for covering the costs of the provision of access to information.\textsuperscript{111}

"One of the greatest challenges is to create effective fora for debates about how to define and introduce incentives for universal access to advanced networks and applications that are responsive to both economic and social goals."\textsuperscript{112}

Arguments supporting competition in the telecommunications market risk overlooking one very important concern; how many network operators can realistically exist to offer competing public telephony services. This concern, which should not be readily dismissed, is a practical obstacle by nature because network roll-outs are costly and time-consuming. Indeed mobile and satellite (i.e. radio technology) exist
as potential alternatives and such a likelihood will increase. Some parts of the world use radio-based communications more than other parts, and it is one answer to developing universal service. However, mobile systems presently complement 'terrestrial systems' in the EC. They are not as of yet substitutes.\textsuperscript{113}

The contemporary and important competition question remains: will competing private investors install two links to every home (e.g. one telephone and one cable operator)?\textsuperscript{114} Extending the question further, it may be asked if it is reasonable with competition to expect a few physical connections to each or most homes by rival telecom operators? To answer the first, there is evidence that this is possible at least for most homes. (In North America telephone and cable connection is evident.) In the EC, cable operators are developing networks to provide an alternative competitor to the TOs. The answer to the second question is less certain and perhaps less than practical. To encourage competition and to encourage universal service through the private sector, it would then be necessary for firms to have access to networks.

5.4 Network Competition

The deadline of 1998 is as important to telecommunications policy as 1992 was to the open internal EC market policy. The year 1998 is when full liberalisation of voice telephony is due to occur.\textsuperscript{115} A communication to the Council reviewing the situation of the telecommunications industry voiced the opinion that further liberalisation would have a positive effect on growth, efficiency, tariffs, universal service and regional cohesion. It would also increase investment and competition in telecommunications and its infrastructure.\textsuperscript{116}

The decision to liberalise voice telephony, previously excluded from provisions and legislation for opening up the EC telecommunications market, was made in 1993 and to be in effect by 1998.\textsuperscript{117} This is an important advancement for a telecom
competitive system, because voice telephony was a reserved monopoly for TOs which amounted to 80-90% of the TOs service-based income.\textsuperscript{118} This proportion of revenue and (former) monopolistic situation adds to the importance of infrastructure access. This market increases the number of services that can be operated independently. As Mosteshar observed:

"[T]he provision of services, unlike the provision of telecommunications network infrastructures, does not require the physical presence of the provider in the geographical area where the services are provided. In the context of the Community, the possibility of providing services between Member States is a significant element in the creation of a common market in such services."\textsuperscript{119}

Again, this separation enables the provision of the network infrastructure to be distinctive from the provision of telecommunications service.\textsuperscript{120}

Nevertheless, what is required (at least in the initial years of telecommunications competition) is an infrastructure-means to deliver competing services. The EC authorities recognised access to existing TO networks was important to fulfil this need. Consequently, the Open Network Provision (ONP)\textsuperscript{121} was created and in a Commission's Communication\textsuperscript{122} it was stated:

"In order to allow timely input to the Community-wide definition of fair access and usage conditions, it is suggested to concentrate on those issues most critical to providers of competitive services and a competitive market environment and to work accordingly to a stringent time schedule...."\textsuperscript{123}

A product of this was Council Directive 90/387/EEC on the Establishment of the Internal Market for Telecommunications Services through the Implementation of Open Network Provision, in which it was stated:

"This Directive concerns the harmonisation of conditions for open and efficient means to and use of public telecommunications networks and, where
applicable, public telecommunications services."\textsuperscript{124}

"The conditions referred to in paragraph 1 are designed to facilitate the provision of services using public telecommunications networks and/or public telecommunications services, within and between Member States, and in particular the provision of services by companies, firms or natural persons established in a member State other than that of the company, firm or natural person for whom the services are intended."\textsuperscript{125}

The purpose of this Directive is to harmonise an important part of the telecommunications market that could deter, obstruct or otherwise affect competition. It also is a means to remove an important market and arguably political barriers to an open internal EC common market. Originally ONP-States did not allow any individual restrictions except those which were derived from special or exclusive rights.\textsuperscript{126} This is an important move towards full liberalisation for, despite some accepted restrictions including network security, network integrity, service interoperability and data protection\textsuperscript{127} it aims to fulfil the principles of transparency, equal access and non-discrimination. While voice telephony is among the ONP's programme, it is permitted as a 'reserved service' only if it meets all of the four criteria: that it is provided on a commercial basis, provided to the public, provided from and to public switched network terminal points, and the switching of voice in real time.\textsuperscript{128} One observer interpreted:

"The restriction 'to the public' implies that private networks based on leased lines may also be used for voice telephony."\textsuperscript{129}

The importance of the ONP Directive (and subsequent amendments)\textsuperscript{130} is its basic principles and essential requirements for achieving harmonisation in open access and use of the public telecommunications network. However, the 1996 amendment to 90/388/EEC, (Directive 96/19/EC), is a further step towards full liberalisation. It
removes the exemptions allowed for voice telephony under the original Directive. It states:

"In order to allow telecommunications organisations to complete their preparation for competition and in particular to pursue the necessary rebalancing of tariffs, member States may continue the current special and exclusive rights regarding the provision of voice telephony until 1 January 1998."\(^{131}\)

This Directive is also important towards eliminating restrictions on the establishment of network infrastructure. In July 1996 all alternative infrastructures, for example telecommunications networks operated by water, energy and railway companies were liberalised for commercial telecommunications services.\(^{132}\) This provides for established telecommunications lines that were previously "in-house"\(^ {133}\) systems (or infrastructures to which telecommunications lines could used) to become immediate competitors to TOs or traditional telecommunications infrastructures. The question which remains asks whether these alternative fixed-wire (et al) providers will target just the corporate consumer for the large revenues or will domestic, households benefit as well? Secondly, newer and other potential alternatives such as radio-based, mobile/cellular communications, and even satellite communications (see below) and private networks raise similar questions. This returns attention to the topic about universal service and the relevant EC principles.

5.4.1 Entry Barriers

Entry-ability into markets is important if competition is to flourish. Similarly, exit-ability is also important. Therefore barriers to entry and exit can be a cause for concern. In relation to exit barriers, Whish explained:

"Barriers to exit are significant when considering market-power. A customer of a powerful supplier will be more exploitable where it is difficult for him to leave the market on which he operates, for example because he owns assets"
that are not easily adapted to other uses. In perfectly competitive markets, resources can move freely from one part of the economy to another.\textsuperscript{134}

The ability to enter telecommunications markets is, at least in the primary stages of liberalisation if not in the long-term, important if competition is to develop. This ability to enter may be hindered or obstructed to various degrees by 'barriers to entry'. Barriers to entry are important in so far as defining market strategies for those firms already in the market. Barriers may be \textit{innocent} or \textit{strategic}. 'Innocent' barriers may be understood as those not created as obstacles to new entrants by incumbent market-players. 'Strategic' barriers may be defined as barriers created by the incumbent to obstruct potential rivals.\textsuperscript{135}

Traditionally a barrier to entry in telecommunications has been government intervention or restrictions on the existence of market operators. Even in instances of market liberalisation, government controlled barriers could be and have continued. For example, when competition was introduced in the UK telecom market, it was only Mercury that was allowed to compete with the traditional incumbent British Telecom. Continuing examples of entry barriers in a now more liberalised and competitive UK market which serve as examples for other States as well include licensing, common connection technology, and price control for residential tariffs. Market structure theorists have defined four main 'natural' barriers to entry. These include: absolute cost advantages by those already in the marketplace, economies of scale, product differentiation advantages by existing players, and the total capital cost for establishing a position of a minimum optimal size.\textsuperscript{136}

All four may be said to be relevant to telecommunications. The latter is of interest as it may preclude many players from entering the telecom market simply because of the need to establish an infrastructure, also known as a network. Electricity, canal, gas and water firms that effectively have an existing network may be attracted to
entering the telecommunications market or form alliances or partnerships with firms which already have telecom experience. Market entry has also attracted and created alliances between existing telecom firms especially between firms of different States. However do such alliances actually increase competition? The benefits of a 'seamless', 'one-stop-shopping' alliance may be debated, and thus economic benefits and efficiency may arguably be gained. It does not necessarily mean the market is competitive. It also does not mean two competing alliances is proper competition. Without further arguing the competitiveness of duopolies and oligopolies, it is of greater interest to examine the barriers of entry that may preclude other potential rivals from challenging duopolies and oligopolies.

One legal observer stated the general position of economists about barriers to entry. He claimed "[m]any economists argue that entry barriers only exist in carefully defined situations. For example, advertising and product differentiation can encourage entry or deter entry depending on the exact situation of the market." A critique of the difference between the tangible and the intangible (generally economic-related) barriers is noteworthy. Whish stated:

"Obviously legal provisions such as licensing laws and intellectual property rights conferring a legal monopoly act as barriers to entry; so might the advantage of scale and anti-competitive practices designed to deter new entrants to the market. After this consensus tends to break down. Some would regard the superior efficiency of a dominant firm, its technological know-how, the cost of advertising, product differentiation and the difficulty of gaining access to risk capital as barriers. Much of this has been questioned. In particular it has been suggested that a barrier to entry means 'a cost ...which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."
Turnbull claimed that:

"[T]here is now general agreement that entry barriers result from asymmetry. This is very important in the field of strategic entry deterrence.... Considerations of entry deterrence require precise and careful analysis as they rely on various conditions. The problem...is that there is considerable difficulty in distinguishing desirable competition from strategic behaviour."

In telecommunications infrastructure (i.e. network) access is essential for any market entry. Already the option of alliances with other telecom firms of networks of a different type and nature has been voiced. Another alternative is to create a new system that is less reliant on the traditional fixed-wire access. Cellular mobile phones are one potential but debatable competitor. They nevertheless, have been dismissed as a true competitor for mass-communication until at least sometime after the turn of the century. Similar technology (i.e. radio-based) is under development to directly challenge fixed-wire/cable connections through the aid of antenna and dishes for radio-telephone exchange. Nevertheless, the importance of network access as: 1) a means of establishing competition and 2) to successfully provide the communication-product has not been eliminated.

Market access to something common like a network is in itself a paradox; competition yet co-operation. Parallels to shared network access include railway infrastructure and more recently in the UK water, gas and electricity. In some industries it is arguably easier than in others to establish competing networks. Telecommunications may be easier than rail or gas, but it does not entirely preclude the importance of network access thus far.

The type and extent of network access determines the shape and success of competition. An argument about the type of competitive system can emerge from
this debate. If, on the one hand, a greater, more open and more pure competition was encouraged whereby any firm can access the network, would this be beneficial? On the other hand, if the market 'naturally' excludes the smaller and less efficient firms would this lead to greater economic and technological efficiency? This debate leads to the more general discussion about the EC's approach to competition. Korah has been critical of the EC's policy of generally protecting smaller and less-efficient firms at the expense of the larger and more efficient. Korah stated:

"My fear is that competition rules are not being used to enable efficient firms to expand at the expense of the less efficient, but to protect smaller and medium sized firms at the expense of efficient or larger firms. I am concerned that the interests of consumers, and the economy as a whole in the encouragement of efficiency by firms of any size is being subordinated to the interests of smaller traders."

Just as big does not necessarily mean bad, neither does small necessarily mean inefficient, and given access to networks this could be possible. There seems to be an assumption that it is necessary to be large in order to be efficient and successful in telecommunications. Perhaps, given the circumstances this is true. Other circumstances however, might dispel such arguments and the opinion that only a few firms will dominate global telecoms could be challenged. This ideal depends upon the conditions and regulation of the market by competition authorities. It also depends on the political objectives of authorities to create national-champions to compete with other national-names.

5.4.2 Essential Access and Bottlenecks

The concept of 'essential access' is interesting since it is one which contradicts the ultimate purpose for its existence. Essential access is a concept which counters basic competition law. The law generally tends to object in principle to competitors cooperating. Glasl explained:
"Market access for all competitors on equal terms is a controversial issue. In EC competition law and policy, third party access to essential facilities is of increasing interest and importance."

Glasl noted that the idea of third party access has usually fallen under the category of abuse of a dominant position. The concept of essential facilities has been applied relatively recently to the EC competition authorities' judgements. Although it has indirectly been used, specific reference is more recent. The situation has been explained under EC law. It is when one competitor owns a facility and access to it is essential for other competitors to conduct business. The circumstances for such an occasion is when it is not expected for the other competitors to provide their own facility at which point the owner of the facility is obliged to provide access to it.

"This principle must be treated with caution, because the law normally allows a company to retain, for its own exclusive use, all advantages that it has legitimately acquired."

The owner can make it difficult for competitors to compete by offering similar goods or service at improved offers. However:

"[T]he principle that companies in dominant positions have a nondiscriminatory basis is one of great and increasing importance in telecommunications...and many other industries."

These industries whereby essential access is of increasing importance tend to share a common element. Prior to liberalisation they were monopoly powers. Although, in the instance of EC states (but not exclusively) the traditional telecommunications operator had monopoly powers from government authority, such powers can be imposed on firms simply because of physical and/or technical circumstances. In such cases the term 'bottleneck' is used. A railway system may be used for imagery purposes. A multitude of tracks meets at a single point such as at a station. The station is necessary for the collection and exchange of customers. Conveniently this
The cited image was an actual problem and deemed a classic case of the bottleneck problem. In the American case *United States v Terminal Railroad Association of St. Louis (1912)*, it was deemed impractical for the different rail companies to have their own terminal facilities. In this case a group of railway firms jointly constructed and owned a terminal. The Supreme Court ruled (via the rule of reason) that this was not illegal, however the monopoly power legitimately acquired could not be used oppressively. (The group would allow others to join if the members agreed unanimously and the new members paid a fee).\textsuperscript{150} Areeda wrote with regard to multi-company (American) cases:

\textquotedblright(1) whenever competitors jointly create a useful facility, (2) that is essential to the competitive vitality of rivals, (3) and (perhaps) essential to the competitive vitality of the market, (4) and the admission of rivals is consistent with the legitimate purposes of the venture, then (5) the collaborators must admit rivals on relatively equal terms.\textsuperscript{151}

The citation was originally made in reference to the US case *Associated Press v United States* \textsuperscript{152} whereby 1,200 newspapers formed Associated Press (AP) for news access among its members. Similarly its members could block new members (competitors). The Supreme Court ruled that the blocking of competitors did violate the Sherman Act but it did not state all should be allowed to enter the association.\textsuperscript{153} The Court did object to the agreement that no member will act as a "wholesaler" of news or sell to non-members. Sullivan stated:

\textquotedblright In holding this arrangement invalid, the Court stated the '[t]he Sherman Act was specifically intended to prohibit independent business from becoming "associates" in a common plan which is bound to reduce competitors' opportunity to buy or sell...''\textsuperscript{154}

Sullivan found the problem with *Associated Press* is the risk that it may be interpreted as joint ventures not being permitted to exclude others from the venture.\textsuperscript{155} The difference between joint ventures and those instances of essential
access centre more around the notion of 'public utility', as one judge compared in
Associated Press. Thus an understanding of greater suitability may regard essential
access as comparable to a public utility where; "...a business infused with the public
interest that was required to serve all..."\textsuperscript{156}

The EC is not without cases,\textsuperscript{157} but where telecommunications is concerned Temple
Lang summarised:

"The cases on telecommunications show that, in general, a company in a
dominant position in one market may not use its power to extend its
dominance or monopoly into other markets. This principle is relevant to, but
not to be confused with, the principle that dominant companies must make
facilities available when this is essential to enable competitors to
compete."\textsuperscript{158}

These dominant companies have been the (former, monopolistic) Public
Telecommunications Operators. The Telecommunications Guidelines\textsuperscript{159} refers to
refusals by these national telecommunications operators to provide services, namely
network and leased circuits to third parties on an equal basis to all users.\textsuperscript{160} The
Telecommunications Service Directive\textsuperscript{161} defined 'telecommunications organisations'
as:

"...public or private bodies, and the subsidiaries they control, to which a
member-State grants special or exclusive rights for the provision of a public
telecommunications network and, when applicable, telecommunication
services..."\textsuperscript{162}

Based on this definition, it may be interpreted that references to TOs by the
Commission in Directives (concerning telecommunications) apply to those that have
special 'monopolistic' rights. This begs the question; what happens if and when the
TO is privatised (if previously public) and the exclusive or special rights are
removed? The Telecommunication Guidelines acknowledge the market changes, stating:

"New private supplier have penetrated the market with more and transnational value-added service and equipment." 163

The Guidelines states that effective competition, application of EC competition laws and the duties of telecommunications administrations of States are important in the role of a competitive telecoms market. The Commission has also emphasised its concern that States need to avoid re-erecting market barriers. 164 The dual policy, however important in the developing stages of a modern and competitive telecommunications industry and information-based society, contains conflicting and potentially contentious elements as far as antitrust enforcement is concerned. While EC policy is for an EC-wide interconnection of networks (or pan-European telecommunications services), the emphasis of The Guidelines and related Directives (e.g. on Services 90/388/EEC and Equipment 88/301/EEC) is on public or private firms which have exclusive or special rights. 165 The Directives are an effort to make these privileged firms subject to competition. Again, the question regarding other network firms without exclusive rights is raised. What rights if any, or should there be rights for other firms to have 'essential access' especially where more than one network exists? One of the features of contemporary industries involving technology is the element of co-operation and strategic alliances. 166 The Guidelines state:

"Co-operation between TOs and other operators is increasing in telecommunications services. ...The Commission recognises that it may have beneficial effects." 167

The Commission acknowledges that co-operation may be restrictive as well, 168 and TOs and co-operative arrangements are subject to EC competition law. In recognising TOs hold either individually or collectively a dominant position there is the risk of exploitation of its position and special rights. Similarly there is recognition
of the potential dominance of markets where TOs do not have special or exclusive rights. Important to the question regarding non-exclusive right-holding TOs with a dominant position, *The Guidelines* stated:

"Further to the liberalisation of services, undertakings other than the TOs may increasingly extend their power to acquire dominant positions in non-reserved markets. They may already hold such a position in some service markets which had not been reserved. When they take advantage of their dominant position to restrict competition and to extend their power, Article 86 may also apply to them." \(^{169}\)

The lack of detailed reference by *The Guidelines* to the network suggests, 1) a culture of some state control over the state-wide network. This culture is supported by the reluctance of some States to give up their power and financial gain from telecommunications as discussed earlier. This reluctance is further supported by unprecedented use of Article 90 to liberalise telecommunications. Furthermore, this benefits the EC in constructing an EC-wide network. Although a nation-wide network is preserved and competition is allowed (by 1998 at the latest for most EC states). \(^{170}\) The potential problem(s) of access to a network where special rights may not exist, is not addressed. The United Kingdom is an interesting example of a state within the EC where competition is advanced relative to other EC states. The US is also interesting with regard to its approach to essential access in telecommunications.

Briefly, the position in the UK has been described as different from the US and the EC. An official at British Telecom explained the situation of telecommunications in the UK.

"The position is rather different in the UK at the present time since technology has moved ahead and competition has been allowed for the
provision of local loop facilities. A number of companies provide local telecommunication services. Over 150 companies have been granted licences to operate as public operators including AT&T. In the UK, in particular, not only is the construction of local loop facilities economically feasible but companies other than BT take advantage of the economies of scale and scope which follow from combining television and telephony in cable television systems. ...In addition to wire-line competition, local radio-links may be used to provide access in the local loop. Finally, Mercury is entitled and does provide its own networks and service to residential and small business customers in the local loop, either in its own right or via interconnection.\textsuperscript{171}

By contrast, Cowen points to the US market where in 1988 MCI wanted access to AT&T's network. In \textit{MCI v AT&T} \textsuperscript{172} the Court found AT&T's refusal to connect MCI to local distribution facilities to be unlawful on the basis of the 'essential facility' principle. It was found that it was not economically feasible for MCI to duplicate the local distribution facilities. Furthermore, regulatory approval would also be unobtainable.\textsuperscript{173}

Cowen argued:

"[I]f a concept of essential facility were adopted in the UK or in a market where alternatives exist or feasibly could exist, it would call into question the economic rationale for de-regulation of that part of the market. To put it another way, if access to the local loop could be the essential facility, ultimately there would inevitably be a natural monopoly into which no economically rational entity would enter. Conversely, if competitive entry into the local loop has occurred, good prima facie evidence exists that there is no such thing as an essential facility vis-à-vis the local loop."\textsuperscript{174}

Although this opinion is theoretically sound, questions of practicality and reality
remain. Such questions also exist despite the earlier cited argument of technological developments and the number on paper of at least 150 companies licensed to operate as public operators in the UK. These theoretically provide for persuasive arguments for developments towards a competitive market, but what exists in practice can be sufficiently different from the impression on paper. First of all the incumbent in the UK, BT, continues to dominate 95% of the residential market. Secondly, the 150 companies are not sufficiently and noticeably evident in the marketplace to demonstrate a 'competitive marketplace' in economic theory terms. Thirdly, to access some rivals (such as Mercury), it has been the case in many parts of the UK that the user or consumer still had to have access to BT's network. Fourthly, is it realistic to expect 150 rival networks and such a choice of companies for consumers? What has happened thus far are two practices: 1) a local franchise for telecom firms or alliances; 2) alliances among a few firms to establish a company (e.g. Bell Cablemedia). Much of the actual market involvement is illustrated in an OFTEL publication. Regarding area, size of company and specialisation, OFTEL stated:

"The area in which a telecoms company provides service will vary between companies. Some companies operate nationally and internationally, while others in specific areas within the UK." ....

"The telecoms companies...vary widely in size, from those who have several million customers and telephone lines, to those...with several thousand customers and telephone lines." ....

"The types of customer served by telecoms companies will differ. Some will target and serve mainly single line customers, often residential, while others will choose to serve mainly multiple line customers who will usually be businesses. Others may serve both types of customers." 

This example of the UK is beneficial as a model for the EC in so far as the questions
raised. After 1998 when competition is officially due to be in existence across most of the EC, are the number of firms operating misleading? At a minimum, the EC market will have ten - one for every state that has not derogated. However, the question then is; how many operate in other member-states? The UK already has served as an example. Should the question then be extended to how many serve areas within the Member State in order to assess the true nature of the competitive market?

The *Telecommunications (Antitrust) Guidelines* defines a geographical market as the area; "...where undertakings enter into competition with each other" and "where the objective conditions of competition applying to the product or service in question are similar for all traders."179 At present national markets are still distinct geographical markets for related services and products.180 The actual number of competitors serving areas within the Members States should be considered as the actual determinant of choice for the consumer. Then the definition of the consumer needs to be broken down into residential and business. This is not to suggest that this is not done, but such explanations may then be used in returning to the question of essential access/facility. The results may also question the Idealist perception of the marketplace. A closer examination of the geographical market (perhaps in relation to the product) may lead to a more accurate policing of the competitive system for the consumer. Nevertheless, it may also shape the definition of a dominant company. This determines essential access; "the principle that a dominant company has...a duty to supply, if a refusal will cause a significant effect on competition."181

However:

"EC case law does not suggest that a refusal to supply by a dominant enterprise is always regarded as having an effect on competition. Such a strict view would be incorrect. ...However, if the consequence of a refusal by a dominant enterprise to supply is that all or most of its competitors are excluded from the market, only strong business reasons can justify the
The difficult and developing principle of essential facilities concerns companies that have a dominant position in one market, usually an upstream market, and that also provide goods or services in a downstream market.\textsuperscript{182}

Cowen stated:

"From the Commission's guidelines on the application of competition rules to the telecommunications sector, it appears that the Commission may wish to take narrow market definitions in order to apply Article 86 to the telecommunications industry."\textsuperscript{183}

With reference to \textit{International Business Machines Corp. v Commission}\textsuperscript{184} the Commission stated:

"Producers of equipment or supplier of services are dependent on proprietary standards to ensure the interconnectivity of their computer resources. An undertaking which owns a dominant network architecture may abuse its dominant position by refusing to provide the necessary information for the interconnection of other architecture resources to its architecture products."\textsuperscript{185}

The important point about dominant network architecture is its lack of a definition by the Commission. Cowen interpreted the Commission's approach as one which is likely to take a narrow and restrictive understanding of the term.\textsuperscript{186} John Temple Lang regarded essential facility as a concept that is more important to EC law than US law.\textsuperscript{187} He stated:

"Essential facility cases involve basic principles such as the obligation to contract in some circumstances and the obligation not to discriminate."\textsuperscript{188}

Other reasons for its importance (especially since the EC is a less integrated economy than the US) include: 1) more dominant positions are said to exist in 'substantial' parts of the European Community than in the United States; 2) state-
owned firms in the EC are more-likely to discriminate and be protectionist; 3) traditional absence of competition laws until more recently in EC states; 4) and the liberalisation of important sectors.189

However, as Temple Lang stated, essential access/facilities is an important analytical tool and effectively an extension to the use of Article 90 (EEC).190 It is a mechanism with which to impose competition on traditional industries, and one with which to liberalise telecommunications. On the basis of TOs given special or exclusive rights, the EC it would seem has effectively legislated an essential facility code specifically in the Telecommunications Guidelines. With regard to the rise of private networks formed through strategic alliances, the question of essential access and Article 90 remain of interest. The use of Article 86 to prevent the abuse of a dominant position will certainly also be important.191

The economic-efficiency school of thought (e.g. the Chicago School theory in the United States) on occasion appears one-sided: That is to suggest that where the market-place is theoretically competitive, the consumer is the ultimate beneficiary of the resulting efficiency. This may be suited to a marketplace of choice, but a question that should be asked is, how much actual choice do consumers have regarding telecommunications. On the one hand there is the issue of the actual number of players in the market. On the other hand there is the concern about the actual accessibility of that number of firms in order that competition is more than simply seen to exist. Yet, further questions may be raised specifically regarding the consumer's actual role in the competitive system. A basic economic competition theory states, the consumer has choice. In telecommunications, while choice may become more prevalent than before, is the active involvement of the consumer limited once a choice has been made?

Paradoxically the maintenance of a competitive market may depend upon regulatory
intervention since such a market may tend naturally to monopoly. Traditionally in many systems such as in North America and Europe, the consumer pays not only for use but for connection. This latter payment may involve initial connection fee upon subscribing to the telecom firm, and also a monthly (or quarterly) line-rental fee. This ties the consumer to the telecom firm. Indeed, where another telecom firm exists in the area, the consumer may change firms, but this involves disconnecting with the first firm, paying a new connection fee and a new subscription fee with the new firm. How often is a consumer likely to change? Different needs of different market places could begin to show flaws if a standard theory is broadly applied. Compared with goods and services, it is less active than for example entering a shop and changing brands of a type of cereal, baked-beans, soft-drink and so on because of price, taste, incentive or other reason. The switching of telecom firms is costly, bureaucratic and inconvenient. On the other hand, the inconvenience may be overcome with time as number-portability becomes more common. However, as the concept of the necessity of a monopolistic telecommunications operator for the purpose of universal service provision becomes discredited this 'tying' of the customer perhaps could be questioned.

5.4.3 Predation

Predation in competition (antitrust) law may be understood in two ways. The first is generally the act that one undertaking pursues in eliminating a rival undertaking. More specifically competition law (i.e. EC law) prohibits a dominant undertaking eliminating a rival to strengthen its own position: It is the abuse of the position of dominance that is the concern (see Article 86). This abuse leads to the second means of understanding predation. This understanding is based on economics through pricing - hence the term 'Predatory Pricing'. Basically this means using pricing tactics to eliminate a competitor. In order to do so without suffering substantial and/or long-term damage, the predator would have to hold a dominant position over the other. Sharpe stated:
"It has never been an objective of the UK, US or EEC anti-trust policy to condemn monopoly per se or necessarily to prevent the creation of monopoly...."192 However:

"The underlying concept of predation is that there are limitations to the manner in which competition should be conducted. Certain types of behaviour will almost universally be condemned ... even if only occasionally called upon to play it. The action if one rival serves to increase the costs of another rival without any corresponding overall gain in efficiency."193

The problem has been in defining the criminal act. As Sharpe further explained:

"[C]onduct which falls short of the obviously criminal or which does not fit into the conventional tort pigeon-hole is notoriously difficult to evaluate and English judges at least have strongly resisted taking responsibility for establishing limits on competitive behaviour.... The EEC law is only slowly embracing predation within the terms of Article 86."194

The American antitrust debate has been more involving than the other two systems cited, but the debate is also hampered by divisions in opinion about predation.195 One of the influential writers, Posner, did not dwell on the significance of predatory power in his often cited work Economic Analysis of Law. Instead it was effectively dismissed. Posner wrote:

"Confirmed instances of predatory price discrimination were rare even before the practice was clearly illegal. The reason is that the practice is very costly to the predator. He incurs a present and substantial loss for gains that are not only deferred, but that may be temporary since once the existing competitors are driven out of the market and a monopoly price is established new competitors will be attracted to the market by that price; the tactic may have to be repeated. Ordinarily it is cheaper to buy off a competitor than to
destroy him by selling below cost."\textsuperscript{196}

An EC legal case suggests that predatory price does exist. Although Posner's economic viability argument is not overtly questioned, the suggestion that such an act is not intentional indicates an argument to the contrary of Posner's opinion. In \textit{Elopak Italia Srl v Tetra Pak (No.2)} the European Commission studied the Italian food and drinks carton market and concluded the existence of predatory pricing. The Commission found it;

"...difficult to conceive how behaviour so opposed to the logic of economic profitability on the part of an extremely efficient multinational company can possibly be the result of a simple management error."\textsuperscript{197}

However the policy to date for the EC suggests such behaviour falls foul of Article 86 and dominant positions, instead of any other specific approach to predatory pricing. While this case is a step in further recognising and accepting the existence of such a problem, it is \textit{AKZO Chemis BV v Commission}\textsuperscript{198} which first began a developed consideration of predatory pricing under EC law. In this case the firm AKZO was accused of violating Article 86 through abusive behaviour towards a smaller competitor. The Commission considered three questions with regard to the abuse of a dominant position. The first was to determine if AKZO held a dominant position under Article 86. Secondly, did AKZO's behaviour constitute an abuse of this position. Thirdly, was there an effect on trade between Member States. AKZO had been accused of threatening its smaller rival ECS of aggressive action unless ECS withdrew from a particular market. After ECS ignored the threats AKZO targeted ECS's customers in other shared markets and offered them prices which were both below previous prices and average total cost. This was accomplished through cross-subsidisation. Through the \textit{Hoffman-La Roche}\textsuperscript{199} test the Commission found the first and third questions in the affirmative. The second question was considered in greater detail. It considered the position of unfair prices. By virtue of
Article 86, the ECJ stated a firm that strengthens its dominant position, "...by issuing methods other than those which come within the scope of competition on the basis of quality" is prohibited behaviour. Therefore:

"From that point of view ... not all competition by means of price can be regarded as legitimate."

The ECJ's explanation of such a pricing position was an important examination of predatory-pricing. The ECJ stated:

"Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced."

"Moreover, prices below average total costs, that is to say, fixed costs plus variable costs but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them."

This is the ECJ's two-tiered test to determine the existence of predatory pricing. If the first test of price below average variable cost failed then the second test of price above average variable cost but lower than the sum of average total cost is used. If found to be so, it is regarded as abusive behaviour. However the latter is only
abusive if the intention to eliminate competitors is demonstrated. This would normally be accomplished through evidence in company documents, as was the case in AKZO's memos. It was also proved through other practical evidence of AKZO's behaviour such as its approaches and offers to ECS's customers.\textsuperscript{204}

While there may be a strong argument against the existence of predatory pricing or simply that such acts are rare, it may also be claimed as Craig and De Burca stated:

"The economic reality is much less certain. In order for predation to be a successful and rational strategy the future flows of profits has to exceed the present losses incurred as a result of the drop in price. This is not theoretically impossible...."\textsuperscript{205}

Craig and De Burca also stated predation "is...a war of attrition, with the outcome to be determined by the combatants' relative losses and reserves...."\textsuperscript{206}

On the one hand future entrants could be deterred, while on the other they may be attracted to enter the market because of such profits the predator has achieved. But there is a risk that such an economic argument as Posner proposed, is too wide, too broad-sweeping and a generalisation which is not always applicable to all markets or industries, all of the time. Soames and Ryan made an important observation.

"Although predatory pricing is notoriously difficult to define satisfactorily, it appears to be a very real threat to the process of liberalising the Community's air transportation market. Indeed, the risk of dominant airlines considering that predatory pricing is a rational strategy to adopt has escalated greatly in recent years due to the increase in competition in the provision of air transportation services on Community routes resulting from the liberalisation process. ...The threat is aggravated by the fact that the Community's jurisprudence on the subject is still in the formative stage, and has not yet, in the field of transportation, been the subject of any decided cases on the part of the Commission and has been considered in only a few cases in other areas.
Soames and Ryan's comment is applicable to the telecommunications industry as well. Similarly a statement for the EC Commission's Directorate General for Competition (DGIV) referring to the airline industry is also suitable for use in discussion about telecoms liberalisation and competition. It stated:

"Consideration of predatory behaviour needs to take account of the regulatory framework of the industry under consideration, and the structure of the industry. In an industry where entry is strictly regulated by government agencies, and where as a consequence existing firms face protection from new entrants, there is no need for predatory actions. As regulations in such industries are liberated, and entry becomes easier, so the scope for predatory action may increase: this is course of particular relevance now that European aviation is progressively being liberalised."  

Substitute 'aviation' for telecommunications and the quotation becomes applicable to a similar problem in another industry. Where there was once a state-owned or protected telecom firm, this firm is now under threat by new entrants (at least after 1998 for most EC states, with some exceptions such as Spain where liberalisation has been allowed to be delayed until after the turn of the century). Even in the more liberalised states, including those outside the EC, the larger firms such as the UK’s BT or America's AT&T are under threat by the increasing number of entrants into 'their' markets. BT faces competition from more than just Cable & Wireless (formerly Mercury), as with many other firms (e.g. EC incumbent operators) after 1998. AT&T is under threat by, among others, the local Bell telephone companies, Sprint and also MCI (which had allied itself with the UK [i.e. EC] firm BT but has since become closer to WorldCom), as they are now allowed to enter the long-distance market (see Telecommunications Act 1996, FCC). A distinction though must be recognised between 'predatory pricing' and 'competitive pricing'. The US
Supreme Court stated:

"Cutting prices in order to increase business is the very essence of competition. Thus, mistaken inferences in cases...are especially costly because they chill the very conduct the antitrust laws are designed to protect. We must be concerned lest a rule of precedent that authorises a search for a particular type of undesirable pricing behaviour end up by discouraging legitimate price competition."\(^{209}\)

A search then for actual predation risks being "an elusive one".\(^{210}\) Yet, historically speaking, predatory behaviour in telecommunications is not new. The Southern Bell Telephone Company used such tactics between 1894-1912.\(^{211}\) However the telecommunications market, like aviation, is one which may warrant special and closer attention than (for wont of a better term), the common, general competitive system or marketplace. One criticism of the American Chicago School-influenced approach stated:

"The Courts have relied too heavily on the idea that predation is rare and even more rarely successful. This judgement is supported by neither theory nor fact. Rather it is supported by some rather ad hoc theorising and a misreading of a number of important cases and instances of strategic behaviour. The courts' reluctance to find predation is understandable. It is difficult, many would say impossible, to distinguish predation from competition."\(^{212}\)

Zerbe and Mumford state the route to take with regard to predatory pricing is to strike a right balance. They explained it is a question of getting the balance right, and this is largely an empirical and factual question. "Empirical questions require empirical answers and, despite the case law on the subject, there is as yet insufficient empirical analysis to determine the right balance."\(^{213}\)
There is the potential for further opportunity for the Commission and the ECJ to consider and possibly further develop a suitable approach to predation in telecommunications. This may not be easy as one study focusing on the American local cable market suggested. Hazlett found that it is still uncertain as to what antitrust remedy for predatory pricing should be. The proximity of predatory pricing and competitive conduct is, it seems, too close for significant distinctions. He stated:

"It is a transient and most strategic dosage, in fact, of ultracompetitive behaviour. Pricing below marginal cost or raising rivals' costs in transparently ineffective ways (such as creating marketing confusions, delaying pole access, or paying sales premia for competitive area subscribers) are tell-tale clues of anti-competitive conduct, but remain difficult for courts to pinpoint and remedy."

However, Hazlett did find that some markets prone to predation are not typical. This is especially the case where there is a market in which it is the competitor who chooses the customer and not the customer choosing the competitor. This is evident in the EC's AKZO case. Pertinent in particular to telecommunications is Hazlett's following observation:

"[F]irms are geographically constrained to invest in sunk capital one potential consumer at a time. Furthermore, they must give advance notice to established market rivals as to when and where they will first emerge on the competitive frontier. And municipal franchises form entry barriers which gives incumbents confidence that short-run investments in predatory deterrence may well be recouped over a monopolistic long-run. There are plenty of opportunities for incumbents to engage in gamesmanship that will increase entrants' costs for more, proportionally and absolutely than their own."
In pursuit of anti-competitive predation -that which is destructive to the competitive process as a whole as opposed to conduct which is competitive- the ECJ or any other competition authority also needs to be wary of being used by one firm as a weapon against another. There is a risk that the legal process and regulators could be used to subvert competition.²¹⁸

Kahai, Kaserman and Mayo observed:

"Clearly, the ability of firms to employ the regulatory process to achieve strategic anticompetitive ends rests heavily on the inability of regulatory officials...to accurately assess both the legitimacy of both proponents' claims and the competitive consequences of their own actions."²¹⁹

Such problems continue to be with the traditional antitrust questions, namely; market definition, entry conditions, market power and predation.²²⁰ From a predatory-pricing perspective, it has been stated that the possibility of such a problem depends largely upon restrictions (such as regulations) on pricing behaviour and control over profit-making. It also depends on some degree of market power, the absence of any great barriers to exit, and the existence of great barriers to entry.²²¹ At least as equally as important though, is the 'fairness' in which predatory pricing behaviour is judged by the courts. Failure to do so risks both injustice and also the use and abuse of regulators and courts by one firm against a competitor.

The AKZO case may not have been entirely accurately decided; or at least the predatory pricing argument was not as fully explored as it might have been. In establishing predatory intent, some observers argue the economic question considering AKZO's credible threat is also important. The Commission did not consider this.²²² Such consideration would assist in further establishing a difference between predatory pricing on its anti-competitive form and active competitive behaviour. Greater investigation into the plaintiff's or victim's cost (e.g. the company ECS in the AKZO case) is important in order to better identify predation.²²³
Although predation is important for further anti-competitive consideration, there is another approach that should reduce its frequency or power. This approach is simply preserving free entry to the marketplace; a principle which has been a main objective for most antitrust policies. The focus of anti-predation should perhaps be targeted towards behaviour preventing, obstructing, or delaying entry, and this is of particular relevance to the liberalising telecommunications market.

5.4.4 Tying

Compared with the EC, the concept of tying in the US has diminished in importance, probably due to the rise until lately of the Chicago School and economic-efficiency theory. By contrast to the trend overseas, there is great concern about tying and other refusals to supply. It was not until the 1985 case *Hilti G v Commission* that the Commission condemned tying under Article 86. In this case Hilti had a patented nail cartridge and customers were to use its own nails for the cartridge. It was determined that this exploited customers and harmed competition. It was also an abuse of a dominant position. In *IBM v Commission* the computer firm practised memory bundling and software bundling, and in effect was tying. It refused to supply software for use with non-IBM computers. It practised promoting new products before information about them was available. This created an artificial advantage for IBM and prevented competitors from modifying their products for IBM compatibility. Similar arguments from *Hilti* were used in *Elopak Italia Srl v Tetra Pak (Tetra Pak II)*. Although in this case the products were a drinks machine and drinks cartons forming an integrated system. The principle was the same as in *Hilti*. The competitors downstream were intended to be excluded. The consumable market was separate, but in effect both consumers and competitors were being involved and excluded from the market. The practice of tying is condemned under Article 86(d) in EC law.
5.5 Alternative Providers and Alternative Markets

5.5.1 Satellite Communications

The satellite sector within telecommunications was described as relatively small, "but one with enormous potential for growth."\textsuperscript{232} This opinion and interpretation was reinforced by one journalist who stated:

"For an industry with only one functioning company, the global satellite telecommunications business has some pretty fierce competition. Dozens of companies are spending billions of dollars to launch hundreds of satellites in an often confusing race to provide telecommunications services to people all around the world."\textsuperscript{233}

The market potential according to one industry spokesman is understood through phone line availability and population comparisons. The managing director of Odyssey Telecommunications International Inc., claimed there are (globally) only 200 million phone lines compared with a population of 5 billion. In financial terms, the market by the year 2004 is expected to be worth $12 billion, with customers ranging from remote parts of the world to wealthy people and corporations linking their offices around the globe and also fast Internet services.\textsuperscript{234}

The EC's approach to this sector originated in a Green Paper in 1990.\textsuperscript{235} The deadline for an EC internal market was 1992. This in itself is interesting since satellites cannot physically be within the EC. Although technically amusing, this could be an interesting debate concerning international competition law. The objectives of this Green Paper (1990) are:

1. the full liberalisation of the earth segment, including reception and transmission and reception-only terminals;
2. free and non-discriminatory access to space segment capacity on an equitable basis; commercial freedom for space-segment providers;
3. harmonisation measures for EC-wide services including mutual licence
recognition, type-approval procedures, frequency conditions, and co-operation for services with non-EC states.\textsuperscript{236}

In keeping with EC principles, this Green Paper (1990) also states any additional regulatory measures should not introduce restrictions beyond specific satellite conditions, licensing schemes founded on objective facts proportionate to the objectives sought, they are transparent and non-discriminatory. Also, and in keeping with previous Directives and policy documents, this Green Paper (1990) seeks the separation of operational and regulatory functions concerning access and control of (in this specific example) the space segment.\textsuperscript{237} Stehmann explained that the Commission through the Green Paper (1990) on satellite communications,

"...hoped that Eutelsat will operate at arm's length from national operators. In order to avoid any distortion of competition the best solution is seen to be ensuring direct access by users to space capacity. Providers should market their capacity directly."\textsuperscript{238}

To achieve the latter, Stehmann suggested:

"The distribution of capacity could then be by competitive bidding by all service providers instead of an arbitrary allocation through national operators."\textsuperscript{239}

Whereas Eutelsat previously provided space capacity to the European Broadcasting Union, thus demonstrating direct leasing is possible, Eutelsat could develop a greater commercial approach by marketing space segment directly to service providers.\textsuperscript{240}

The legislation that followed the Green Paper (1990) for satellites are generally similar to those which followed the 1987 Green Paper previously discussed. The legislation covered services and equipment (including Directive 93/97/EC), but importantly Directive 94/46/EC brings into context the relationship between satellite communications and (wired) telecommunications. This Directive amends 88/301/EEC and 90/388/EEC. Directive 94/46/EC noted that some EC states had
already opened up some satellite communications services to competition, and licensing schemes were in operation. Nevertheless, it was noted within 94/46/EC:

"[T]he granting of licence in some member States still does not follow objective, proportional and non-discriminatory criteria or, in the case of operators competing within the telecommunications organisations, is subject to technical restrictions such as a ban on connecting their equipment to the switched network operated by the telecommunications organisations. Other Member States have maintained the exclusive rights granted to the national public undertakings." ²⁴¹

The Directive's purpose is to bring satellite earth stations within the established telecommunications legislation. Stehmann stated:

"The satellite policy of the Commission appears to be a logical continuation of the approach applied to the terrestrial network. Liberalisation is concentrated on those parts which are essential for the provision of all non-voice services for which competition is envisaged." ²⁴²

As Stehmann notes, the equal-access rules are to ensure Eutelsat signatories do not abuse their monopoly over the network when in competition with other service providers.²⁴³

"In this context the liberalisation of the earth segment cannot be regarded as a first step towards the end of the network monopoly. It is rather meant to be a necessary but exceptional device to promote the provision of non-voice services. However, it is a good example of the technology-driven retreat of network monopolies." ²⁴⁴

The provision for exclusive rights concerning public voice-telephony will no doubt expire with the end of the same rights for (wired) telecommunications, if in keeping with unifying terrestrial-oriented and satellite-oriented legislation.²⁴⁵ The importance
of satellites is three-fold. Firstly, it is a potential competitor to the existing network and infrastructure. Secondly, it is an alternative for the mobile/cellular telecommunications land-based network. Thirdly, it is a complementary network to the terrestrial fixed-wire and/or mobile networks. This technology and its usage is in place and functioning, but it is the liberalisation and competition within the satellite communications industry which is of importance. Simultaneously, it is the competition between satellite, fixed wire and mobile networks which is also important. One question is, will the three networks actually become formidable competitors or largely complementary? The answer may lie in breaking down the consumer market, distinguishing not only between commercial and private users, and travelling (i.e. globally or widely mobile) individuals and isolated populations and 'static', non-isolated populations.

Even so, how much choice will isolated populations have? These are rhetorical questions under the present context and brief, but none-the-less important factors for consideration. However, if there is competition within each (satellite, mobile, fixed-wire) then the question becomes less important, except to say that competition between them will (according to economic theory) be favourable to the consumer.

The foreseeable importance of satellite competition is with the anticipated growth of the satellite-phone market (or satellite personal communications services) and the convergence of communications and information services (TV, entertainment, data and the Internet), particularly as a global service.

The EC has already begun to consider the satellite-phone market with the release of a Council Resolution at the end of 1993. Entitled: On the Introduction of Satellite Personal Communications in the Community (93/C 339/01), the resolution adds to the telecommunications policy developments from the 1987 Green Paper, the 1990 Green Paper and the Directives pertaining to satellite equipment (93/97/EEC and 91/263/EEC). The Resolution added to an earlier Communication by recognising:
"...the need for appropriate regulatory conditions allowing the development of new markets for satellite communications services and the need to encourage a competitive European space industry and promote its interests at [an] international level."\textsuperscript{246}

That said, the Resolution expands on the new market and the international level of the market through recognising:

"...the planned introduction of satellite personal communications networks and services on a global scale will play a role in the development of telecommunications services in the Community in general and in that of satellite and mobile services in particular, as well as in the development of the Community's space and telecommunications equipment and services industries...."\textsuperscript{247}

The Resolution invites the development of policies pertaining to the development and trade in this sector, but also for the EC to collaborate in constructing competitive space and telecom-related industries to effectively participate in the global market. It also calls for international monitoring and co-operation with regulating bodies concerning standardisation, licences and frequencies, The Council Resolution stresses:

"...the importance of developing a Community policy with regard to satellite personal communications that will build on existing policies regarding telecommunications, in particular satellite communications, and on future policy on mobile communications based on the Green Paper on the subject and if necessary, on regional development and trade policies in general..."\textsuperscript{248}

As it has been shown, the policy of the EC appears to be one of evolution with sectors (such as the above one on satellites) adopting policies and Directives based on the 1987 Green Paper. At the (deemed) appropriate time these are amended to
adapt to the original equipment and service Directives (88/301/EEC and 90/388/EEC). This approach is supported above. It is natural to adopt or combine satellite communications policies with those concerning mobile communications, forming an approach for satellite personal communications services.

5.5.2 Mobile and Wireless Communications

The changes in market structures, industry players and even legislation are remoulding the traditional communication structure, combining or (even more appropriately) blurring industry and market divisions. These developments in the (tele-)communications industry and their influence on a competitive (telecoms) market have been outlined throughout this study. The developments have also been witnessed at regular occurrences during the preparation and course of this examination. Garrison and Taylor wrote:

"The parallel convergence of telecommunications and computing resulting from technological innovation compounds...[the]...challenge to traditional regulation."249

Among these innovations are the wireless communications systems. The growth of the industry (and multimedia services) has been described as; "...a central force in shaping the development of the EC communications and information infrastructure."250 The EC Commission has also produced a Green Paper on a common approach to mobile and personal communications251 (hereafter Mobile Green Paper), and a Green Paper on telecommunications infrastructure (including mobile and television networks).

In the Mobile Green Paper, the Commission estimated there would be 40 million users in the EC of mobile communications by the year 2000 and 80 million by 2010.252 It is estimated that there will be 450 million users by 2010 globally.253 In 1993 there were 30 million mobile phone users globally; 13 million in the United
States and approximately half of that in the EC. As such, it is not surprising to come across opinions like the one of Butler and DeSilva:

"Mobile radio services represent one of the most dynamic, fastest growing and important segments of the telecommunications industry...." 

It is also unsurprising to find statements as:

"[W]hatever the result, it is evident that mobile services will play an increasingly important role in the new national information infrastructure." 

Why is this industry or market within the broader framework so important? There are at least two reasons. One is it is an alternative to the traditional local loop. Secondly, the convergence of technology and its development beyond the initial stage of convergence suggest an interesting and plausible shape of the future of communications. However, a word of caution is needed. Excitement and enthusiasm in industries can mislead or distort present and future reality. Telecommunications is certainly no exception to the intoxication of hope. One of the things which risks being over-looked in the market-players’ attraction to product and market growth, and the potential wealth, is the fragmentation of markets by the systems used. Stehmann provides an example of this problem:

"In the past, mobile telephony has been major example of the high costs created by the fragmentation of national markets. Having installed different and incompatible systems in individual member states, car telephones become useless once they pass a national border. Different standards and technical specifications prevented equipment manufacturers from reaping economies of scale which kept the costs of mobile telephony high." 

As Stehmann observed:

"As a result, this sector offered fertile ground for the promotion of co-operation and market integration."
Yet, the mobile communications sector, despite its technological innovations, is perhaps less exciting than it can seem at least at the legislative level. It contains problems shared with the traditional wire-based telecommunications system for EC authorities. Unsurprisingly, the Mobile Green Paper carries shared principle and objectives found in the 1987 Green Paper and subsequent documents. Also unsurprisingly Directives 88/301/EEC and 90/388/EEC (et al) form the foundation and legislative links towards a common EC telecommunication infrastructure. This does not altogether rule out the market differences. As with satellite communications there are licensing and technology-differences, such as frequency issues and standards.259

The important elements are the liberalisation sections in opening up an EC-wide competitive market. For example, the provision of mobile terminal and network equipment has been open since 1988. The manufacture and supply of terminal equipment for the mobile sector is included in 88/301/EEC at 6(6). The abolition of exclusive or special rights has not (yet) applied to mobile communications.260 The barriers the Mobile Green Paper states needing to be overcome include:

1. the existence of exclusive or special rights which prevent overall market access; technology licensing causing EC fragmentations;
2. national-licences which delay EC-wide implementation;
3. fragmentation of development and service provisions which obstructs a global approach to personal communications services;
4. tariffs and pricing structures;
5. infrastructure usage restrictions;
6. a lack of a timetable for radio frequency allocations of new technology;
7. and barriers for EC manufacturing and operators access to non-EC states.

Furthermore, the EC's response to American initiatives for satellite-based personal communications was unfavourable.261
The solution suggested in the Mobile Green Paper was to extend EC principles and laws pertaining to the telecommunications industry to include the mobile sector, as it has with satellite communications (see above). There are other interesting elements of mobile telecommunications beyond the problems and topics which transcend telecommunications more generally, for example dominance and legal concerns which were examined earlier. These elements include the mobility - aspect especially in so far as its intangible link through satellites and secondly, the value-added services. In this case, though not necessarily exclusive to this example, is the added value of a mobile information-society.

This information society covers voice, data, the Internet (and quite possibly 'multimedia'). One vision of the future is as follows:

"Handheld and even 'wearable' communicators (combining the portability of a mobile phone with the power of modern computers) will have sophisticated communications facilities for video, Internet/Intranet access and remote database interrogation, as well as fax, email and normal voice communications."[262]

This capability, added to the basic concept of a mobile telephone but with the sophistication of being a global (satellite-based) personal communications system, makes for an interesting discussion. Omitting the colourful 'value-added services' cited above, one observer described the modern and truly mobile telephone concept in the following manner:

"Imagine a pocket-sized mobile telephone that could be used anywhere in the world. On home territory it would communicate via the local cellular network; elsewhere it would automatically route calls via a constellation of satellites. No need for radio based-stations; no need, perhaps, for the wired networks through which even cellular calls are rooted for part of their journey. Telecoms and space-technology companies are imagining as hard as
they can. To date, at least seven global 'satellite-phone' projects (plus a
handful of regional satellite-based networks) are wending their way towards
the market..." 263

Despite such developments and delivery of communications to the extent of the
mutli-communications equipment cited in the previous quotation, access to the
network whether its wire, radio-relay or satellite remains important for the success
of the competitive system. The Commission stated:

"Any policy with regard to satellite-based personal communications systems
must take into account the interests of users (these systems may offer a
valuable addition to terrestrial based services), the interests of the
manufacturing industry, and of service providers (satellite and other). In this
context the Commission has raised a number of issues in the satellite PCN
area relating to: regulation, competition policy, standardisation and
intellectual property rights, economic and industrial considerations,
multilateral framework and geo-political relations, and third generation
mobile communications policy." 264

A concern of the Commission which is a reflection of the changing nature of
telecommunications overall is its global nature, and in particular the global or even
foreign-ness of the companies operating communications and networks. The
Commission also stated:

"Policy in this area cannot limit itself to regulatory questions within the
European Union, but must address the wider trade issues and issues related
to the competitiveness of European industry." 265

In this regard the Commission is especially concerned that most (not all) satellite
proposals and most satellite operators are American, 266 or more importantly non-EC.
This concern draws out the overall telecommunications discussion: the globalisation
of the industry, and the potential conflict between the traditional state (jurisdiction,
sovereignty, and enforcement of [competition] law) and the potential direction of companies into a more international arena in which states could have little or no control. The issue of jurisdiction and the matter of globalisation is worthy of greater analysis, and as such follows in Chapter Six.

Having suggested the existence or development of a global economic playground, the competition concerns nevertheless remain both evident and important in the domestic (EC) marketplace. Secondly, the same domestic competition problems could extend into a global marketplace. The problems of concentration in the context of the changing telecommunications industry were earlier analysed. It would now be appropriate to turn the attention to legal problems relating to corporate and competitive behaviour which will affect the functioning of competition in modern telecommunications.

5.6 Summary

Competition in the telecommunications industry is dependent upon the successful liberalisation of infrastructure access. Such liberalisation is not restricted to one approach. This may range from competitors having access to another's network to separating the service-provision of the dominant operator from its network-provision, forming an independent infrastructure-operator. It is particularly the transitional period between the market of monopoly to one of competition which is of importance. Its importance is not only in shaping the competitive-system's culture, but may also affect the success of the players and long-term survivors of the competitive game. There is also the added element of encouraging alternative network providers which could come from other industries with previously little or no telecommunications interests, such as electricity, rail or canal companies. Furthermore, technological innovation provides for alternative networks and communications means; namely radio, mobile technology and satellites. However, there is the question about how suitable or realistic some alternatives are to
traditional fixed-networks; or are they merely compatible communications means.

One might predict radio services to be an equal competitor to fixed-wire, and/or the convergence of radio and fixed providers could emerge as the new status quo. Is the role of law to affect this? Some would argue for less intervention and to allow natural economic forces and consumer decisions to determine the shape of telecommunications. Yet, in a system of competition where the Idealist position on competition may be questioned (see previous chapters), the law as established is concerned with promoting competition. The American system was founded on preventing the abuse of private market power, whereas the EC law was founded to encourage and protect the development of a common market. In either case, it is the protection of competition that is important, and as such predicting possible future competitors is not the role of law; even where technology suggests possible alternatives. The law though is also a tool for opening previously closed or restricted markets and industries to competition. The different ways in which this was used and the philosophy of competition is interesting especially between the US and the EC.

This interpretation of competition philosophy has led to debates about the position of policies that have seemingly become values, such as universal service. These debates have been furthered by the concept of the information society. In this regard, questions have been raised about redefining universal service and whether it is something which should be protected and promoted by governments or left to the economic markets. It is neither the number of competitors nor the interesting developments (such as the changing types of communications means) that are of significance. It is the problems in competition law and the availability of an opportunity to correct them through the process of liberalisation that is of much greater importance.

Competition is the current political fashion for operating the telecommunications
industry; preferable to monopoly. Can the law adequately prevent monopoly from returning? Should the law intervene to protect against the rise of companies achieving dominant positions in order to prevent anti-competitive oligopolies? These are a couple of questions that can provoke strong opinions about the degree of competition and intervention. However, there is the interpretative problem in competition law, which suggests there might be a legitimate time when dominance or anti-competitive behaviour is either unavoidable or favourable to efficiency and the consumer. This then questions the legal regime, as some might in the case of the EC's interpretation of law compared with American approaches through rules of reason and per se.

In telecommunications there are conflicts and ambiguities which are not necessarily unique to the industry, but might be unusual to most markets. These include the infrastructure problem and therefore the need to use competitors' facilities, entry barriers, as well as bottlenecks because of an insufficient number of networks. Such difficulties create or further other problems including the question of: What is essential access and is this necessary?; Who determines access?; Is predatory pricing really anti-competitive, or is it all part of the competitive game? Then there is the matter of markets; How are these defined? In the end, it is the law that is a means to judge the level of acceptance and of effectiveness in overseeing these problems. It is also the law which often waits for the action to occur and thus the damage done. In some instances, such as in regard to the number of players and trends towards oligopolistic, strategic markets, perhaps the law is capable of entering as a preventative force rather than as a post-mortem. This is a challenging task, because as stated earlier, it is a question for the law to find the right balance between empirical and factual questions. These challenges need to be faced and the approaches to them re-addressed.
ENDNOTES


2. Article 85(1) EEC: Article 85(2) declares any agreement or decision which is prohibited by Article 85 is automatically void.


4. Ibid.


6. Ibid., p. 953.

7. Ibid., p. 955-956.


11. Ibid., Craig and De Burca, op. cit., p. 888-889; Whish, op. cit., p. 187-188.

12. for a close examination of the term and the multitude of activities which have been found to be an 'undertaking' see Whish, op. cit., p. 187-190.

13. Whish, op. cit., p. 188.


15. Ibid.


17. Ibid.


20. Waller, op. cit., p. 60.


22. Ibid.


27. see Whish, op. cit., p. 207.


29. Ibid.


33. Ibid.

34. Craig and De Burca, op. cit., p. 849.

35. Ibid.


41. Ibid., p. 3.

42. Ibid.

43. Ibid., p. 31-32.

44. Whish, op. cit., p. 206.

45. Ibid., p. 19.

46. Ibid., p. 20.

47. Hawk, op.cit., p. 67.

48. Ibid.


50. Hawk, op.cit., p. 69.

51. Ibid.

52. Whish, op. cit., p. 206.

53. Ibid., p. 207.


55. Ibid., p. 37.

56. Hawk, op. cit., p. 72.

58. Ibid., p. 339.

59. Waller, op.cit., p. 63.

60. Ibid.


64. Ibid.

65. Ibid.

66. cited in Mosteher, op.cit., p. 54 (Document A 2-0259/88, Explanatory Statement, para 8.); exclusive or special rights for network infrastructure was further supported in 90/388 EEC.


73. Chalmers, op. cit., p. 125.

74. Mansell, op. cit., p. 589.


76. G. Locksley, 'What is USO?', USO in a Competitive Telecoms Environment, op. cit., p.9.

77. Stehmann, op. cit., p. 21.

78. Ibid., p. 21.

79. Ibid.


81. Ibid., section 254(2)(c)(1).

82. Ibid., section 254 (2)(c)(1).

83. Ibid., section 254 (2)(b).

84. Stehmann, op.cit., p. 21.

85. Ibid.

86. see 'Wake-Up Call', Businessweek, 20 December, 1993, p. 38-42 for a number of anecdotes.


88. W. Munchau, 'Europe on the Sliproad to Information Highway', The Times, 4 October, 1994, p. 27.

89. Ibid.

90. I. Harding, '$100bn to Put France on the Superhighway', The European, 28 October - 3 November 1994, p. 17.


92. Muchau, op. cit., p. 27; Harding, op. cit., p. 17.

94. Ibid., p. 3.

95. Ibid.


97. Ibid., p. 2.

98. Cave, Milne, Scanlan, op. cit. p. 3.

99. Ibid.

100. Ibid.

101. Cave, Milne, Scanlan, op. cit., p. 43.


105. Ibid., p. 97.

106. R. Cawley 'Universal Service in the EU', USO in a Competitive Telecoms Environment, op.cit. p. 53.

107. Ibid.


110. Ibid.

111. Ibid., p. 97-98.

112. Ibid., p. 98.

113. Ibid.
114. Ibid.

115. With the exception of Spain, Ireland, Greece and Portugal which have transitional periods of up to 5 years (see Commission Directive 96/19/EC amending Directive 90/388/EEC Implementation of Full Communication in Telecommunications Markets, [1996] OJ L 074 (22 March 1996)).


117. Council Resolution on the Exclusion of Voice Telephony From Competition In Telecommunications (93/C 219/02).

118. Stehmann and Borthwick, op. cit., p. 605.

119. Sa'id Mosteshar, op. cit., p. 53.

120. Ibid.


123. Ibid. at para V2.


125. Ibid. Article 1 para 2.

126. Ibid., Article 3 para 3.

127. Ibid. at Article 3.

128. Ibid. Article 2; 90/388/EEC; Stehmann and Borthwick, op. cit., p. 603: This allows, for example, private networks to lease lines as in the case of smaller firms which do not create enough internal traffic for a flat-rate rental to be affordable. Stehmann and Borthwick, op. cit., p. 603.

129. Stehmann, op. cit., p. 159.


134. Whish, op. cit., p. 45.


137. (e.g. Yorkshire Electricity and Kingston Communications of Hull, UK; also the conglomerate VIAG in Germany)


140. Turnbull, op.cit., p. 96-97.


142. (e.g. Ionica)


145. Ibid.

147. Ibid.

148. Ibid.

149. Neale and Goyder, op. cit., p. 128.

150. Ibid.


160. Ibid.


163. Ibid., at 952.

164. Ibid.

165. (The exclusive or special rights are effectively abolished by the Service Directive 90/388/EEC: also see Pombo, op. cit., p. 562).


168. Ibid.

169. Ibid., p. 980, para. 111.

170. 'Luxembourg, Ireland, Spain, Greece and Portugal have been granted derogation to the time limit', *OFTEL News*, OFTEL No. 36, June 1997, p. 9.


173. also see Cowen, op. cit., p. 20-21.

174. Ibid., p. 22.


176. Mercury, for example, would then pay BT for use of the network - ADCs (access deficit contributions)


181. Temple Lang, op. cit., p. 475.

182. Ibid., p. 476.

183. Cowen, op. cit., p. 45.

185. Ibid. at para 116, also cited in Cowen, op. cit., p. 46-47.

186. Cowen, op. cit., p. 47.


188. Ibid.

189. Ibid.

190. Ibid.

191. Cowen, op. cit., p. 49.


193. Ibid.

194. Ibid.


201. Ibid.

202. Ibid. at para 71.

203. Ibid., para 72.

204. Sharpe, op. cit., p. 74.
205. Craig and De Burca, op. cit., p. 971.

206. Ibid.


208. cited in Soames and Ryan, op. cit., p.152, but see footnote 7 on the same page.


213. Ibid., p. 984.


215. Ibid.

216. Ibid., p. 642.

217. Ibid., p. 642.


219. Ibid.

220. Ibid.

221. Ibid., p. 649.

222. L. Philips, op. cit., p.248-249.

223. Ibid., p. 255: also- Philips (op. cit.) argues on the mathematical-based game theory that the Commission would nevertheless have found after a more complete investigation "indistinguishable problems". p. 255.


226. Ibid.


231. Article 86: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as compatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."


234. Ibid.


237. Ibid., p. 3.

238. Stehmann, op. cit., p. 163.
239. Ibid.

240. Ibid.


243. Ibid.

244. Ibid.


246. Council Resolution on the Introduction of Satellite Personal Communications
Services in the Community (93/C 339/01).

247. Ibid.

248. Ibid.

1, 27-30, at 1 and 27.


251. Green Paper on a Common Approach in the Field of Mobile and Personal
Communications in the European Union, Commission of the European Communities
(COM(94) 145) Final.

252. Ibid., at Section 1 Introduction & III.I.

253. P. Ashall, 'How Liberalisation is Creating Opportunities in New Markets',
Financial Times Conference, 'World Telecommunications', 7 and 8 December 1993,
p.15.2.


255. R. Butler and E. DeSilva, 'Industries in Transition: Mobile Service Regulation
Enters a New Era', Communications Lawyer, Vol. 11, No. 4, 1994, p. 18.

256. Ibid., p. 21-22.

257. Stehmann, op. cit., p. 164.
258. Ibid.


260. Ibid., Annex D 2.2.

261. Ibid., section III.2 and 7: also cited in Pombo, op. cit., p. 583.


266. Ibid. also Haynes op. cit.
CHAPTER SIX

Globalisation: Telecommunications as an Example of International Legal Conflict of Competition Laws

6.1 Introduction

The chapter is an instrument to advance the view that competition policy is no longer confined to state jurisdictions, but also increasingly beyond regional jurisdictions (e.g. the EC). The position advanced here is that the new telecommunications is inherently an industry and market that is of an international type. The purpose of this chapter is to raise more questions and challenging issues that require answering and addressing in the re-assessment of the fundamental approach to competition policy and ultimately the interpretation of competition law.

The view advanced in this chapter suggests that telecommunications is becoming a globalised industry and market. Telecommunications is also a significant infrastructure for other services which assists in expanding their markets. It is a meta-technology, because it has an important effect on a number and range of other industries and markets. In many cases the boundaries of these beneficiary markets could be beyond their original national borders. It would be negligent for this theme to be overlooked or ignored in re-evaluating competition law and policy in particular regard to telecommunications and the Information Society.

Telecommunications, while having connected much of the world for sometime, has its own trans-national structure and interaction. It has as by-products the rapid, global communications for other industries (e.g. financial services) and markets selling through the Internet. These too present questions and challenges to national
regulators. Telecommunications is effectively the modern trade route: the canals and railway lines of the Information Society.

On the one hand, nothing has changed under traditional legal law practice. Anyone operating within any country is technically responsible for their own actions under that country's laws. However, the position of the national regulator may be threatened, even weakened by this process of globalisation.

There are three approaches governments may take in regard to the new transnational telecommunications industry. One is to do nothing and believe in an insular, domestic policy, on the basis that nation-states remain absolutely sovereign. The second is to establish bi-/or multi-lateral agreements of co-operation or enforcement with other countries. The third is to assist in the development of a separate, neutral authority charged with overseeing, adjudicating or regulating matters of a global concern. Yet enforcement of law from beyond a state's borders, either by another state or by an international organisation is in principle an inherent conflict with the sovereignty of nation-states. However, a model of absolute sovereignty has, at least since 1945 during the UN era, been increasingly outdated as has the existence of international law definition qualifying sovereignty. The EC structure, which is arguably a new kind of international organisation, raises even more pointed questions of sovereignty as current political debates (e.g. in the UK) demonstrate. It must, however, also be said that agreement between states (e.g. US-EC Competition Laws Co-Operation Agreement (1991)) do not guarantee co-operation nor effective enforcement. Likewise, the right decreed by a state to enforce its own laws beyond its own borders (e.g. effects doctrine) conflicts with the principle of national sovereignty. It is these conflicts which are fascinating, especially in light of the apparent changing commercial nature through telecommunications of the world at large.
6.2 Globalisation

Some might argue that globalisation is not a new concept or activity. The creation of multinational corporations and international businesses or business links between states is historically not new. International trade extends as far back, if not further, to the ancient civilisations of Greece, Rome, the Ottoman Empire and East Asia. Multinational corporations can be found in the times of the development of Belgian, Dutch, English, French and Spanish empires with the royal grants of monopolies for trade in furs and precious metals. But there was still a strong bond between the state and the form of corporation involved.

Globalisation may also be a term that has not adequately been defined. It is a term which has recently become a 'catch phrase'. Globalisation can suggest that national borders are insignificant, markets are borderless, and/or that firms do not have a nationality or home. It is also a term which has been used to describe a dynamic process rather than one which is static. A separation of the bond between the state and corporation is perhaps the focal point which generated interest in multinational corporations in the 1970s. The power and effect of these organisations was recognised, for example, through the oil crisis, financial crisis and even markets such as coffee. Countries which were not previously recognised as influential states became powers in their own way (such as the Middle East oil producing countries). This emergence of both the multinational company in conjunction with globalisation began a fundamental change in the political-economies of the world.

"International business has forged a network of global linkages around the world that binds us all - countries, institutions, and individuals - much closer than ever before. Those linkages tie together trade, financial markets, technology, and living standards in an unprecedented way." ¹

This separates the royally-decreed 'multinational companies' and the international
trade of past history from contemporary international business. The evolution of trade theory shows progression of thought from Adam Smith's opinion that each country should specialise in products which it can create most efficiently, to more recently Michael Porter's *Competitive Advantage of Nations*. In the latter a state's competitiveness depends on its ability to innovate. This is benefited by strong domestic competition and demanding (domestic) consumers.²

Nevertheless, the growth of modern international trade, multinational corporations and closer relations of states through a form of economic 'cause and effect' strengthened the necessity for international trade laws and organisations. International co-operation may be further intensified through the growth of industries such as telecommunications and the resulting capabilities these may provide. For example, developments in telecommunications assist in the speed and types of financial transactions made in speculative trade. Yet, despite this apparent transition to another stage in international trade theory which suggests a further distancing of corporate power from traditional state-political dominance, the subject is perhaps not quite so transparent and definitive. Instead this furthering of globalisation can at times be ambiguous and a grey area threatening many theoretical-certainties, or emphasising other forms of political tension. In explaining globalisation, Humbert stated:

"Globalisation is the name given for a lack of a theoretical concept matching more closely observed phenomena. Although we are far from a world integrated economy, which would rationally characterise the competition of a wide globalisation process, we can point out that the evolution of important economic variables, which are necessarily localised, depends on economic forces that are mainly driven by non-local factors."³

Perhaps globalisation is a product of the meeting of the previous two systems of national and international economies. Humbert lists four phenomena regarding the
economic evolution of globalisation. First, this term and process has originated from the main industrialised states, just as did internationalisation. Secondly, the "adequacy between a nation-state economic sovereignty domain and its markets is under pressure". Thirdly, "by traditional analysis industry was not given a real international dimension." The fourth phenomenon is the development of communication infrastructures (et al) which in effect shrinks the world towards a seemingly 'global village'. The direct and integrated involvement of telecommunications not only separates itself from most other industries as one in its own distinctive right, but is also both an important cause and problem to the status quo.

The consequence is the emphasising of the faults in international regulation of competition. It also creates tension and conflict as different state-industrial policies and competition laws are forced to meet. This industry is not the only one to cause inter-state disputes, but as a communication infrastructure telecommunications is more forcible in the bonding of states. The subject of inter-state conflict has in part begun to be resolved. The internationalisation of trade has encouraged various forms of co-operation and economic unification of states. The North American Free Trade Area (NAFTA) is one example and the EC (now the European Union) is another but more integrated area. Nevertheless, the problems and conflicts for states caused by globalisation remain. Individual states and unified bodies (e.g. the EC) are affected. So depending upon the issue at hand the conflicts may be understood as being between individual states, or between trading blocs. In the end it may be simply a reduction in the number of political players, but it does not significantly lessen the challenges.

International trade agreements and organisations exist such as the ITU (International Telecommunications Union) and WTO (World Trade Organisation) which may develop into positive forums and judicial bodies for relevant international trade
problems, in particular as courts for an international competition law. As of 1997, there is an international agreement on telecommunications services through the General Agreement on Trade in Services (GATS). However, while it remains to be seen how effective this will be, there is nevertheless a developing need for public international law and bodies such as the WTO for effective international competition law enforcement.5

There are two forms of international regulation: the co-operative approach between states; and the transnational approach which is a legal umbrella over states.

In 1991 the EC and the United States established the Competition Laws Co-Operation Agreement (1991).6 The EC and US publicly acknowledge the need for international agreements. In this particular Agreement it was stated:

"Recognising - that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the European Communities and the United States of America;

Noting that - the Commission of the European Communities and the Government of the United States share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them; the sound and effective enforcement of the Parties' competition laws would be advanced by co-operation and, in appropriate cases co-ordination between them in the application of those laws;

Noting further that - from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties ...."7
"...[the] agreement is to promote co-operation and co-ordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws."  

The stated meanings and implications are important acknowledgements of a changing economic and commercial world, but this is merely an agreement and not enforceable. Nevertheless it is a step forward. Sir Leon Brittan explained:

"Facing up to the challenges of our interdependent world, and recognising that both countries share a commitment to protect competition in their markets, the aim is to provide for rapid consultation procedures and dispute avoidance mechanisms in competition matters."  

A significant problem with unenforceable Agreements as opposed to binding Treaties can be found in this statement. This is the protection of competition in the parties' markets. The problem more specifically is the interpretation of competition, the policies and theories of competition and enforcement of the system can differ sufficiently so as to conflict with the other state's philosophy. While recognising potential difference of opinion in the Agreement as cited above, practice may make the Agreement appear to be theory.

It is worth noting again the purpose behind EC laws (supported by Articles 85 and 86) is to create economic integration of EC states. American law by contrast has historically been concerned about private power. Secondly, American enforcement has been more influenced of late by Chicago School theorists opposing intervention in the marketplace, unlike the approach EC authorities have taken. Each approach may not only be founded on philosophical visions and interpretations of the organisation of domestic economic freedoms, but as a matter of national co-ordination, policy and power as a whole. Fidler explained;

"[C]ompetition law directly touches on issues relating to a State's economic
well-being and power, which are already matters pertinent to the national interest. US, British and European authorities have at different times shown concern at the way in which competition law affects the economic power and competitiveness of their respective economic players. Part of the success of Chicago School antitrust thinking during the Reagan administration could be found in the message that traditional anti-trust thinking weakened the ability of US companies to compete effectively with foreign challengers. Section 84 of the British Fair Trade Act 1973 specifically lists as one key factor in evaluating the 'public national interest' how British companies are faring in the international market place. Part of the motivation for some of the European Commission's decisions in the early 1980s on joint venture agreements relates to fears that European industry was falling behind American and Japanese competitors."

Thus foreign policy and trade policy may affect competition law adjudication. Conflict arises in two areas. One is the extraterritorial application of law to international mergers. The second is the extraterritorial application of law whereby a firm in one state commits outside of another state an act which would be illegal in that state, but the act affects that state in some manner. The offended state in its efforts to enforce its laws against the company located in another state calls into question matters of jurisdiction; A question of asserting one's law into the sovereign territory of another.

6.3 Jurisdiction

Jurisdiction of states are traditionally founded on the notions of sovereignty and territory. In terms of globalisation conflicts can arise when one state wishes to impose its rule of law within another. For example a situation may arise in which a company's behaviour affects the market of a state in which the company is not directly present. The "harmed state" may want to take action against the foreign
company such as through antitrust laws. A foreign state seeking to impose its competition laws on another state or the further development of transnational laws risks the sovereign integrity of states. Without straying into the realms of international law, some basic definitions need elaboration in. These are sovereignty, territorial sovereignty and jurisdiction.

Sovereignty, according to learned scholars and caselaw has been defined as follows.

"Sovereignty in relation to states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of the state." 13

Territory is a basic necessity for sovereignty: without which there is little to claim for title. Without territory, the legal entity cannot be a state. "The essence of territorial sovereignty is contained in the notion of title. The term relates to both the factual and legal conditions under which territory is deemed to belong to one particular authority or another."14

Jurisdiction has been stated to be "...the power of the state to affect people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. Jurisdiction is vital and indeed the central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations." 15

This intervention into another state is known as the effects doctrine. This is brought under the territorial principle and termed the 'objective territoriality principle'.16 Whereas a state is deemed to hold jurisdiction over all persons, property and activities within its territory, the extension of competition (namely antitrust) laws into the territory of another creates ambiguity in relation to sovereignty and territory.17 As extension of competition laws and their enforcement into other sovereignties may be interpreted with some hostility, in breach of the principles of
sovereignty and territory defined above, it is also the case that the state could exercise its power abroad where criminal acts are committed beyond its jurisdiction by its own nationals and other nationals against it. This (the universality principle) may be an extreme example, but the point is made.\textsuperscript{18} Perhaps the difficulty, the problem, the ambiguity of the situation is the distinction between enforcing a crime of humanity and behaviour which is less personal and more business-oriented. A principle of protection becomes confused with economic principles and policies. Humanity may be understood to be elevated to higher principles than something which is of a political-economic policy or culture. In the case of the latter, offence may be taken by states where others seek to apply their own policies or laws in others', thereby threatening or offending the respect of sovereignty. Shaw explained:

"Claims have arisen in the context of economic issues whereby some states, particularly the United States, seek to apply their laws outside their territory in a manner which may precipitate conflicts with other states. Where the claims are founded upon the territorial and nationality theories of jurisdiction, problems do not often arise, but claims made upon the basis of the so-called 'effects' doctrine have provoked considerable controversy. This goes beyond the objective territorial principle to a situation where the state assumes jurisdiction on the grounds that the behaviour of a party is producing 'effects' within its territory."

Although with modifications over time, the United States has "energetically" maintained an effects doctrine.\textsuperscript{20} Regardless of the history of the application of the doctrine by the US\textsuperscript{21} its application and appropriateness nonetheless continues to become increasingly important. Brown stated:

"During the course of the twentieth century, territorial limits on national jurisdiction gradually eroded. Revolutionary transformations in international commerce, technology and business organisation produced regulatory needs that were incompatible with strict territoriality principles. State practice
increasingly included extraterritorial assertions of jurisdiction, relying particularly on the effects doctrine and nationality principle."

Two examples of 'effect' acts may be used for some direction as to contemporary problems and for application to the telecommunications industry: The *Woodpulp* case and the *Boeing-McDonnell Douglas* merger.

### 6.3.1 *Woodpulp* 23

The decision of the ECJ and the basis of the Commission's argument in *Woodpulp* may be traced back to the *Dyestuffs* case. 24 Although in this case the term and definition of *economic entity* was important, it was also the "unity of the undertaking"25 which was an important doctrine. On this doctrine may be based jurisdiction, establishing what in effect is the relevant point of contact. Prior to the *Woodpulp* case, this doctrine allowed for the EC authorities to avoid explicitly defining their jurisdiction as regards to cross-border business issues. 26 In the Decision the Commission stated:

"In this case all the addresses of this Decision were during the period of the infringement exporting directly to or doing business within the Community. Some of them have branches, subsidiaries, agents or other establishments within the Community. The concentration on price, and the clauses prohibiting export or resale all concerned shipments made directly to buyers in the EEC or sales made in the EEC to buyers there...." 27

Importantly:

"The effect of the agreements and practices on prices announced and/or charged to customers and on resale...within the EEC was therefore not only substantial but intended and was the primary and direct result of the agreements and practices." 28
This clearly established the EC's reliance on the *effects doctrine*. In referring to the company (the parent of the EC subsidiary) outside the EC it was previously stated:

"The applicant whose registered office is outside the Community, argues that the Commission is not empowered to impose fines on it by reason merely of the effects produced in the Common Market by actions which it is alleged to have taken outside the Community. Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common market. It appears from what has already been said that the increases at issue were put into effect within the Common Market and concerned competition between competitors operating within it." ²⁹

By arguing that the undertakings were established outside the EC, the applicants claimed the Commission's decision breached public international law on the basis that:

"...the application of the competition rules in this case was founded exclusively on the economic repercussions within the Common Market of conduct restricting competition which was adopted outside the Community." ³⁰

The ECJ however, noted:

"By making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on that market." ³¹

Thus the problems are: 1) decisions (and actions) by firms outside the EC affecting the EC, and 2) using influence over subsidiaries to breach EC law. In either (or both) instance(s), the use of law is based on the *effects doctrine*. The question which rises may usefully divide the issue into two, and this may be beneficial in regarding the
discrepancy over judicial sovereignty. Under international law there is prescriptive jurisdiction which concerns nationality, protection (security) and territory. This allows for one state to enforce law in another on these principles. However, these are not economic principles per se. They are more to do with security, political (military) acts against the state and perhaps extended to criminal acts (taking into consideration extradition treaties). In effect and generally speaking, these are defensive measures to protect the political sovereignty of states. In the instance of *Woodpulp*, there is the problem of an offensive or more intrusive approach which points more towards exploiting policies and law rather than defending the market within the confines of the EC. Ferry stated in regards to this issue of 'imperialism':

"The direct enforcement of decisions under the Community's investigatory powers raises this question in one form. The indirect enforcement of such decisions against a subsidiary in the EEC to obtain disclosure of information held outside the EEC by a foreign parent, raises it in another form."  

Thus, while a subsidiary may be within the jurisdiction of the Commission and the ECJ if located within an EC Member State, the behaviour of firms outside the EC including parent firms are in practice beyond the EC authorities' jurisdiction. As stated in the *XIVth Report on Competition Policy*:

"The *Aluminium* and *Woodpulp* cases illustrate the Commission's assumption over non-EEC undertakings when the activities of those undertakings have a direct and appreciable effect on competition and trade within the EEC. This reflects the policy, which is essential in the view of modern world trade, that all undertakings doing business within the EEC must respect the rule of competition in the same way, regardless of their place of establishment ('effects doctrine')."  

Although recognising the dilemma and conflict of contemporary global economics, the approach may be conflict-prone. The EC's approach to the problem of non-EC
firms and the effects from without the EC has been criticised. Rather than using an *effects doctrine*, the British Government suggested using what it labelled the *territorial principle*. The UK argued the *effects doctrine* assumed extra-territorial jurisdiction over conduct which occurred wholly from outside, in the case of this study, the EC. The justification for this jurisdiction was based on the economic effects which the foreign action had within the EC. This reiterates what has already been described, but in contrast through the *territorial principle* to maintain the traditional public international (law) respect for sovereignty and territory approach. Jurisdiction under the *territorial principle*, should according to the British Government in 1989 instead be founded on the "prohibited acts done or implemented within the Community". The acts of agents and subsidiaries "which are carried out in accordance with the directions of the foreign undertaking may be properly regarded as the acts of the undertaking."  

Jurisdiction, (according to the said White Paper), under these circumstances is then not extraterritorial, but consistent with the *territorial principle*. It may be important though, for the foreign undertakings to have a presence either by agents or selling through offices within the EC for proper application of the territorial principle. This approach was not accepted by the EC, but rather it was immaterial if any presence through subsidiaries, agents or branches existed within the EC. Competition policy difficulties in the form of 'imperialism' and the problem of globalisation to states is most evident in the *Boeing-McDonnell Douglas* merger.

### 6.3.2 Boeing-McDonnell Douglas

In *Boeing-McDonnell Douglas*, this is an agreement about the effects on the international aviation market. It is also an example of where the EC-US Competition Law Agreement should and could have been put into productive use. It is also an example of territory-jurisdiction conflict, the problem of economic/commercial use of the universal principle behind the effects doctrine and the problems outlined in the
last quotation by Brown cited above. The problem centres around the oligopolistic airline manufacturing market and in particular between two 'flagship' manufactures, one American and the other European (EC). The ruling made by the American competition authorities, the Federal Trade Commission (FTC), accepted that:

"On its face, the proposed merger appears to raise serious antitrust concerns." 41

The basis for the FTC's acceptance held:

1) McDonnell Douglas "...can no longer exert a competitive influence in the worldwide market for commercial aircraft." 42

2) "There is no economically plausible strategy that McDonnell Douglas could follow, either as a stand-alone concern or as part of another concern, that would change that grim prospect." 43

In this interpretation of the firm's position, the FTC allowed for the merger with Boeing with the argument that Boeing and Airbus already dominated most of the commercial airline market. The FTC decided that the merger would not substantially lessen competition. 44 Some dissension within the FTC questioned the reasons supporting the decision. One dissenter was of the opinion that McDonnell Douglas has been successful in market pressure despite its comparatively smaller size. 45 While the firm may need more customers it does not make it uncompetitive for future sales, it was stated. 46 The merger however, would make Boeing the world's largest aerospace company. 47

There is more than this though. Not only may the number of manufacturers be small, or at least the gap between the leaders and the lesser players be sufficiently substantial, there is the post-initial purchase of the aircraft business to consider. Contracts for exclusive supplier of aircraft, 48 servicing and supply of spare parts 49 are also potential competition problem areas. The EC Commission claimed the merger would result in Boeing controlling 84% of the global in-service business. 50 The
merger raises concerns about the future competitiveness of Airbus by the company and EC authorities. The point which is reportedly the one of greatest concern to EC authorities is the exclusive supply deals with airlines such as American, Delta and Continental Airlines.

These supply deals originally could have lasted as long as 20 years which therefore would exclude competition from rivals such as Airbus (among others). Others argue that the deals are insignificant as others such as British Airways, who are loyal customers to Boeing, could be expected to continue to do so. From the position of competition theory, such customers still have the choice to switch to a competitor. Exclusive supply deals by their contractual nature are considerably more binding and tie the customer to the company. This does not guarantee that customers will use competitors. The president of Continental Airlines for example, stated its relationship with Boeing would not change regardless of the Commission's decision.

One suggested approach to solving the dispute was the proposal of a third party licensed for servicing and supply of spare parts. This, according to the Commission, would reduce the over-dependency of aircraft firms (namely McDonnell aircraft operating firms) on Boeing. Continental Airline's president dismissed the proposal to end the exclusive agreements, claiming the Commission was "naive" and such a request was "made out of not understanding the business". This opinion from a customer is of general interest, but on the whole the Commission has an obligation to protect the competitive system (in the EC) and should, in theory, be less concerned with the affect on the offending company or the choice of a customer to continue with the company. Competition is the ability for choice. However in this merger case, but not exclusively with this case, there is the involvement of politics.

In this instance the evidence of sides taken, EC with Airbus and the US (FTC) with Boeing, the pure protection of competitive systems becomes tainted and/or
distorted. Perhaps most evident in the taking of sides was the threat of retaliation and a trade war started by the US if the EC did not agree to the merger. While it may be argued that the authorities involved were acting in favour of their 'national firms/industries', there was the issue of jurisdiction.

The merger is between two American firms, and the formal exclusive-supply agreements thusfar are with American airline firms. Furthermore, Boeing and McDonnell Douglas have few assets in the EC. Yet with concern over potential discrimination against Airbus, such as through supply arrangements, the EC's competition concerns have been sought to be extraterritorially enforced. This is argued on the basis of the takeover being a global issue.

"The Commission argues that the takeover is a global issue giving Boeing three quarters of a market worth trillions of dollars over the next quarter of a century.... Since Boeing is a global power that does much of its business in Europe, the Commission argues that it has jurisdiction, just as US antitrust authorities can issue rulings governing European companies that do business in the United States."

This argument is the 'effects doctrine'. Where disagreements between antitrust authorities conflict and arguments become reduced to political conflict and obstacles, the void of an effective global competition authority becomes evident. This problem is furthered where agreements between states such as the EC-US Agreement fail to resolve disputes. This is underlined in the following citation:

"If Brussels lacks confidence in the FTC, it is hard to imagine effective transatlantic co-operation. For the EU to insist on dictating changes in the US market looks like an attempt to impose its laws unilaterally on other countries. That undercuts EU criticism of extra-territorial US policies; it might also provoke Washington to interfere in future European competition
cases over which the EU claims jurisdiction." 63

The problem is not always simple interference because of a disagreement of rulings. There is also the problem of a failure to respond adequately to a shared concern. The FTC and the EC Commission were both concerned with the sole-supplier arrangement, but the FTC did not challenge this with Boeing. 64 It would be logical to expect the EC to request the US to investigate these concerns under the EC-US Agreement. 65 This Boeing-McDonnell Douglas incident is an example of the problem which can be created whereby states' competition interpretations and also their political agendas can be damaging to all concerned. This merger is also revealing in the double standards which governments at times take. On the face of antitrust interpretation this case may be seen on the one hand as a conflict between capitalism and interventionist ideologies. The overt action of the EC may be regarded as the interventionist, protecting European interests in Airbus. Whereas the American approach would seem to support market forces. Such an interpretation, broadly speaking, would be in line with the Chicago School's antitrust philosophy of allowing the marketplace to determine the fate of companies.

"[T]he merger is only another ripple in the tidal wave of consolidation and globalisation sweeping the markets. The higher forces of capitalism are at work...." 66

On the other hand, and as noted, intervention by the American government through its protectionist position against EC discomfort about the merger contradicts this purely antitrust interpretation. This may be seen in an apparent industrial policy of the American government in encouraging the reduction of market-players. This was outlined in the following description:

"The merger is the culmination of a consolidation process in the US aerospace industry that is threatening the survival of European manufactures. In the space of three years, the top 15 US aerospace companies have been
welded into three conglomerates dominating the world market.... To maintain competitiveness and to drive down US Government procurement costs, the companies were encouraged to merge. The Clinton Administration would waive antitrust objections, the bosses were assured. They needed little encouragement. A merger frenzy ensued. Time-tables also played a part. American manufacturers knew Europe would not be ready to follow their lead. Tie-ups across European borders were slowly becoming acceptable. Airbus, although stumbling from one banana skin to the next, was becoming a threat to Boeing in the early 1990s." 67

To avoid such disputes from becoming inter-state or global trade wars and to avoid political conflict, as this case threatened to become, a policy of co-operation may be best in many circumstances to achieve amicable solutions. The globalisation of some industries and markets may lead to political-emotional involvement thus resulting in damage to the competitive system. While specifics such as employment-protection 68 may be in the political interest and more-so in some industries (such as aerospace) than others, the problems are potentially akin.

The fundamental issues in Boeing may be found in time in the global telecommunications industry. Furthermore, there is the growing problematic issue of global market concentration and dominance. On the one hand it is very much a market problem. On the other hand, it is an economic form of national dominance.69 The question which could be given greater consideration and is a factor in the phenomenon of globalisation asks whether national support for global companies is really in the interest of states or if such policies are dated and misguided? If a company truly becomes 'global' rather than simply a multinational, then is it really a national company; one with ties and loyalty to its state, or has the state become an economic and political pawn for the interests of the (global) company?
The void or weakness of an international competition body may only further raise conflict between states in so far as one state or trade area extending the scope of its competition rules into others' jurisdictions or sovereignties. Similarly, the right of one sovereignty to disrupt an economic or commercial activity such as a merger in another's jurisdiction raises questions. These questions and problems may become more frequent as globalisation develops. The paradox to globalisation is the importance of states (as opposed to states' self-choice) opening their domestic market, and in telecommunications this is evident.

6.4 Internationalisation of Competition Policies and Law
As earlier chapters have indicated basic goals of competition policy may be understood to:

"...ensure the best possible functioning of the market by protecting the competition system from distorting practices and restraints be they public or private. In theory at least, this ensures the consumer the best choice of goods and services at the best possible price, and forces firms to become industrially competitive." 70

The growth of industry at an international level particularly during the last two or three decades has begun to challenge the traditional notion that competition policy is purely a domestic concern, distinct from the separate global marketplace. Regardless of national emotions and fears which can arise with the development of international business, provoking often extreme responses such as calls for isolationist policies, the opening of markets and trade through multinational firms has made it more difficult to clearly distinguish domestic from foreign. 71 One consequence has not only been free trade agreements and trading blocs or alliances, but an effort by at least some governments to extend their influence abroad. This is evident with 'effects doctrines', extending the reach of domestic law into other jurisdiction if only for self-protection. This policy is also not entirely new. One commentator traced the history
of the American judicial behaviour of regulating conduct outside the US back to its country's Constitution.72

"The power of Congress, under the U.S Constitution, to enact legislation that regulates conduct occurring outside of U.S. territory is well-settled. In a recent decision, the Supreme Court pronounced the matter no longer open to any debate: 'Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.' This is not a new conclusion; for many decades, in a wide variety of contexts, the Court has summarily upheld the extraterritorial application of U.S. law against constitutional challenge.73

It is also noteworthy that the Supreme Court of the US has on occasions permitted a number of American states to extend extraterritorially their local laws.74 It is noteworthy that the American Congress does not constitutionally have the power to enforce its laws beyond the US.75 While the latter can lead to an engaging debate about the constitution, judicial rulings and the right for extraterritorial enforcement, the practice is not restricted to the United States. As cited, the EC (through Woodpulp and its involvement in the Boeing merger for example) also pursues such a policy. It is politically a dangerous one, despite its usefulness in protecting the domestic system. Extraterritorial enforcement risks the arrogant policy of imposing one state's will on another. While recognising policy imposition is a regular occurrence, the assumption of the right to make rules for the imposition into other states is a violation of the principles of international law regarding sovereignty. Problems of political conflict from this behaviour has been raised by the EC. In a letter to the Congressional Committee in 1984, the EC stated:

"US claims to jurisdiction over European subsidies of US companies and over goods and technology of US origin located outside the US are contrary to the principles of international law and can only lead to clashes of both a political and legal nature. These subsidies, goods and technology must be
subject to the laws of the country where they are located." 76

This concern and approach may be seen in the Woodpulp case. It is also applicable to the political dispute over the Boeing-McDonnell Douglas takeover and in the example of the BT-MCI merger. As in the instance of Boeing, it is not necessarily the purpose of extraterritorial application of competition policy to protect abuse of the domestic market (by 'foreigners'). The traditional perception of the judiciary as a neutral applicator and enforcer of law is tarnished by the use of law as an offensive political weapon. Favouring one's own national companies, especially in ignoring anticompetitive behaviour such as dumping abroad or any other effects on another state is not uncommon. The acceptance of the Deutsche Telekom-France Telecom Atlas alliance (for example) was criticised as creating a 'national champion' (especially to challenge foreign [non-EC] giants such as AT&T). In the DeHavilland Decision the proposed merger was not however, used by the Commission to promote economic power. The European Parliament, France and Italy were critical of the Commission for not using such an opportunity to promote 'national' (i.e. European) interests. 77

The European Parliament, as a result, called for:

"...a revision of the European Community's competition law to force the Commission to consider global competitiveness of EC industry and jobs when reviewing such transactions." 78

However as Fidler stated:

"[T]he European Commission realises the importance of EC competition law in building a sense of European-ness among the member States and in demonstrating to non-EC States and companies that the European Community is not a figment of the imagination." 79

Furthermore:

"The concern about domestic autonomy and national competitiveness has
also recently appeared in the United States in calls for intelligence efforts against foreign economic and corporate espionage in the United States.80

The problem may not only be trade and market distortions by firms outside the affected (national-) market, but rather in inter-state trade these distortions are exacerbated by the absence of a common (international) competition law. Again, international agreements do exist, and again the GATS (under WTO) is an example of some trade law development.

The WTO's negotiations on basic telecommunications were completed in February 1997. The agreement under the GATS covers public and private telecommunications services involving end-to-end transmission of customer-supplied information. These include voice or data transmission: voice telephony, data, fax, telegraph, telex, private leased circuits, fixed and mobile satellite, mobile telephony, mobile data, paging and personal communications systems. So-called “value-added” services were not formally part of the negotiations, but were already liberalised in 44 schedules affecting 55 countries of the Uruguay Round negotiations. The GATS schedules for telecommunications are concerned with what aspects of telecommunications are to be liberalised and when. The purpose is to encourage and increase market access, including establishing new infrastructures, provide services including cross-border (e.g. calling cards, resale), and interconnection rights.

However, the liberalisation is not uniform in either time-span, service-provision and investment (e.g. foreign ownership rights). Rather, there were in February 1997, 69 countries committed to opening up various levels of the market. The GATS requires countries to allow foreign operators access to build infrastructures and compete in the national market. Significantly this is undertaken through the more traditional GATT/WTO ‘Most Favoured Nation’ (MFN) process. This affects domestic law as countries need to change national legislation to be in keeping with the GATS’
general obligations and disciplines (e.g. with regard to transparency). However, it remains to be seen how quickly signatories do make the necessary changes and also the effectiveness of the dispute settlement mechanism. Significantly, it will be interesting to observe how effective this process is not only in liberalising markets, but in managing competition obstacles. This process of liberalising markets remains to be only one side of the proverbial coin. In removing the political barriers to trade, there still remains the need to remove commercially-derived barriers and behavioural obstacles. The other side to market liberalisation is in managing and protecting the competitive market. As the number of national markets are opened, this becomes even more important.

In this respect, there seemingly remains (at present) a void between states. Reasons for this may vary, but probably depend largely on the common commitment in preserving the principle sovereignty - at least of one's own territory. International theories have attempted to reduce the importance of the state, but they have failed to be persuasive or realistic. Nevertheless, it is important to recognise non-states players are important influences and factors in modern politics and state-economics. There may be an argument for 'national interest' and a case for supremacy of the state over economic players, but the growth of international economics, business, and international industries and markets calls for a new or at least additional approach. This approach demands some other form of diminished sovereignty or binding co-operation in order to resolve disputes of those players and factors in the global marketplace.

Telecommunications seems to be a stronger candidate than many other industries for having a position in the global economy. There are, nevertheless, elements of telecommunications which may remain appropriately under the national policies such as manufacturing or universal service obligation. The basic nature of telecommunications, the transmission and reception of signals across the world, by
definition encourages its acceptance as a global industry and/or market. Globalisation extends any interest of multinational corporations into a new realm, further from the traditional philosophy of state sovereignty. It brings the conflict of competition policies (or lack of) to new levels, and this is especially noteworthy when the firms involved in alliances, joint ventures and mergers create global firms (which could be seen as something more unified and separate from multinationals).

The recognition of "realities of modern world trade" as stated by the EC and thus the resulting policy approach of assumptions over non-EC undertakings through the effects doctrine, stresses the legal problem of contemporary international (economic) politics. This problem is further emphasised by, but not exclusively, the issues raised in the Boeing merger. Sir Leon Brittan and Karel Van Miert of the European Commission explained their opinions in support for international rules on competition in a Communication to the EC. They stated not only have liberalisation and globalisation been the shaping characteristic features of international economics of late, but the reduction of import tariffs through the GATT negotiations (from about 35% down to below 4%) has led to a massive growth in the amount of those conducted. They estimated every 7-8 years the value of the trade has doubled, and in actual figures this rose from about $200 billion in the early 1960s to more than $5000 billion in 1994. Thus, "[n]ational economies are more open to foreign competition today than ever before." As discussed earlier, the pace of change and increasing types of communication technology is furthering the value, volume and amount of international commercial and financial exchanges. The globalisation of industries such as telecommunications adds further pressure to the status quo of international politics and economics. Moreover, telecommunications not only contributes to international trade, but potentially becomes an entity in its own right; perhaps under the simple title of international communications or a global information infrastructure. It was stated in
the Report of the Fifth Regulatory Colloquium of the International Telecommunications Union:

"It has become commonplace to observe that telecommunications has entered a period of explosive, global growth. This telecommunications revolution has been marked by the unleashing of technological change, competitive forces and the privatisation of state monopolies, the creation of consortia of service providers which are global in scope, and of wholly new services embodying advanced capabilities often targeted to specific needs of business individual consumers."  

This statement supports not only the argument, and moreover the interpretation of the telecommunications industry and market put forth towards the beginning of this thesis, but it is an important recognition from a governing body - not just from the industry's players. Through this recognition by a governing body emerges the argument about the global nature of the revolutionised industry, and the importance for regulatory and government changes in response to the new situation. In the Report it was stated:

"Technological and market forces are changing the telecommunications industry from a state industry with special status (and often under state ownership) to one in the mainstream of trade. The globalisation of national economies, the trend towards 'information economies' and open access, the greater the interest of the state in telecommunications as a key factor in national development, the significant decreases in costs in the sector which have facilitated entry, the fact that telecommunications is an essential infrastructure to facilitate trade in goods and services now being covered within the trade framework, such as financial services, and the creation of global telecommunications companies and consortia, all have contributed to bringing about this change. Telecommunications is now seen as the modern trade route."
This recognition of change is widely accepted, on the basis that 69 states in February 1997 submitted offers for future WTO/ITU negotiations on basic telecommunications. This was an increase from only 48 governments involved with submissions in 1996. Secondly it acknowledges the increasingly international nature of this sector even as the negotiations were held wide under the auspices of the WTO. However, the number of states and the increase of participants in trade negotiations does not necessarily acknowledge the true acceptance by governments of change. A loose parallel may be drawn between the public acceptance by EC member states towards liberalising telecommunications during the 1980s and the actual change and protests as noted earlier. This problem at an international level was observed by the ITU.

"The efforts to place telecommunications in a trade setting, if they continue to be successfully pursued, will certainly add to the momentum of the telecommunications revolution, with major benefits for all countries. Whether there is an orderly transition from today's partly monopolistic and nationally regulated bilateral trading system in telecommunications to one which trade barriers are largely discarded and such established free trade principles as Most Favoured Nation (MFN) treatment within a multilateral framework are applied will depend in part on establishing a strong dialogue between trade experts and those in the field of telecommunications."

Political movement towards this trade approach occurred as recently as the 1994 Marrakech Agreement, whereby the GATT became the WTO. Telecommunications received specific attention under the formation of the GATS. However with 126 states as members of the WTO (up from the GATT’s number of 92 in 1986), there are potentially 126 different sets of competition rules for global firms and industries such as telecommunications to meet. While variations in competition laws may be important to meet certain needs of industrial states, numerous competition interpretations may no longer be appropriate with the globalisation of some
industries (of which telecommunications - the new trade route - may be one). Whereas there was a call for seamless systems and 'one-stop-shopping' for global communications, it could be reasonable to consider one-stop-shopping for certain needs or industries in regard to competition policies and laws. To a point this has begun to be recognised. Under the old telecommunications system, the inter-state connections were ruled under the ITU. In the modern, liberalised system, the changing goals of the ITU become more comparable to the WTO objectives and policy interpretations. The ITU\textsuperscript{91} acknowledged this, stating:

"There is a growing convergence of goals of the ITU and WTO - to increase the value and utility of telecommunications to society as a whole, and to foster telecommunications regulatory reform so that countries may fully benefit from modern technologies and develop their national economies. However, not all ITU members are members of the WTO, and even for the ..... countries which are members of both, there is a surprising lack of information and understanding among the telecommunications community about what the WTO is, what it does, and what impact it is likely to have on their telecommunications regulatory regimes. Perhaps even more importantly in that context, are the potential impacts on each nation state's broader public interest goals - general economic growth and job creation, the opportunity to fully participate in the growing global trading system, and social benefits of opportunities....." \textsuperscript{92}

This statement raises important concerns about the disparity of policy and law among states. In one respect these are due to a potential lack of full comprehension about the changes occurring. Under the newer trade system (WTO [with the GATS] and ITU), there is the pursuit of opening state monopolistic sectors and establishing "...general 'obligations and disciplines' that are binding on World Trade Organisation (WTO) member governments, and ...committing WTO members." \textsuperscript{93}
Sir Leon Brittan and Karel Van Miert favour, from an EC position, international rules for the following reason:

"European firms ... face a competitive disadvantage if they have to compete on world markets with foreign producers operating from home markets that are subject to less vigorous competition policies. Multilateral rules would promote more equal conditions of competition worldwide."  

From a less national, state or trade-area centred position as such, international rules in competition are important because: 1) conflicts of law and jurisdiction between states can be avoided, and 2) a gradual convergence of competition laws can be encouraged. The first is important (in continuation with the line of argument in this chapter), "... to minimise the jurisdictional conflicts and resulting trade conflicts that can arise, not only from the application of competition law to anti-competitive practices conceived abroad, but implemented within one's jurisdiction." The second, convergence, reduces the potential for conflict, promotes legal certainty for business, avoids expense and duplication of work. Furthermore, not all states have a developed competition policy or system. Some states for example, may lack the necessary domestic competition rules to enforce anti-competitive practices with international dimensions. In light of the changes in the telecommunications industry, namely the corporate structure through alliances, Brittan and Van Miert make a particularly noteworthy observation about global business changes:

"The 1980s and 1990s have seen a significant increase in international mergers, strategic alliances, joint ventures, licensing agreements etc. These arrangements may face examination by different authorities at the same time with potential for a conflict in the law or remedy applied to the same case. In an extreme example, divergences in the laws applicable to the same set of facts may result in conflicting conclusions as to the legality of the behaviour under review. However, even where there is a common view as to the anti-competitive nature of the conduct, the remedies imposed in each jurisdiction
may be incompatible."\textsuperscript{98}

In keeping with this train of thought about a wider common international competition law, as opposed to the more telecommunications-specific common competition law, what framework could be considered? Brittan and Van Miert are of the opinion that an International Competition Authority can not with its own powers of investigation and enforcement be created in the medium term. Instead, it is practical to build on existing institutions. Within the WTO for example, common principles could be established with the view to promote gradual convergence, equal conditions of competition globally, establish co-operation between domestic authorities, and dispute settlement.\textsuperscript{99}

However, domestic competition structures would have to be developed (at least among the under-developed) and secondly conflict could exist in the basic necessity of finding common principles. The philosophies behind competition law, policies and their enforcement vary from an interventionist to a libertarian position. Perhaps after a century of antitrust and having completed a cycle of opposing approaches to policy and judicial interpretations, lessons may be applied in creating a set of common principles. Secondly, competition law and policy may be suited under industry-specific analysis such as telecommunications.

Some of the basic and fundamental difficulties in working towards a global competition principle, policy and law have been stated, such as differences in policies, inadequate enforcement or simply the limited or non-existence of such regulations. Perhaps in the instance of the latter, this is the easiest to resolve as there are no preconceived opinions or traditions involved; unless something fundamental about the political system (such as the former Eastern European communist system) opposes the basic economic principles behind competition practices. In devising a global competition system of rules, it would not be value-free. It could not be
neutral. No concept of market freedom can be value-free.¹⁰⁰ This approach of suggesting economics is a science and applying the law scientifically does not make a neutralisation of ideology. Yet, like the European Community (namely the Commission), the WTO and other such organisations should be ideologically neutral. They may be party-politically neutral, but the principles are unavoidably ideology-based.¹⁰¹

So even though liberalisation and competition may be spreading to become widely accepted for many states, within this broad set of principles the opposing approaches may politically obstruct progress towards a global competition regime. Furthermore and importantly:

"[I]nternational order lacks a supranational authority to which to refer the conflicts that might arise among its participants." ¹⁰²

De Leon stated:

"The need to reconsider international regulation over economic transactions inevitably uncovers significant problems stemming from the particular nature and importance attached by policy makers to these regulations. These ideas entail entrenched principles about state intervention and individual freedom, and are therefore doomed to conflict. Additionally, the very nature of the phenomenon creates further challenges to the task of harmonising these views. The international economic order emerges from the consensus of its participants. This is frequently ignored by policy makers who assume that public policy goals may be set and reached independently from the will of those affected by these rules." ¹⁰³

For example, in approaching the very issue of international regulations, the tactic taken by governments will most inevitably be 'state-centric'. Economic and political powers such as the United States will, naturally, consider it in their interest to influence international law formation and interpretation to parallel the American style
and philosophy. Simultaneously and not exclusively, the European Community would want their influence to be predominant. In their *Communication* Brittan and Van Miert stated:

"A basic assumption of this Communication is that a framework of competition rules, negotiated in the WTO, would be compatible with EC competition law, in particular the provisions of the EC Treaty. The WTO instrument would, as is traditional in GATT/WTO apply to governments and not be self-executing or have direct effect. It would also be much more general than the relevant provisions under EC law, and the emphasis would in the first stages be on procedural obligations." ¹⁰⁴

In telecommunications, an area whereby both a global and a state-centric approach is evident and a potential conflict, this policy debate is important. The Fifth Regulatory Colloquium Report outlined four "distinct, but related reasons" for telecommunications as an important trade issue of global concern. The Report (ITU)'s reasoning claimed telecommunications was an important infrastructure (network) for the exchange of goods and services, from financial information, professional and even tourism. With the advent of competition the problem of market access was raised making trade negotiations about the right to sell services in foreign markets important. Thirdly, these negotiations require national telecom regimes to be reformed to enable proper domestic and foreign competition and access. Fourthly its importance is:

"Because issues concerning telecommunications relationships between countries or between telecommunications operators in different countries that have traditionally been handled within the ITU framework, such as issues concerning accounting rates and correspondent relations between international telecommunications operators, also arise in the context of international trade negotiations." ¹⁰⁵
Under the GATS general obligations are imposed on states namely with regard to licensing, transparency and foreign investment limiting. However, it is perhaps becoming more important that international agreements such as the GATS go beyond traditional inter-state agreements to something resembling and meeting convergence in so far as the changes in telecommunications are concerned. Convergence has two separate subjects in this instance; telecommunications and the state. Yet, these two are connected. Convergence in regard to states could mean a convergence of laws such as trade or competition-specific. Initially this notion challenges, even threatens the sacred sovereignty and independence of states; but this may not necessarily be the case. Convergence in regard to telecommunications, as stated in Chapter One, is more technological and consequently market-based. In the Chairman's Report of the Sixth Regulatory Colloquium of the ITU, it was explained:

"There are many ways to describe what is meant by convergence in communications. Convergence can refer to the provision of new services over existing infrastructure, development of new types of infrastructure, and the enhancement of existing services and technologies to provide new capabilities. Convergence can also be defined as technological, market, or legal/regulatory capability to integrate across previously separated technologies, markets or politically defined industry structures. Convergence also involves an important international component, as many services and information sources that were traditionally controlled on a domestic level are being provided on a global basis."

The result of overlapping systems, infrastructure, services and markets and industries, according to the ITU, "...is that traditionally defined industry segments are less and less distinguishable". Despite these practical changes, regulatory bodies are not necessarily as adaptable in meeting the newer market and structure forms. This may be due to legislative obstacles or simple lack of appreciation of change. Nevertheless, and regardless of the reasons, the issue remains as outlined by
the ITU:

"Despite the blurring of industry segments, many regulators continue to licence and regulate discrete services for certain carriers, while equivalent functions provided over other types of systems may be less regulated, or not licensed at all. This discrimination is not sustainable, as is evidenced by growing arbitrage of services.... Sources and alternative means of delivering information are becoming increasingly abundant and ubiquitous, while certain operations such as traditional press and broadcasting are still subject to close content regulation, and others (the Internet, satellite broadcasting) either are not or cannot be as easily controlled. Technology, of course, knows no regulatory or legal limits..." 110

Presently with these practical conflicts at basic, national legislative and policy levels it is hardly surprising that the global nature of the new (tele-)communications beast is unchallenged by the slow, confused and ageing political approaches by states. The ITU observed:

"Competitive principles are coming to dominate the market worldwide, but there remains regulatory segmentation and even monopoly control of major industry elements on the national level in many countries.... Because other trends that are occurring are largely beyond the direct control of governments, and market forces are increasingly determining industry evolution, it is apparent that the impact of convergence upon regulation will be greater than the impact of regulation upon convergence." 111

Significant challenges are faced by regulation and policy-planners in regard to communication convergence. There may not be a common perspective among states on all issues pertaining to convergence. These will be affected by the economics and technical advance-position of states, and even different needs influenced by social, economic and even geographical criteria. Yet, where there is common ground on
which to develop global principles, while simultaneously maintaining degrees of independence, is in the separation of the technical element of communications from the market-economic element. As the ITU noted, there are still important roles for governments in convergence.

"These include management of the radio spectrum, to assure equitable allocation of frequencies among competing service, and limit interference; promotion of minimal technical standards if needed to ensure universal compatibility of systems...." 112

Nevertheless, the management of these elements may need some global agreement as to standards, frequencies and types of common interconnection capabilities for the co-ordination of a Global Information Infrastructure.113

The market-economic element is significant in so far as the rise of the global market, the global industry, and last but certainly not least the global player (company). It is here that different, weak or non-existent competition laws and policies meet and conflict. It is here where there is a conflict between state laws; where the conflict may due to the inadequacies of effectively meeting the globalisation process of markets, thereby risking a void or state of (global) market anarchy. As stated earlier, Brittan and Van Miert do not foresee the emergence of an effective international competition authority. Instead the laws should emerge through establishing common principles. In the meantime some of the principles behind the policies of states are either flawed, conflicting or confused about the meaning and mixing of the terms competition policy and antitrust policy. De Leon stated:

"A...misconception by supporters of antitrust policy arises from their unfounded assumptions that the policy question is developed and enforced follow a 'public interest' objective, in principle, the promotion of competition."114

Although his conclusions are particularly critical of those who do not take into
account consideration of the economic consequences of antitrust, (just as the Chicago school theorists might argue,) he (perhaps inadvertently) raises an important point in making a distinction between antitrust and competition policy.

De Leon's use of the term *antitrust* is adopted from the American and OECD practice as "the body of laws and regulations governing business practices (horizontal or vertical agreements between enterprises, abuses of dominant positions, monopolisation, mergers and acquisitions)" Secondly, the use of *competition policy* is more general as in the European Community tradition. The separation of these two is significant and may assist the advancement of establishing common principles at a global level. However, in establishing the principles, 'antitrust' is an element of 'competition policy'. As De Leon states, the economic arguments in either case, but especially 'antitrust', should not be ignored. However, its use and influence should perhaps be regarded with caution, though economic theory's usefulness for guidance should be acknowledged. De Leon (et al) argues against policies which are considered without regard for the economic theory and implications. He stated:

"A constructive and more profound perspective must not attempt to isolate social reality and market functioning from those sets of rules that enable them to function." 

Rather than wholeheartedly adopt or ignore economic theories, consideration of antitrust consequences is beneficial at both domestic and international levels. However, one also should be careful with dismissing concerns about restrictive trade and business practices; for contrary to the cited words of P. Godek by De Leon, anxiety about imagined ills of capitalism may in fact be healthy if the related principles of freedom are to be ensured and other economic theories are not entirely reliable. Economic rhetoric is as much apart of public policy as is any other political theory rhetoric. Competition policy is the sum of trade and legal rights or restrictions for business practice. Antitrust is as it was intended; against trusts.
Antitrust is a political not an economic policy. Economic theory provides methods for which antitrust and competition policy consequences may be argued, judged or only predicted. If a common policy is against the domination of a private (economic) power or trust and in favour of public government, then this is a common principle on which to start the globalisation of competition policy, learning from (but not necessarily exclusively) the American trend and from common market lessons of the EC. Telecommunications is an industry-specific example with which to develop the necessary principles, practices for a global economy, and learn from the lessons, successes and failures of experienced competition (antitrust) regulators.

6.5 Summary

While "[t]he internationalisation of services is at the very core of the process of economic globalisation"\textsuperscript{120}, telecommunications is the principal infrastructure for delivering these services. This infrastructure is important, and the control (commercial or political) over the infrastructure-market determines its effectiveness, efficiency and costs, affecting these features in the service-market. It is worth repeating a couple of fundamental questions which the modern communications-centric world faces: Is national support for global companies really in the interest of states or are such policies dated and misguided? If a company truly becomes 'global' rather than simply a multinational, then is it really a national company; one with ties and loyalty to its state, or has the state become an economic and political pawn for the interests of the (global) company? The answers then determine the legal policy of states and of world trade organisations. Yet a failure to give serious consideration to these matters may risk furthering the void or weakness of international competition management. In turn this may add further conflict between states in so far as one state or trade area extends the scope of its competition rules into others' jurisdictions or sovereignties.

If the commercial structure of states is changing from manufacturing industrial-based
to information(-communications)-based, and if the structure of the telecommunications industry is altering to such an extent that it is becoming a global industry, as opposed to a multinational one, could this modern Information Society have consequences to the political structure which has been the status quo for at least the past century? That is to suggest, if such changes are occurring (which affect potentially all states), is the presumption of state-supremacy at risk of being questioned? It is possible that both are happening; neither the structure of state-ism significantly changes, nor does globalisation seriously threaten the state's power. Nevertheless, even if devolution spreads worldwide, there would still be the recognition that, as Brittan stated, an interdependent world has been developing; hence the independence of states also demands co-operation. In some instances, co-operation may extend to surrendering some of the state's traditional, absolute power, because its absolute power has been challenged, and indeed weakened by industries which are truly global.

To maintain order and control, some form of effective mechanism may be required such as a world competition authority. To achieve this, there might be required some common principles about competition. Advances towards such a framework is evident through agreements and treaties such as the GATS. A modern ITU provides an example for an industry and market-specific authority. As noted above with the views of Karel Van Miert and Sir Leon Brittan, the WTO could be an appropriate organisation with which to develop international competition laws.

The conflict to overcome for an effective authority remains centred on sovereignty and jurisdiction. The capability of the new telecommunications industry, its changing structure and importantly, its intangible, yet valuable information-product gives rise to a greater potential than most other industries for a re-examination and modernisation of these political values. A re-examination is not simply to change the system for the sake of it, but because modern technology (e.g. telecommunications)
and commercial society challenges the present acclaimed supremacy structure of the state; founded and developed under different circumstances at a different time.
ENDNOTES


2. also see: Ibid., p. 35.


4. Ibid., p. 4.

5. Com (96) 284 Communication to the Council from Sir Leon Brittan and Karel van Miert, 'Towards an International Framework of Competition Rules'.


7. Ibid., preamble.

8. Ibid., Article 1(1).


11. Ibid., p. 567.


15. Shaw, p. 393.

17. Ibid.

18. Ibid., p. 453-454; This is to be distinguished from the much more limited concept of 'crimes of universal jurisdiction'.


20. Ibid., p. 423-424.

21. for further comment see Shaw op. cit.: also see G. Brown (cited below) p. 2-21.


25. Ibid. para 33-41.


28. Ibid.


32. Ferry, op. cit., p. 61.

33. Ferry, op. cit., p. 67.


36. Ibid.

37. Ibid.


42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid., p. 4.

46. Ibid.

47. Ibid., p. 1.

48. Ibid.


50. Ibid.

51. Ibid.


53. Ibid.

54. Ibid.

56. Tucker and Skapinker, (15 July 1997) op. cit.


61. Ibid.


63. Ibid.

64. 'Brussels v Boeing', op. cit., p. 13

65. Ibid.


68. see generally August op.cit.

69. see the opinions of P. Lawrence et al. 'Competition in Aerospace Must Be Fair and Rational', (Letters to the Editor), Financial Times, 23 July 1997, p. 28.


71. Ibid.


74. Brown, op. cit., p. 3: also see footnote #7.

75. Brown, op. cit., p. 3, at footnote #5.

76. cited in Shaw, op. cit., p. 427, see footnote #158.

78. Fidler, op. cit., p. 574.

79. Ibid., p. 567, see footnote #13.

80. Ibid., p. 569.

81. Ibid., p. 573: also 'Webster's CIA: Orderly Ship with No Destination', *International Herald Tribune*, 10 May 1991, p. 3; furthermore in post-cold war society there have from time to time been news reports of state conducted industrial espionage between Western states on behalf of private companies.

82. see Fidler, op. cit., p. 565 citing Marxism as one example.

83. XIVth Report on Competition Policy, op. cit.; also cited above.


85. Ibid.


87. Ibid.

88. Ibid.: italics added.


90. e.g. "Although governments profess to be committed free traders, their actions Fall short of their words," *The Economist*, 'All Free Traders Now?', 7 December 1996, p. 25-27 at 25.


92. Ibid.

93. Ibid.

94. Ibid.

95. Brittan and Van Miert, op.cit.
96. Ibid. at 1b.

97. Ibid.

98. Ibid.

99. Ibid.

100. Ibid. Part III.


103. I. De Leon 'The Dilemma of Regulating International Competition under the WTO System' [1997], 3 *ECLR* 162, p. 162.

104. Ibid.

105. Brittan and Van Miert, op. cit., IV(d).


107. Ibid., p. 19.


109. Ibid.

110. Ibid., p. 1(B)

111. Ibid.

112. Ibid.

113. This term has been used, but not exclusively, by L. Irving, J. Hernandez, W. Chow, 'Steps Towards a Global Information Infrastructure', www.indiana.edu/fclj/v47no2/irving.htm: also note comments in the Sixth Regulatory Colloquium, Itu, op. cit.

114. I. De Leon, op.cit., p. 171.

115. see footnote 4 in De Leon, op. cit., p. 162-163.
116. Ibid

117. Ibid.

118. Ibid., p. 117, noting footnote 68.

119. see Chapter Three.

120. Ibid.
CONCLUSIONS

This thesis has sought to facilitate a re-assessment of contemporary competition law (antitrust) and policy. The need for such an analysis stems from a century of antitrust law during which problems have persisted despite the range of philosophical approaches that have been deployed in its development. Furthermore, these persistent problems are not only demonstrable through the example of the liberalising telecommunications market, but this market is also an example in which assumptions attributed to perfect markets manifestly fail to meet the ideals. Telecommunications is also an appropriate market - example because firstly, it is an established industry undergoing the process of deregulation and therefore serves well as a case study for a competition - system review. Secondly, it is an important market because of its significance as the infrastructural foundation of modern commercial society.

Through the progression of this thesis towards a re-assessment of competition law and policy, some of the fundamental and the continuing problems have been brought to the forefront. The thesis was constructed in stages, beginning with the setting out of the telecommunications environment (both the market and the policies) at the time the thesis was undertaken. The philosophical foundation of competition policies was discussed, followed by analysis of specific areas in both telecommunications (e.g. universal service and interconnection) and the market (e.g. strategic alliances and mergers). There remains, for example, the broad problem of market dominance and its threat to a properly functioning competitive market. Indeed, the very nature of telecommunications currently presents some challenges to the basic model and ideals of the fully competitive marketplace. Finally, the issue of telecommunications beyond national jurisdictions and the developing context of "globalisation" was introduced to further the re-assessment, showing that competition policy and law can no longer
realistically be confined within state boundaries. In all of these respects the telecommunications sector affords an excellent illustrative example.

The study is primarily advanced in the context of the law of the European Community, although there are common problems shared with other jurisdictions in relation to the telecommunications market. There may here be seen interesting and good examples of both common conflicts in competition policy and problems facing the telecommunications market as it is liberalised into a truly competitive form. Telecommunications is also a fundamentally important market, because it is increasingly the basic infrastructure of contemporary commercial society.

The basis of this thesis is the questioning of the underlying philosophy which underpins the foundation of the law and policy of competition. It is now an appropriate time to reflect on competition policy, because, after a century of existence, not only do a number of problems remain, but the changing nature of the industry provides a suitable opportunity to seek solutions to these problems. Furthermore, the expectation that the contemporary commercial world is beginning a revolutionary form of change into an "Information Society", the significance of this industry, its impact and increasingly global nature of it make the present a time of importance and influence.

There are a number of theories and influences which have been deployed in the search for the ideal and perfect means of regulating competition; be it by government intervention or 'the natural law of economics'. In many instances, shared legal questions were answered differently by the US and EC authorities. The answers were (and are) affected by different policies and aims, such as the goal of integration which is fundamental to EC law. Different philosophies have resulted in different answers. The EC, for example, has a reputation for being more interventionist than the US. The American experience is beneficial to the development of competition
laws such as the EC's, because it has the experience of extreme philosophies (intervention versus non-intervention) influencing its antitrust enforcement culture. However, the experiences from other authorities like the EC, may provide valuable lessons towards forming new approaches to competition problems.

The changes in national marketplaces suggest the likelihood of a new commercial society. Telecommunications is the infrastructure of developed societies, in a manner parallel to the role of railroad in the Industrial Society. This confers upon the industry and market a fundamental national importance. But this does not necessarily mean there should be greater national intervention. Rather, it is the peculiarities of this market and its ambiguities in a competitive environment which make telecommunications an interesting study. Reference has been made to the American experience of competition in telecommunications in the late 19th and early 20th century as an example of competition problems. The rise and domination of private power, as was the case in the early experience of the US, over such an important social and commercial infrastructure would seem to contradict the principles of competition as well as some political philosophies of Western states. The significance of such power is enhanced by the extension of modern telecommunications' infrastructure beyond state borders to a global level. Its importance as the infrastructural basis of the domestic economy add to or highlight the importance of domination problems within the market. There are also issues of interest and importance arising from the cross-border effects and the globalisation prospects of both the industry and individual companies. Even so, it must be emphasised that the telecommunications industry does not in itself represent a unique example, it is rather a type-example which carries messages for a much wider range of modern commerce.

A further point of interest is that the telecommunications industry and marketplace is a well established commercial sector in which the introduction of competition offers
a new and highly significant challenge. There is the concern throughout this thesis that competition, if not managed so that it is continuous, will appear to function as ideal competition only for a short period. Thereafter, the names may change, the players may change, and the ways and even methods of conducting traditional exchanges of goods and services may change, but the problems faced in a competitive system may not undergo real change.

Preventing the rise of trusts, or private domination of industries and the marketplace, may have been the origins of US antitrust law and to a degree similarly played a role in the EC's own legal origins, but old problems remain. They remain because of changes in interpretation and lapses in thinking as to what degree of domination is acceptable and what is not. In its history antitrust interpretation has ranged from a political or policy approach to an attempt to apply "scientific" principles through economic theory. Yet, it is perhaps understanding that the difficulty in applying scientific principles to law and in expecting scientific facts and/or 'truths' to regulate society remain a social and commercial constant.

The appeal of the application of scientific principles to law, which lies in the perceived predictability of the results, was raised as an issue in this study. This appeal is understandable because every case can be made to fit neatly into the same perceived model. Such a method is initially attractive because it affords ready answers, and it is also an approach which can, misleadingly, be interpreted as a neutral tool for common use. The problem is that the appeal of clear answers risks blinding one to more complex realities. This offers a dangerously over-simplified ideal. It has been argued that this ideal is more misleading than helpful. In contrast to the laws of physics which supposedly offer predictable certainty, the involvement of the human player in the marketplace precludes any such certitude. This human interaction dilutes arguments concerning laws of economics because the presumption of perfect knowledge is called into question. The advocation of the alleged laws of
natural economics becomes more ideological than science. This risks reducing its credibility as a beneficial tool and the arguments become self-defeating.

Progress towards a legal system which uses economic theories in a more appropriate manner may be possible by acknowledging the inherent faults within a system of "scientific" principles. This would be to use the theories as tools for the anticipation of possible or probable costs of laws and judicial decisions. Then the result may be judged to be acceptable or not. For example, if society values a competitive system, then some intervention, despite doctrinaire opposition in some quarters may be necessary. The problem however, which further illustrates the difficulty of the human participant in creating the ideal predictable results, lies in choosing which of the many and opposing economic theories to use as the tool. This should be further developed in the re-assessment of competition policy for which this thesis calls.

In so far as modern telecommunications is concerned, the new capabilities and possibilities and opportunities will no doubt attract many firms to the market, but at the same time the objective of "competition" for companies is to win. For society, the objective is different. The liberalisation of telecommunications is on the basis that the market can achieve a more efficient and effective communications service than the public sector. Values such as "universal service" have emerged and become "rights". Achieving and retaining universal service is one area in which the competitive market could be distorted by necessity or as a result of rights and privileges granted in order to render this principle effective. The need for interconnection, and particularly in the early years of liberalisation the infrastructure deficit, emphasises the importance of co-operation and access to rivals facilities. These factors, especially the latter contribute to some contradictions inherent in telecommunications and problems for an idealistic competitive system. It also risks encouraging anti-competitive behaviour and adds support to the arguments of interventionists. However, co-operation has also been seen as a necessity in meeting
the demands of consumers, especially large businesses which internationally conduct trade. While this is not anti-competitive *per se*, it does raise some interesting matters about strategic alliances.

Strategic alliances have raised a number of interesting problems and concerns for debate. These continue the argument about intervention and non-intervention in the market by competition authorities, and scepticism about applying the idealist model of competition enforcement, as in the views espoused by "the Chicago School" philosophy. This subject is of particular interest at a time of telecommunications market liberalisation. It opens up a range of concerns among which include joint ventures and mergers. Questions arise from these matters about the relationship between companies, their effects on competition and the application of law. Questions also are raised about political intervention in allowing or disallowing alliances, including important issues arising in and in the interface with foreign jurisdictions.

A complex problem in competition assessment is that of oligopolies. Oligopolies are a problem, because such a market situation is vague compared with definitive positions such as a monopoly. It is a complex situation of imperfect competition with opportunity for barriers to entry for potential competitors to be erected, intentionally or unintentionally, and also for collusion between the existing players. The threat is a concentrative marketplace. Oligopolies raise a number of important questions that are necessarily addressed in the re-assessment for which this thesis calls. In regard to telecommunications sector, the transitional period (from the old monopolistic regime towards a competitive system) presents the opportunity to avert the negative consequences of an oligopolistic and concentrative marketplace. There is thus at present an opportunity to avoid long-term damage to the competitive market or the future need for intervention. Telecommunications is an example in which there is likely to arise oligopolistic issues in various sections of the market such as
infrastructure. Among these concerning factors are questions about the nature and expense of the product or service: Is the market one which requires a large company, and can only support a few such companies? Furthermore, in maintaining a competitive system, some additional analysis is recommended in oligopolistic structures. Other questions that need addressing include: Does the competitive behaviour of the companies affect the marketplace, changing it from a competitive one to an oligopolistic one? If so, is this avoidable? Oligopolies require re-examination, particularly to ensure legal instruments are available to better oversee competition.

The basic principles of competition and the governance of the system is further challenged by the recognised problem that telecommunications is an ambiguous case. At times anti-competitive behaviour (e.g. co-operation or foreclosure) might be acceptable or necessary in order to achieve, for example, nation-wide or international connections. As a result, it may be beneficial for some mergers and for some joint ventures to occur which might ordinarily go against judicial philosophy. The problem is in forming some consistency and predictability. It also causes tensions between corporate behaviour and industrial and market structure. The question is: where to go from here to find a sound approach for competition law which meets the needs of contemporary society, rather than pursuing a fashionable ideology.

Telecommunications is a study of ambiguities. Conflicts within the system of competition will continue, including the contradictory principle of a necessity for some form of co-operation. However, it is possible that the industry's structure is evolving into something entirely new with unforeseen problems, perhaps resulting from responses to older ones. It is also challenging the state-centric legal structure through its globalisation, both as an industry and with its service-capabilities.

EC law is an example of a normative structure unifying competition law between
states, however it lacks the predictability demanded by lawyers and industry alike. It may be that, as an example of inter-state law, the lesson to be learnt by the EC is that some legal matter are best left to the individual countries. Nonetheless, in the instance of an industry and/or marketplace which extends beyond the confines of individual states, EC law clearly has the potential to be one the more progressive examples of developing trans-national facilitation and regulation. The problem however, is the mandate of the EC system, (especially after the Maastrict Treaty) to move towards increasing political unification between the Member States and the divergent understandings and acceptance of this between them. The EC's weak record in predictability encourages some attraction to the American method of neo-classical economics as a means to establish a common principle among states for a more global competition system. Yet this approach also has inherent weaknesses which generates serious risks in jumping to seemingly "obvious" conclusions. The potential of such a global system is also weakened by the continuing effects of the inward-looking nature of the state system. Yet, if national identities attached to telecommunications companies were removed and a wider interest in world competition were adopted the competitive behaviour of these companies might become more manageable in domestic markets.

A concern which emerges from studying telecommunications is that the benefits of the competitive telecom marketplace will largely be corporate businesses, because they use more communications services and contribute more revenue to the telecom firms than the domestic persons. Telecommunications seems to be an all-encompassing term, whose usage is lacking in distinction between two very separate markets and the recipient of the benefits of the new telecommunications era. Indeed specific reference to the corporate or the domestic markets is made from time to time, but over all the perception is of one market. This may create confusion in the analysis of competition, and clarification could assist antitrust interpretation.
There is now the opportunity for a practical re-examination of competition theories and laws in the light of past experiences and a century of variable experience, largely deriving from the United States. The opportunity is present also in light of 'globalisation' whereby a void in the global market, weak or non-existent policies and laws in many states suggest discussion and action is necessary. Furthermore, through examining an industry such as telecommunications which is both competitive and cooperative, and which is also under-going significant transformations, it is an opportunity to re-evaluate and make the necessary corrections to competition law. This thesis has examined competition law in light of the changes to the telecommunications industry. Weaknesses in the law, ranging from areas of under-development to philosophical faults have been promoted, ultimately demonstrating that, in contrast to the opinion of some, the antitrust debate is far from over; history has not ended. As such, much analysis and debate can emerge from this examination towards improving competition law and developing it in the next century.

The regulation and maintenance of competition in a marketplace which is undergoing radical changes and, to some degree, moving beyond the structural presumptions upon which former and existing patterns of regulation were based, inevitably raises serious questions. Analysis of the direction and implications is needed, and a response to these questions is essential. This thesis seeks to examine these issues and in doing so underlines the fundamental dichotomy between a competitive ideal and a strategic market reality. The satisfactory resolution of this issue, in the maintenance of the advantage of a competitive ethic in ways compatible with the real marketplace, is vital for an efficient and effective telecommunications sector in the Twenty-first century. It may, by analogy, have also a much broader importance for other marketplaces and industrial sectors.

The return of competition and liberalisation in telecommunications and its development across the globe has greater significance for the industry. One
significance is the increase in the number of potential (national-) markets telecom firms could enter, yet at the same time there is an increase in the number of consumer and product markets. Another significance is the importance of the industry as a whole to society entering the 21st century. These changes and the surge in importance of telecommunications is, like the railways were in the nineteenth century for manufacturing in large countries, in the provision of a global infrastructure for economic prosperity based on the commercial exchange of information.

On both sides of the Atlantic principles such as Universal Service have been questioned as to their relevance and contemporary significance. Are such principles of value, and are they best served by the marketplace rather than by governments? Do such principles have any value or should they be modified and updated? Furthermore, how far do governments become involved in connecting the populations to communications? These policy questions directly affect competition in telecommunications. On the one hand, will the marketplace ensure universal connection and service, or will those who are least profitable suffer disadvantages? Leaving aside the differences between vast city populations and remote island hill farms, will businesses benefit significantly more than the domestic consumer? If on the other hand the government intervenes and imposes obligations on a telecoms firm to provide service to the less profitable population, will this place the company at an unfair disadvantage relative to other telecom firms? In short, the future of competition regulation in the telecommunications sector must somehow square a circle between the imperatives of competitive commerce and the linked, but not wholly concordant necessities of service provision.

The importance of these questions, especially in this analysis, is the demonstration of the difficulty and the inherent conflicts telecommunications has in relation to pure competition theory. These questions also incorporate an overlap of competition
(antitrust) principles and social principles, which in the EC can at times be seen between DGIV (Competition Directorate in the EC Commission) and DGXIII (Telecommunications Directorate). In regard to principles of competition, the expense and technical nature of the industry may pose start-up challenges for firms seeking to compete with the established, incumbent telecommunications operator. This leads to such questions as: who has access to the infrastructure, how is it paid for, and finally who has the right to access (or be denied access)? Yet, from a position of social principle, some conflict with competition principles (such as intervention for equal access) could be resolved through technological advances.

In telecommunications the convergence of technologies and the emergence of new market opportunities has generated a rapid process of development which does not admit a leisurely development of appropriate legal responses. This thesis does not seek to advance any "perfect" model for telecommunications, or general, competition regulation. Its purpose has rather been to examine the issues which must be taken into account in the useful development of legal norms for the positive growth of an industry which is not only important in itself, but essential to the broad base of modern commerce. In a rapidly evolving commercial sector it would be foolish to set in stone a "solution" to questions which are themselves in the course of emergence. It can, however, fairly be said that the evolution of regulatory law in parallel with commercial development must remain tied to the basic social concerns which afford the justification for such regulation in the first place. The ultimate production of adequate regulatory restrictions rests upon a clear understanding of the needs which are to be addressed. It is to this vital preliminary endeavour that this thesis has been instrumental for the facilitation of positive and productive dialogue in its chosen area of study.
BIBLIOGRAPHY

Books


Mason, E. S., Economic Concentration and the Monopoly Problem, Massachusetts: Harvard University Press, 1957.


Mulgan, G. and Briscoe, I., The Society of Networks: A New Model for the Information Superhighway and the Communications Supermarket, 1995, Arguments 5, Demos


Articles


Media Articles

Newspaper Sources


'Atlas Delay Expected', *Financial Times*, 26 September 1995 p.2


Cane, A., 'How the Local Loop Becomes a Devestating Weapon', Financial Times, supplement 'International Telecommunications Survey', October, 1995


Cane, A., 'Warm Welcome for "Giant Step"', *Financial Times*, 17 February 1997, p. 3.


'German-French Phone Deal', *International Herald Tribune*, 7 December 1993, p. 11.

Grose, T., 'BT, MCI Ring Up $22B Deal', *USA Today*, 4 November 1996, p. 10B.


Henry, D., 'BT Gets Global Jump With MCI Deal', *USA Today*, 4 November 1996, p. 10B.


Lee, M., 'Mergers are a Myth' Financial Times 26 February 1997 p24


Lynch, D., 'Regional Bell Link-Up Has Broad Impact', USA Today, 20 December 1995, p. 10B.


'A Marriage of Convenience', The Economist, 9 November 1996, p. 104

Martin, M., 'BT and MCI Confirm Merger', International Herald Tribune, 4


'MCI Joins Against Sprint Deal', *International Herald Tribune*, 2-3 September 1995

'Mercurial Marriage', *Financial Times*, 1 April 1996, p. 22.


Munchau, W., 'Europe on the Sliproad to Information Highway', *The Times*, 4 October 1994, p. 27.


'Phone Firms Set the Competition Wires Buzzing', *The European*, 12-18 November 1993, p. 28.


'The Pressure Mounts on Rivals to React', *Financial Times* 5 November 1996 p.28


'Wake-up Call', *Businessweek*, 20 December 1993, p. 38-42.


'Webster's CIA: Orderly Ship With No Destination', *International Herald Tribune*, 10 May 1991, p. 3.


Williams, F., 'US, EU Vie For Credit on Telecoms', *Financial Times*, 17 February 1997, p. 3.

Magazine Sources

'All Free Traders Now?', *The Economist*, 7 December 1996, p. 25-27


Government Press Sources

'Commission Accelerates Liberalisation in Telecoms Sector While Emphasising the Importance of Universal Service', IP/96/183, 29 February 1996.

'Commission Approves Creation of Pan-European Telecommunications Network', IP/96/211, 8 March 1996.


OFTEL, 'Beyond the Telephone, the Television and the PC', *Oftel News* November 1995

*OFTEL News*, OFTEL No. 36, June 1997

Radio


Conferences


Alt, A. 'Finding Strategic Partners: the Increasing Challenge'
Ashall, P. 'How Liberalisation is Creating Opportunities in New Markets'
Carpentier, M. 'European Community Telecommunications Policy'
Deas, J. C. 'Prospects for Multi-Media- the Role of Telecommunications'
O'Bryne, S. 'Is There a Global Outsourcing Market?'
Quello, J. H. 'US Telecommunications Policy'
Staple, G. 'Global Traffic Growth, Market Access and Trade Agreements'
Tutton, M. R. 'Becoming a Global Player'
Valiance, I. 'Managing a Hybrid'


Company Releases


Internet Sources:

www.analysys.com
www.att.com
www.bertelsmann.de
www.bt.com
www.dtag.de
www.europa.eu.int
www.fcc.gov
www.ftc.gov
www.ft.com

www.globalone.com
www.iht.com
www.industry.net
www.itu.ch
www.oecd.org
www.sprint.com
www.times.co.uk
www.welt.de
www.wto.org