

# Contents

<b>Introduction</b>	<b>1</b>
1. Privatization – Liberalization – Regulation – Competition	1
2. Structure of this book	14
<b>PART I: THE EVOLUTION OF EU TELECOMMUNICATIONS POLICY AND LAW</b>	<b>19</b>
<b>Chapter 1: The Transition from a Regime of a State-run Monopoly to a Liberalized Market</b>	<b>21</b>
1. Introduction	21
2. Policy Papers	22
2.1. The 1987 Green Paper	22
2.2. Satellite Communications	23
2.3. The Creation of a Framework for Full Competition in Telecommunications Services	25
2.3.1. The 1992 Review and the Council Resolution of 22 July 1993	25
2.3.2. Bangemann ‘Information Society’ High Level Group and the 1994 Action Plan	27
2.4. Extending Competition from Services to Network Infrastructure	29
2.4.1. Infrastructure Green Paper (Part I)	29
2.4.2. Infrastructure Green Paper (Part II) and the Communication of 3 May 1995	30
2.5. The Mobile Green Paper: The Development Towards a Universal Mobile Telecommunications System	32
2.6. The Rulings of the European Court of Justice on the Commission’s Use of Article 86 (ex 90) of the EC Treaty	35



3.	Opening up of the Markets: Legislative Measures	37
3.1.	Opening the Market for Radio Equipment and Telecommunications Terminal Equipment	37
3.1.1.	The Terminal Equipment Directive	37
3.1.2.	The Internal Market for Radio and Telecommunications Terminal Equipment	38
3.2.	The Liberalization of Telecommunications Services and Infrastructure	41
3.2.1.	Services other than Public Voice Telephony	41
3.2.2.	The Satellites Directive	42
3.2.3.	Cable Television Networks	43
3.2.4.	The Mobile Directive	45
3.2.5.	The Full Competition Directive	47
4.	The Framework for Harmonized Regulatory Principles: Legislative Measures	49
4.1.1.	The ONP Framework Directive	49
4.1.2.	The Leased Lines Directive	50
4.1.3.	The Voice Telephony Directive	51
4.1.4.	The Interconnection Directive	53
4.1.5.	The Licensing Directive	55
5.	Concluding Remarks	56

## PART II: THE APPLICATION OF EU COMPETITION POLICY AND LAW TO THE ELECTRONIC COMMUNICATION SECTOR 57

<b>Chapter 2: Access Agreements – Refusal to Supply and the Essential Facilities Doctrine under EU Competition Law</b>	<b>59</b>
1. Introduction	59
2. Article 82 and Refusal to Deal – The Case Law of the ECJ	62
2.1. Description of Cases	62
2.1.1. <i>Commercial Solvents v. Commission</i>	62
2.1.2. <i>United Brands</i>	63
2.1.3. <i>Telemarketing</i>	64
2.1.4. <i>RTT v. GB-Inno-BM</i>	65
2.1.5. <i>Magill</i>	66
2.2. Discussion	68
3. The Essential Facilities Doctrine in EU Law	74
3.1. Discussion of the Commission's Essential Facilities Cases	75
3.1.1. <i>B&amp;I Line plc v. Sealink</i>	75
3.1.2. <i>Sea Containers v. Stena Sealink</i>	76
3.1.3. <i>Port of Roedby</i>	77
3.1.4. <i>London European v. Sabena</i>	78
3.1.5. <i>British Midland v. Aer Lingus</i>	79



3.2.	Summary of the Principles Emanating from the Essential Facilities Cases	81
3.3.	The Rationale for an Essential Facilities Doctrine	82
3.4.	Definition of Essential Facilities in the Access Notice	83
3.5.	Access to Essential Facilities – Objective Justification for Refusing Access	83
3.6.	The Dual-role Situation and the Significance of a Competitive Market Downstream of the Essential Facility	85
3.7.	The Significance of New Entrants and New Products or Services	88
3.8.	Special Duties Imposed on the Operators of Essential Facilities	89
3.9.	Comments – Case Law of the ECJ and CFI	90
<b>Chapter 3:</b>	<b>Specific Issues of Competition Law</b>	<b>97</b>
1.	Excessive Pricing	98
1.1.	Theoretical Background	98
1.2.	The Approach in the Case-law	101
2.	Price Discrimination and Other Exclusionary Pricing Practices such as Discounts and Rebates	104
2.1.	Theoretical Background	104
2.2.	The Approach in the Case-law	108
3.	After-markets	113
3.1.	Theoretical Background	113
3.2.	The Approach in the Case-law	115
4.	Tying	117
4.1.	Theoretical Background	117
4.2.	The Approach in the Case-law	121
5.	Predation	123
5.1.	Theoretical Background	123
5.2.	The Approach in the Case-law	126
<b>Chapter 4:</b>	<b>Strategic Alliances and Mergers in the Converging Telecommunications, Media and IT Sectors</b>	<b>131</b>
<b>Section I:</b>	<b>Horizontal Strategic Alliances</b>	<b>131</b>
1.	Introduction	131
2.	Discussion of Cases	132
	BT-MCI	132
	Atlas and GlobalOne Cases	133
	Unisource and Uniworld Cases	136
3.	Comments	137
<b>Section II:</b>	<b>Mergers and Strategic Alliances in the Emerging Multi-media Sector – EU Competition Policy</b>	<b>138</b>
1.	Introduction	138



2. Discussion of Cases	138
2.1. MSG Media Service	138
2.2. Nordic Satellite Distribution	139
2.3. HMG Groep SA	140
2.4. Kirch/Richemont/Telepiu	141
2.5. Kirch/Richemont/Multichoice/Telepiu	142
2.6. Bertelsmann/CLT	142
2.7. Bertelsmann/Kirch/Premiere and Deutsche Telecom/ BetaResearch	144
2.8. Re Television Par Satellite	149
2.8.1. The Relevant Product Markets	150
2.8.2. Structure of the Market	152
2.8.3. The Commission's Legal Assessment	153
2.9. WorldCom/MCI	157
2.10. MCI WorldCom/Sprint	160
Section III: Access to Premium Content – The Emergence of New Media	162
1. Introduction	162
2. Access to Premium Content	162
3. Brief discussion of Relevant Cases	164
Conclusions of Sections II and III	170
General Conclusion of Chapter 4	175

### PART III: ADAPTING THE TELECOMMUNICATIONS REGIME TO THE EMERGING MULTIMEDIA ENVIRONMENT – THE EU ELECTRONIC COMMUNICATIONS FRAMEWORK

177

#### Introduction

178

#### Chapter 5: The Challenges of Convergence to Regulatory Approaches – Nature and Scope of the Regulatory Regime

181

1. Horizontal Regulation of Infrastructure – Split between Economic and Content Regulation	181
2. Sector-specific Regulation and Competition Law	185
2.1. Limitations of the Previous ONP Framework	185
2.2. Limitations of Competition Law	187
2.3. Interrelation between Competition Law and Sector-specific Regulation	187
2.4. Comments	190
3. Scope and Extent of the Infrastructure Regulatory Regime	192

#### Chapter 6: The Competition Directive

195

1. Summary of the Competition Directive	195
2. Joint Provision of Cable and Telecommunications Networks by a Single Dominant Operator/Line-of-business Restrictions	197



2.1. Cross-ownership Hinders the Development of Multimedia Markets	198
2.2. Ineffectiveness of the Measure of Accounting Separation – Requirement for Legal Separation of Telephone and Cable Interests	200
2.3. Legal Separation Versus Structural Separation	202
2.4. Line-of-business Restrictions	205
2.5. Article 8 of the Competition Directive	208
<b>Chapter 7: The Framework and Access Directives – Imposition of Specific Remedies</b>	<b>209</b>
Section I	209
1. National Regulatory Authorities	209
2. Right of Appeal	211
3. Exchange and Provision of Information to NRAs and the Commission	212
4. Significant Market Power and Dominance – The Two-tier Approach is Abandoned	214
5. Undertakings with Significant Market Power (SMP)	217
6. Market Definition and Analysis Procedure	221
7. Consultation and Transparency Mechanism	224
8. Numbering – Availability of Numbers	230
9. Rights of Way/Co-location and Facility Sharing	230
10. Obligations of Accounting Separation and Financial Reports on Undertakings which Enjoy Special or Exclusive Rights in Other Sectors	232
11. Powers of NRAs Concerning Dispute Resolution	233
11.1. Dispute Resolution Between Undertakings	233
11.2. Resolution of Cross-border Disputes	234
Section II: Access/Interconnection	235
1. Rights and Responsibilities of Undertakings and NRAs in Relation to Access/Interconnection	236
2. Review of Former Obligations for Access and Interconnection	241
3. Imposition, Amendment or Withdrawal of Obligations	241
Section III: Imposition of Remedies as Set Out in the Specific Directives	242
1. Objectives for Selection of Remedies	245
2. Specific Obligations	248
2.1. Obligation of Transparency	248
2.2. Obligation of Non-discrimination	249
2.3. Obligation of Accounting Separation	250
2.4. Obligations of Access to, and Use of Specific Network Facilities	251
2.5. Price Control and Cost Accounting Obligations	254
2.6. Regulatory Controls on Retail Services	258



2.7. Regulatory Controls on the Minimum Set of Leased Lines	260
2.8. Carrier Selection and Carrier Pre-selection	263
Concluding Comments	263
<b>Chapter 8: The EU Authorization Framework for Electronic Communications Networks and Services</b>	<b>269</b>
1. Introduction	269
2. The Previous Licensing Directive	270
3. Major Problems and Assessment of the Previous Licensing Regime	270
4. Tackling the Problems – The Authorization Directive	274
4.1. General Principles	274
4.2. Simplification of the Licence Application Process	275
4.3. Minimum Rights of Undertakings under the General Authorization	276
4.4. Conditions Attached to the General Authorization and to the Rights of Use for Radio Frequencies and Numbers	277
4.5. Compliance with the Conditions of the General Authorization or of Rights of Use	281
4.6. Rights of Use for Radio Frequencies and Numbers – Procedure for Restricting the Number of Rights of Use to be Granted for Radio Frequencies	282
4.7. Information Required under the General Authorization and for Rights of Use – Publication of Information	287
4.8. Administrative Charges	289
4.9. Modification of Rights and Obligations	292
Concluding Comments	292
<b>Chapter 9: Universal Service Provision – End User Rights</b>	<b>295</b>
<b>Section I: Universal Service Provision</b>	<b>295</b>
1. Introduction	295
2. Scope and Availability of Universal Service	297
3. Designated Undertakings Providing Universal Service	299
4. Provision of Access at Fixed Locations	300
5. Directory Enquiry Services and Directories	301
6. Public Pay Telephones	302
7. Specific Measures for Disabled Users, on Low Income and/or Persons with Special Social Needs	303
8. Affordability of Tariffs	305
9. Control of Expenditure and Provision of Additional Facilities	305
10. Quality of Service of Designated Undertakings	308
11. Costing of Universal Service Obligations	309
12. Financing of Universal Service Obligations	310
13. Review of the Scope of Universal Service	312



Section II: End User Rights	315
1. End User Contracts	315
2. Transparency and Publication of Information/Quality of Service	316
3. Accurate, Comprehensive and Accessible Tariff Information	318
3.1. Accurate Tariff Information	318
3.2. Comprehensive Information on Tariffs	319
3.3. Accessible Tariff Information	319
4. Integrity of the Network	320
5. Operator Assistance and Directory Enquiry Services	320
6. Free Calls to Emergency Services	321
7. European Telephone Access Codes	325
8. Non-geographic Numbers	325
9. Provision of Additional Facilities	325
10. Number Portability	326
11. Handling of Complaints	326
12. Out-of-court Dispute Resolution	328
 <b>Chapter 10: Data Protection, Security and Confidentiality</b>	 333
Section I	
1. General Data Protection Directive	333
Section II: Specific Measures in the Electronic Communications Sector	337
2. Directive on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector	337
2.1. Security of Network and Services	338
2.2. Confidentiality and Data Protection	339
2.3. Traffic Data	341
2.4. Itemised Billing	343
2.5. Calling and Connected-line Identification	343
2.6. Location Data Other than Traffic Data	346
2.7. Automatic Call Forwarding	347
2.8. Subscriber Telephone Directories	347
2.9. Application of Certain Provisions of Directive 95/46	348
2.10. Unsolicited Communications (Spam)	349
3. Proposed Directive on the Retention of Communications Traffic Data	355
 <b>Chapter 11: The Impact of the EU Electronic Communications Framework on the Broadcasting Sector</b>	 369
1. Authorization of Electronic Communications Networks and Services Used for the Provision of Broadcast Content	369
2. Assignment of Radio Frequencies for Broadcasting Purposes	370
3. Must-carry Obligations	372



4.	Access Regime for Digital Gateways	374
4.1.	Structure of the Market – Identification of the Problem	375
4.2.	The Relevant Access Regulatory Regime	377
4.2.1.	Specific Provisions for Conditional Access Systems to Digital Radio and TV Broadcasts	380
4.2.2.	Access to Other Associated Facilities for Digital Television Interactive Services	381
4.3.	Digital Gateways – The Essential Facilities Doctrine and Sector Specific-regulation	381
5.	Interoperability and Standardization of Digital Interactive Television Services	385
5.1.	Interoperability and Standardization	385
5.2.	Interoperability versus Product Differentiation	387
5.3.	Digital Gateways and Standardization	388
5.4.	Relevant Provisions in the Framework and the Specific Directives	392
6.	The Role of Public Service Broadcasters in the Emerging Multi-media Environment	395
7.	Funding of Public Service Broadcasters	398
<b>Chapter 12: EU Radio Spectrum Policy in the Converging Environment</b>		<b>403</b>
1.	Introduction	404
2.	Strategic Planning of the Use of Radio Spectrum: Political and Legal Framework in the Telecommunications Sector	405
3.	The Commission's Assessment of the Functioning of the Legal Framework	407
4.	Major Issues Raised in the Consultation Process	408
4.1.	The Institutional Framework for Radio Spectrum Co-ordination – A Priori Agreement on Radio Spectrum Harmonization – Voluntary Implementation of ERC Decisions – The Case for Legal Obligation	410
4.2.	The Need to Balance the Varying Commercial and Public Interests in the Allocation of Radio Spectrum – Criteria to Identify Priorities	413
4.3.	Harmonization is not Suitable for all Circumstances	416
4.4.	Re-farming	418
4.5.	Radio Spectrum Assignment and Licensing	420
4.6.	Radio Equipment and Standards	426
4.7.	Ensuring Availability of Information on Spectrum Use	430
4.8.	The Radio Spectrum Decision	432
5.	Concluding Remarks and Latest Developments	434
5.1.	Latest Developments – Spectrum Trading	438
5.2.	A New EU Strategy for an Optimal Use of Radio Spectrum	444



<b>Chapter 13: Market Definition and Analysis of the Relevant Markets</b>	<b>451</b>
Section I: The Markets Included in the Annex to the Commission Recommendation on Relevant Markets	451
Retail Level	452
Wholesale Level	457
Section II: Market Definition and Analysis Procedures for Electronic Communications Markets – A Practical Guide	478
1. Market Definition	478
2. Market Analysis and Imposition of Remedies	482
3. Notification Procedures Before the European Commission	486
Section III: Methodology for Market Definition and Analysis of Electronic Communications Markets	492
1. Market Definition Methodology	492
1.1. Product Market	494
1.2. Geographic Market	500
1.3. The Commission's Approach in Practice	503
2. Market Analysis Methodology	516
2.1. Case Law of the ECJ and CFI – The Commission's Approach	516
2.2. Collective Dominance	522
 <b>PART IV: SPECIFIC ISSUES: EU AUDIOVISUAL POLICY – CONTENT REGULATION/BROADBAND</b>	 <b>535</b>
<b>X Chapter 14: EU Audiovisual Policy – Content Regulation</b>	<b>537</b>
1. Introduction	537
2. The 'Television without Frontiers' Directive	541
2.1. Principles of Jurisdiction – Place of Establishment	543
2.2. Responsibility of the Transmitting State to Check Compliance by Broadcasters	546
2.3. Free Movement for Broadcasts – Freedom of Reception and Retransmission – Specific Exceptions to the Transmitting State Principle – Protection of Minors and Avoidance of Incitement to Racial, Sexual, Religious or National Hatred	546
2.4. Rules Applicable to Domestic Broadcasters	548
2.5. Events of Major Importance to the Public – List of Major Events – Notification to the Commission	549
2.6. Measures to Promote European Programmes – Definition of European Works – Independent Productions	551
2.7. Broadcasts of Cinematographic Works – Exclusion of 'Local Television' from European Content Requirements	553



2.8.	Regulation of Television Advertising, Sponsorship and Teleshopping	553
2.8.1.	Advertising and Teleshopping	553
	Format	553
	Timing of Advertising and Teleshopping	554
	Content of Advertising and Teleshopping	555
2.8.2.	Sponsorship	557
2.8.3.	Advertising Quotas	557
	Teleshopping	558
2.8.4.	Possibility for Member States to Impose Stricter Rules	559
2.8.5.	Right of Reply	559
3.	Protection of Minors and Human Dignity in Audiovisual and Information Services	560
3.1.	The Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services	560
3.2.	Council Recommendation on Protection of Minors and Human Dignity	563
4.	Nature and Scope of Content Regulation for On-line Services	568
4.1.	Introduction	568
4.2.	Content Regulation of On-line Services	569
4.3.	Balance between Public Interest and Market Considerations: The Role of Self-regulation in the On-line Environment	572
	What Kind of Self-regulation?	573
	Comments	576
5.	Towards a Modern Framework for Audiovisual Content: Media Regulation in the Converging Era	577
5.1.	A New Audio-visual Content Services Directive?	580
5.2.	The Scope of Future Audiovisual Content Regulation	581
5.2.1.	Definition of Audiovisual Content Services	583
5.2.2.	Basic Tier of Obligations	583
	i) Protection of Minors and Human Dignity	583
	ii) Identification of Commercial Content and Minimum Qualitative Obligations Regarding Commercial Communications	586
	iii) Right of Reply	587
	iv) Basic Identification/Masthead Requirements	588
5.2.3.	Determination of Jurisdiction – Territorial Competence	588
5.2.4.	The Regulation of Advertising	592
5.2.5.	Events of Major Importance to Society – Right to Information/Right to Short Reporting	596
5.2.6.	The Promotion of European Content and Independent Production	597



<b>Chapter 15: Broadband</b>	<b>601</b>
1. Introduction – Definition and Importance of ‘Broadband’	601
2. Technologies/Platforms for the Provision of Broadband Access	602
2.1. Wireline Platforms	602
2.2. Wireless Platforms	605
3. Interaction Between Broadband Competition, Growth and Regulation	607
Why Focus on DSL Regulation	609
4. Broadband Regulation	611
4.1. Competition Law	611
4.2. Regulating Local Loop Unbundling	613
A. Regulating LLU under the Previous ONP Framework	613
The LLU Working Document	614
The LLU Communication	619
The LLU Recommendation	625
The LLU Regulation	629
B. Regulating LLU under the ECNS Framework	632
i) Obligations of Access to, and Use of, Specific Network Facilities	634
ii) Obligation of Transparency	635
iii) Obligation of Non-discrimination	636
iv) Obligation of Accounting Separation	637
v) Price Control and Cost Accounting Obligations	637
4.3. Regulating Bitstream Access	638
A. Regulating Bitstream Access under the ONP Framework	639
B. Regulating Bitstream under the ECNS Regulatory Framework	640
5. Broadband Policy	643
5.1. Choosing between the Different Types of Bitstream Access	643
5.2. Complementary Use of Bitstream Access and LLU	648
<b>Appendix 1</b>	<b>653</b>
<b>Appendix 2</b>	<b>657</b>
<b>Index</b>	<b>671</b>