“Breaking up is hard to do”—National Merger Remedies in the Information and Communication Industries

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"Breaking up is hard to do"—National Merger Remedies in the Information and Communication Industries

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Introduction

"Breaking Up Is Hard to Do" sang Neil Sedaka in 1962, reaching the top of the Billboard Hot 100 in the United States. This sentiment still rings true today for business as well as personal relationships. In merger control, the separation or alteration of business units, assets, and third party relationships in such a way as to allow all parties to remain viable presents a great challenge—a challenge that parties and competition authorities attempting to remedy the competition concerns of a merger often have to face. For mergers in the information and communication sector, the challenge can be even greater than usual. The determination of the appropriate scope of a divestiture remedy, the design of remedies to safeguard against potential foreclosure effects, and the monitoring of service levels and competitive pricing is particularly difficult because of the rapid technological change, the presence of network effects, and the legacy of regulation of access to infrastructure and content that tend to characterise this sector.

A review of these challenges and how they are being met in practice is the principal aim of this article.[2] Understanding common themes and trends in remedy interventions within a particular sector has relevance and value to market participants, deal makers and regulators. Further, this more in-depth and focused investigation allows our analysis of remedy design to reflect and take account of the process of competition in a particular sector, and compare with sectors in which the competitive processes differ.

In this article we contribute to the evaluation and assessment of merger interventions at the national level, with an analysis of merger remedy decisions that fall into UK Standard Industrial Classification (SIC) classification section J (information and communication).[3] The focus of our review is a set of 27 merger remedy decisions in six major European countries (which we call "the Big 6")—France, Germany, Italy, the Netherlands, Spain, and the United Kingdom—over the period 2000–2007 (although we also draw on other cases). Like its earlier companion article, which analysed the merger remedies experience in the wholesale and retail sector, the analysis builds on data collected in the course of the e-Competitions Merger Remedies Matrix project.[4] The project entailed the review of over 500 merger remedy decisions across 30 European countries, including all the European Union Member States, to examine trends in the number of interventions and types of remedies.

We find that, echoing the title of this article, "breaking up is hard to do"—competition authorities reviewing mergers in the information and communication sector have tended to accept a range of remedy packages, often mixing both structural and behavioural commitments. This practice contrasts starkly with the experience in the wholesale and retail sector, which demonstrated a strong preference for structural (i.e. divestiture) remedies. This article examines the factors that help to determine this outcome. It is important to note, however, that the article focuses on the design and acceptance of remedies. The article does not do an ex-post evaluation of the

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2 This is the second in a series of articles that provide a sectoral perspective to a comparative analysis of national merger remedy decisions. The first article, Hoehn, Rab and Saggers, "Retail Therapy: A cross-country comparison of merger control remedies practice and experience in the wholesaling and retailing sectors of France, Germany, Italy, the Netherlands, Spain and the United Kingdom", was published at [2009] E.C.L.R. 153.

3 This section combines activities involving production and distribution of information and cultural products, provision of the means to transmit or distribute these products, as well as data or communications, information technology activities and the processing of data and other information service activities. The main components of this section are publishing activities, including software publishing (division 58), motion picture and sound recording activities (division 59), radio and TV broadcasting and programming activities (division 60), telecommunications activities (division 61), information technology activities (division 62) and other information service activities (division 63).

4 The e-Competitions Merger Remedies Matrix is sponsored by Clifford Chance LLP and PricewaterhouseCoopers LLP. For further details, see *http://www.concurrences.com* [Accessed February 19, 2009].

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effectiveness of remedies in each case. This type of ex-post assessment is an obvious and recommended next step, but is beyond the scope of our present research.

This article is organised as follows:

- Section 1 briefly sets out some issues that frame the assessment of mergers and merger remedies in this sector.
- Section 2 provides a detailed review of the merger remedies experience in the Big 6 in this sector over the period 2000–2007.
- Section 3 draws together the broad conclusions of the article and areas for future inquiry.
- Annex 1 sets out the cases in our review.

1. Competition issues. . . and beyond

Mergers in the information and communication sector raise a number of issues that competition authorities have to weigh up in their decision-making process. Against the competition concerns that a deal may raise, the competition authority must balance the often strong efficiency and cost-saving motivations that are drivers of consolidation in the sector. Decisions also have to be made in an environment of rapid, and sometimes revolutionary, technological change. This makes it challenging to understand how the market will evolve. For example, a major driver of change across the whole sector (regionally, nationally and internationally) has been the growth of digital technology for the production and distribution of text, sound, video and voice. This trend, often called "convergence", creates the potential for companies to be active at various levels, and across related dimensions of the value chain; producing films or music, recording them, and distributing them not only through traditional "bricks and mortar" outlets but also through telephone networks and over cable and satellite platforms.[5]

Given the environment of technological innovation and convergence, companies have—not surprisingly—pursued cross-media mergers.[6] Cross-media mergers typically raise fewer competition concerns because there is no horizontal overlap between the parties pre-merger. However, competition authorities are sometimes wary of those mergers that have associated vertical elements or involve dominant firms, as these are seen to bring with them the risk of leveraging of market power and/or the entrenchment of incumbency through network effects.[7]

In addition to assessing the competitive impact of a transaction, the authority may need to be alert to the role of sector regulation. Finally, competition authorities need to be tuned to the often highly charged emotional atmosphere created when transactions touch on freedom of expression, involve strong personalities, and affect products that consumers hold dear (e.g. mobile phones).

As a prelude to the review of remedy cases in the information and communication sector, the remainder of this section briefly discusses some of the competition concerns that authorities may have to face with a merger notification, as well as other public interest issues that regulators may have to take into account. Apart from the standard horizontal issues, vertical competition issues receive a significant amount of attention. These are connected to public interest notions of plurality, access and choice which figure prominently in this sector.

Legal and regulatory framework

Mergers that meet the jurisdictional thresholds under Regulation 139/2004 (EC Merger Regulation (ECMR))[8] are required to be notified to the European Commission and, except in limited circumstances, cannot be put into effect prior to approval by the European Commission. The ECMR provides a "one-stop shop" for such "concentrations with a Community dimension", which generally means that the European Commission has sole jurisdiction over mergers within its competence. The test for clearance is a competition-based assessment—the ECMR prohibits a concentration that significantly impedes effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

Plurality and cross-media ownership regulation

However, despite the one-stop shop principle, a national competition authority may have limited jurisdiction to intervene in certain circumstances. Of relevance for the review of remedies in the information and communication sector is the recognition of the distinctiveness of the media sector in art.21(4) of the ECMR. This provides that:

5 Nor is convergence the preserve of fast-moving markets such as broadcasting and telecommunications. Even the more traditional "paper-based" publishing industry is affected by the convergence phenomenon. Regional newspapers, for example, currently face challenges over and above the economic cycle. They are working hard to compete with more flexible new-media channels that are taking market share, while media companies are continuing their investment in online activities.

6 This is by no means a recent development. Cross-media mergers and joint ventures between media and telecommunication companies already happened in the 1990s, with *Time Warner/AOL* being a prominent example.

7 There is a long tradition of this at the EU level, with competition concerns key to the prohibition or abandonment of the proposed pay TV joint ventures by Bertelsmann, Kirch and Deutsche Telekom in the mid 1990s. The first named author undertook a study for the then Merger Task Force on competition issues and policy implications in the convergent industries in 1996.

8 Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation (ECMR)) [2004] OJ L24/1.

> "Member States may take appropriate measures to protect legitimate interests other than those taken into account by [the ECMR] and compatible with the general principles and other provisions of Community law."

Plurality of the media is recognised as a legitimate interest. However, there have been no cases to date where Member States have intervened in mergers in the information and communication sector under art.21.

Mergers that do not meet the thresholds under the ECMR are generally subject to the national merger control rules in the individual Member States, where applicable (it is on these decisions by national competition authorities that we focus).

Certain Member States have adopted specific rules to regulate mergers in the information and communication sector. These rules can include restrictions on media ownership or cross-holdings, specific approval requirements for mergers meeting defined thresholds, or the involvement of sector regulators (in conjunction with the country's competition regulator) in reviewing mergers in the information and communication arena. The policy concern behind these restrictions centres on the concept of plurality. Pluralism in media is a fundamental rule of European media policy.[9] The media sector represents the cornerstone of the democratic process and freedom of expression.[10] There are few states where political and economic actors do not try to influence news coverage according to their own interests. Concentration of media ownership may result in a skewed public discourse where certain viewpoints are excluded or under-represented. While media plurality is not a primary goal of merger legislation, a number of countries have special regulations (such as cross-ownership restrictions) to safeguard media plurality. [11]

Interface with sector regulation

It is a feature of information and communication mergers that in addition to scrutiny by the merger control authorities, they may require approval from the sector regulator(s), chiefly the communications authority.

The information and communication sector provides an insightful case for discussing merger remedies from the sector regulatory perspective. Until recently, the European telecoms sector was a regulated industry with a stable market structure offering limited scope for consolidation. This changed in the 1980s with the beginning of market liberalisation and the development of digital switching and transmission technology.[12] Notwithstanding liberalisation, there remain in place sector-specific rules and authorities with oversight of the sector.

Even where specific sector approval is not explicitly required, the sector regulator may liaise closely with the competition authority in respect of mergers within their competence. For example, in 2002 the Italian competition authority approved the transaction involving SEAT Pagine Gialle and Cecchi Gori Communications[13] subject to a remedies package, despite the telecoms sector regulator calling for outright prohibition (i.e. in their view no package of remedies could feasibly solve the competition problems created by the merger).

As another example, in France the competition authorities must notify the independent telecoms regulator, the *Autorité de Régulation des Communications Électroniques* (ARCEP), of transactions affecting sectors within the scope of the ARCEP, and the ARCEP can render an opinion on the matter in question (although this opinion is not binding on the competition authorities). The Ministry of Economy can also order the French competition authorities to seek a non-binding opinion from the *Conseil Supérieur de l'Audiovisual* (CSA) on transactions that affect the audiovisual sector.

Horizontal competition issues

In cases of horizontal consolidation, the competition issues arising tend to be similar to those in other sectors and involve assessing potential market power using traditional analytical tools including market shares, concentration ratios and barriers to entry. In most cases barriers to entry will be of an economic nature, but they can assume other forms. Of particular note for the information and communication sector are network effects which tend to lead to higher levels of market concentration, and the role of regulation as a barrier to entry when it provides for the establishment of special

9 Accordingly, art.10 of the European Convention on Human Rights not only enshrines an individual right to media freedom but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democratic society.

10 Diverse opinions in newspaper publishing and broadcasting are the chief concerns here, but increasingly also in other types of publishing (for example, online publishing).

11 For example, in the Netherlands, cross-ownership of daily newspapers, radio and television activities by the same group is allowed only if the individual market share on any of these three markets is no higher than 35%, and the sum of the market shares after the transaction will not exceed 90%. In Spain (amongst other cross-ownership restrictions) any company holding more than 5% of a television broadcaster with national coverage (except satellite broadcasters) may not generally hold more than 5% in another broadcaster in Spain. These types of restriction emphasise that regulators and deal-makers in the information and communication sector have to examine a variety of factors, including the effect of the transaction on competition.

12 See M.E. Porter and V.E. Millar, "How Information Gives You Competitive Advantage: The Information Revolution Is Transforming the Nature of Competition" (1985) 4 *Harvard Business Review* 149.

13 *SEAT Pagine Gialle/Cecchi Gori Communications,* decision of February 28, 2002 (Italy).

rights—for example, where only a limited number of licences are envisaged.

The main type of concern that arises from horizontal mergers is the creation or strengthening of market power at the same level of trade.

For example, in 2004, a merger between two radio operators, Capital Radio and GWR Group, raised concerns that the increased market share of the combined entity in the East Midlands region of the United Kingdom would weaken the positions of local advertisers who purchased airtime from the stations.[14] Advertisers would now have access to fewer independent stations, which would give the merged entity the ability to raise prices or to offer lower quality products and service to the advertisers.

Competition concerns arising at the horizontal level may be intensified due to vertical links between the parties. An example is the acquisition by Group Canal+ (controlled by French Group Vivendi) of Stream, an Italian company controlled by Telecom Italia.[15] There was concern over the creation of a near monopoly in Italy, as Stream and Telepiú (a wholly owned subsidiary of Canal+) were the only providers of pay-TV in Italy. Canal+ was active across the communication sector, including the production and distribution of pay-TV channels by cable and satellite, the distribution of feature films and audiovisual works, and the acquisition and sub-licensing of programming and television sports broadcasting rights. The Italian competition authority opened an in-depth review to examine the horizontal and vertical concerns arising through the combination of players active across the various stages of the pay-TV value chain and in other information and communication markets.

It is important to bear in mind that there can be strong efficiency reasons for consolidation that may outweigh the anti-competitive effect. In the United Kingdom, for example, Global Radio's acquisition of GCap Media provides an illustration of efficiencies evidence being used in an information and communication merger, where the Office of Fair Trading (OFT) considered whether to accept undertakings in lieu of a reference to the Competition Commission. According to the OFT's press release on the case, this is the first time that efficiencies evidence had made a material difference to the outcome in a "horizontal" merger case. Simon Pritchard, then the OFT's Senior Director of Mergers, said:

> "Merger efficiencies benefit customers and put pressure on rivals. In this case, they tipped the balance in favour of clearance in London. This shows that with the right facts, efficiencies can make a difference, even at first phase, and even in a horizontal merger with high market shares. The divestment remedies in the Midlands, where efficiencies were not sufficient, are about restoring competition to make sure customers will not be harmed."[16]

Vertical competition issues

The leveraging of market power into adjacent markets along the vertical chain and the potential foreclosure effects that may arise is often a concern of the competition authorities when assessing vertical mergers in the information and communication sector.[17] The threat to competition is that vertical integration may change the incentives of the owner or controller of particular inputs or distribution platforms to continue to offer access to third parties on competitive terms. This may take the form of an outright refusal to supply any third party, or certain pricing strategies (e.g. exclusionary margin squeeze). Non-price strategies include tying and bundling which can be used to exclusionary effect. Such practices, which may well have a pro-competitive objective and efficiency enhancing effect, are present in the information and communication sector in explicit and often normal commercial offers: for example, a bundled offer of pay-TV channels or bundles of pay-TV services, internet access, and telephony—the so-called "triple-play".

Two types of vertical issues that may arise in merger cases in this sector are access to content and access to infrastructure.

Access to content

A company that operates upstream in the value chain may have control over a product that is a critical input for downstream businesses. In the information and communication sector this may relate to control over an audiovisual product (films, music or TV programmes) and/ or the holding of copyright. Control at source is

14 *Capital Radio/GWR Group,* decision of December 22, 2004 (UK).

15 *Group Canal+/Stream,* decision of May 13, 2002 (Italy). Notwithstanding the approval of the transaction by the Italian competition authority, subject to conditions, the merger was later abandoned and the operation was restructured and notified to the European Commission (and approved subject to conditions) (COMP/M.2876-*Newscorp/Telepiú* [2004] OJ L110/73).

16 Office of Fair Trading (OFT), "Global/GCap radio merger: OFT seeks remedies and relies on efficiencies for the first time" (Press Release, August 8, 2008), available at *http://www.oft.gov.uk/news/press/2008/95-08* [Accessed February 19, 2009].

17 For detailed treatments of the effects of non-horizontal mergers and foreclosure see J. Church, "The impact of vertical and conglomerate mergers on competition" (Church Economic Consultants Ltd and Department of Economics University of Calgary, Final report for the Directorate General for Competition, European Commission: Brussels, 2004), available at *http://ec.europa.eu/competition/mergers/studies_reports/merger_impact.pdf* [Accessed February 19, 2009] and P. Rey and J. Tirole, "A primer on foreclosure" in M. Armstrong and R. Porter (eds), *Handbook of Industrial Organization* (Amsterdam: Elsevier, 2007), Vol.3. These two papers were very influential in shaping the European Commission's treatment of vertical competition concerns.

relevant from a strategic perspective where the amount or breadth of products and/or intellectual property (IP) rights at issue is such as to allow the company to gain a competitive advantage by offering a uniquely attractive product or service proposition to customers, which competitors find difficult to replicate.[18]

The Spanish competition authority's intervention in the acquisition of sole control of Audiovisual Sport (AVS) by a dominant player in the Spanish pay-TV market, Sogecable SA, in late 2006 highlighted these concerns.[19] AVS had exclusive rights to resell football broadcasting rights to TV operators. The transaction raised concerns that Sogecable might post-merger have incentives to enhance its hold on the Spanish pay-TV market by precluding its rival pay-TV operators from access to football broadcasting rights.

Access to infrastructure

A company may possess a certain infrastructure allowing it to exert a significant degree of control in terms of access to a given customer base. This is relevant from a competition perspective where the market power of the owner/controller of the infrastructure is significant and where the infrastructure is seen as a critical gateway to the market.

Some remedy case examples that illustrate foreclosure concerns through restricting access to infrastructure include:

- The Spanish competition authority intervened in the merger between Sogecable SA and Via Digital in 2002.[20] The transaction brought together the two large satellite pay-TV platforms in Spain. The authorities feared that this would allow the merged entity to gain market share for its own group of TV channels by restricting the access of owners of rival TV channels to the merged entity's platform.
- In 2003, the merger of two Spanish telecoms companies—Abertis Telecom and Retevisión—brought together the only two region-wide terrestrial broadcasting networks in Catalonia.[21] As the costs of installing a competing infrastructure across the region would be substantial, there was concern that the merged entity would enjoy substantial market power over third party broadcasters needing to access the merged entity's facilities to reach the region.
- In 2003, the Italian competition authority reviewed the merger between Telecom Italia and Megabeam Italia.[22] One of the areas in which the transaction raised serious competition concerns was in the provision of Wi-Fi (Wireless Fidelity) sites and services. After the merger, Megabeam, a Wi-Fi services provider, would have had access to Telecom Italia's Wi-Fi spots infrastructure, and the concern existed that Telecom Italia would then foreclose access to these sites to third-party Wi-Fi service providers.

As we discuss later, each of these cases was ultimately cleared subject to commitments by the merging parties that facilitated access to infrastructure.

Other potential competition concerns

The presence of a company in a number of related markets and across the value chain has become a key feature of mergers in the information and communication sector. In this context, mergers across and in related markets, whether vertically related or not, may themselves raise concerns over increased barriers to entry and potential foreclosure effects.

"Leverage" into neighbouring markets

A recurring theme relates to the potential leveraging ability of the parties—their ability to transfer market power into a neighbouring market. This type of leverage is typically achieved through tying (either commercially or technologically) the sale of one product to the sale of another. Perhaps the most internationally renowned case (albeit not a merger case) is that of Microsoft facing challenges from US and European competition authorities for integrating their own internet browser and media player facility in their PC operating system.

At the national level in Europe there have also been a number of merger remedy cases that dealt with similar leverage concerns. In 2001, the Italian competition authority reviewed a transaction in which SEAT Pagine Gialle, a subsidiary of the Italian telecommunications incumbent Telecom Italia Group, purchased Cecchi Gori Communications, the owner of two free-to-air terrestrial TV channels (TCM and TCM2) in Italy. SEAT was a multi-platform telephone directory (online and offline) and business information provider, and the concern was that the merged entity might use advertising on TCM and TCM2 to steer consumers towards using the SEAT directory.[23]

In 2003, a merger in France between two providers of regional newspapers and free newspapers, Comareg

18 For example, the first named author has examined in detail the foreclosure concerns relating to sports rights and the incentives that rights-holders may have to restrict access to the content from other broadcasters. See T. Hoehn and D. Lancefield, "Broadcasting and Sport" (2003) 19(4) *Oxford Review of Economic Policy* 552.

19 *Sogecable SA/Audiovisual Sport (AVS),* decision of February 26, 2007 (Spain).

20 *Sogecable SA/Via Digital,* decision of November 13, 2002 (Spain).

21 *Albertis Telecom/Retevisión,* decision of October 17, 2003 (Spain).

22 *Telecom Italia/Megabeam Italia,* decision of August 7, 2003 (Italy).

23 *SEAT Pagine Gialle/Cecchi Gori Communications,* decision of February 28, 2002 (Italy).

and France Antilles, raised concerns that the combined entity might enhance its market power in an already concentrated market by bundling the advertising prices across its regional and free publications.[24]

In the French newspapers merger *Groupe Hersant Media/Lagardere*, the competition authorities raised concerns that the merged entity might bundle their advertising sales so as to leverage their strong position in the regional press market into connected media markets; for example, the online market.[25]

Emerging markets

Competition concerns may arise with the creation or development of a new market, in which the first provider might pursue various strategies to entrench a pioneer advantage (price, technical, or interconnection restrictions). First mover advantages can be of particular importance in network industries. It is therefore unsurprising, for example, that this circumstance has invited particular attention by the merger control authorities when assessing mergers in the information and communication sector.

In 2006, Reti Televisive Italiane (RTI) acquired broadcasting assets from Ramo di Azienda di Europa TV to improve its position in the new and emerging market for providing television content through mobile phones. This transaction raised competition concerns that RTI would now own a large share of the Italian broadcasting network. However, the Italian authorities approved the transaction once it became clear that RTI aimed to use the acquired transmission capacity exclusively to develop a DVB-H (digital video broadcasting handheld) network for the provision of television content on mobile phones, a market which was still nascent and in need of investment in Italy. In this case the Italian competition authority allowed the merger as it was not concerned that the merged entity was trying to entrench its position or control the broadcasting market.[26]

2. Remedies landscape

Our review in the previous section demonstrated that the competition authorities in the Big 6 countries have had to achieve a balance between potentially conflicting policy concerns when considering mergers in the information and communication sector. The balancing required considerations of:

- the reasons which lead companies in the sector to seek a merger, in particular efficiencies and technical innovation;
- any serious competition issues to which some mergers may give rise, for example the risk of foreclosure;
- the need to safeguard plurality, albeit media plurality as such may not be a formal requirement under the relevant merger control regime; and
- ultimately, the outcome for consumers as the main beneficiary of welfare enhancing competition policy interventions.

In this section we discuss the types of remedy competition authorities in the Big 6 have accepted to meet their concerns over adverse impacts on competition and after, hopefully, striking the appropriate balance between competition and other public interest objectives.

We have reviewed 27 merger remedy cases in the information and communication sector in the Big 6 in this sector in the period 2000–2007. It must be noted, however, that the data series for Germany and the United Kingdom start in 2003 and 2004, respectively.

Divestiture v structural remedies

Generally, divestiture remedies are the preferred method of addressing competition concerns in merger decisions made by the European Commission under the ECMR.[27] We reviewed this issue in the Big 6, by considering remedies by type within the categories summarised in Table 1. We then categorised the cases into *structural only* remedies, *behavioural only* remedies, or *mixed* packages of both structural and behavioural commitments.

In cases of clear horizontal overlap, the competition authorities have tended to find that the most effective way to restore effective competition (other than prohibition) is to create conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture or the severance of structural links that aggravated foreclosure issues.

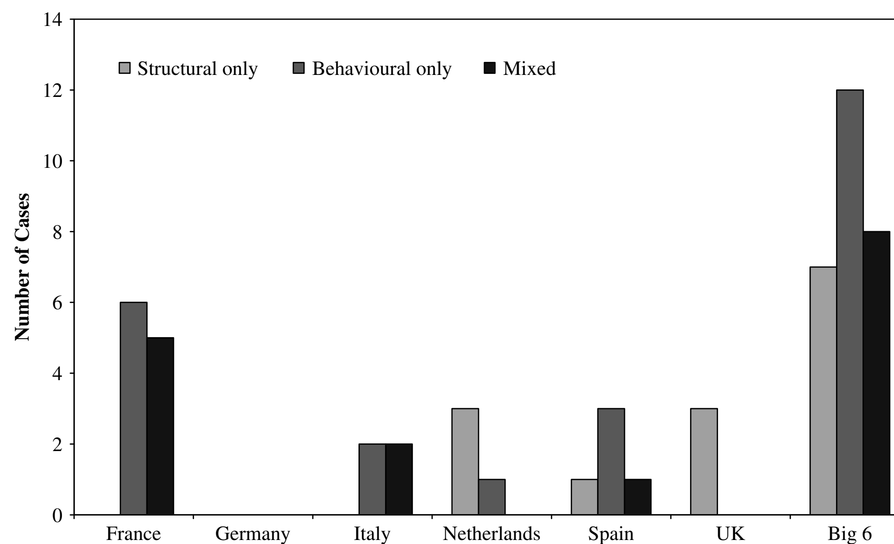
Figure 1 shows that, in contrast to our previous analysis of the wholesale and retail sector, this sector has a very different balance of structural and behavioural remedies, with authorities favouring the latter. Only 26 per cent of merger remedy decisions in the information and communication sector have purely structural remedies, compared with 63 per cent in the wholesale and retail sector. While divestiture has tended to be a preferred remedy in the Netherlands and the United Kingdom, in the information and communication

24 *Frances Antilles/ Comareg,* decision of April 29, 2003 (France).

25 *Groupe Hersant Media/ Lagardere*, decision of December 7, 2007 (France).

26 *Reti Televisive Italiane (RTI)/Ramo di Azienda di Europa TV,* decision of April 10, 2006 (Italy).

27 For an explicit confirmation of this policy, see the European Commission's New Remedies Notice, published October 2008: Notice on remedies acceptable under Regulation 139/2004 and under Regulation 802/2004 [2008] OJ C267/1.



Source: Authors' calculations

Figure 1: Merger remedies in the information and communication sector (Big 6), 2000–2007—structural *v* behavioural[28]

Table 1: Remedies typology

Structural remedies	Behavioural remedies
Divestiture of a controlling stake in a viable standalone business.	Granting of access to infrastructure.
Divestiture of a business unit carved out from a company structure.	Granting of access to technology. Granting of access to content.
Divestiture of assets package.	Termination of exclusive vertical agreements.
Divestiture or grant of long-term licence.	Other behavioural.
Commitments to exit from a joint venture.	
Other structural.	

sector, the authorities in France, Italy and Spain have been receptive to commitments on conduct.

28 The dataset does not cover all merger remedies cases in each country for the period 2000–2007. There are no German merger remedies cases shown in Figure 1 because the German data series of cases in this analysis begins only in mid-2003. The German authority has taken merger remedies decisions in this sector previously. For example, the authority ordered a divestiture of a business in clearing the merger *Axel Springer/Jahr Verslag* (decision of September 27, 2000 (Germany)). The German authority has also prohibited outright certain transactions in this sector (for example, the German competition authority prohibited a takeover by Axel Springer of Pro Sat 1 Media AG in 2006). The first remedies case included in the UK data series is in 2004, after the implementation of the Enterprise Act of 2002.

As a divestiture is typically permanent in nature and relatively invasive, the authorities have to be confident that their recommendation is proportionate to the competition threat created, that the divested assets remain viable, and that the buyer of the divested assets will not itself use the assets to threaten the competitive process. There are, therefore, a number of different types of divestiture remedy. Some case examples include:

- In 2006, the Dutch competition authority accepted divestiture of a number of high broadcasting masts to an independent third party in the merger of KPN Telecom BV and Nozema Services.[29] This divestiture sought to remedy competition concerns created in the market for the transmission of wireless radio signals. Conditions imposed by the competition authority on the divestiture were that the buyer be approved by the authority and that the divestiture be made within two years of the authority's decision. In a decision in April 2007, the Dutch competition authority approved the sale of the masts to Télédiffusion de France (in so doing, further encouraging foreign entry into the Dutch telecoms market).[30]
- The merger of Unión Radio and Antena 3 Radio in Spain (in 2005) raised horizontal concerns about the provision of the sale of advertising to radio stations in a number of municipalities.[31] The Spanish competition authority

29 *KPN Telecom BV/Nozema Services,* decision of March 6, 2006 (Netherlands).
30 *KPN Telecom BV/Télédiffusion de France*, decision of April 20, 2007 (Netherlands).
31 *Unión Radio/Antena 3 Radio,* decision of December 27, 2005 (Spain).

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accepted the divestiture of radio stations in affected municipalities to redress competition concerns; the authority would maintain the final decision on the suitability of the buyer.

- In the 2004 UK merger of Capital Radio and GWR Group, the OFT agreed to the parties' offer to divest a radio station in the East Midlands (the parties made this offer at an early stage so as to avoid the OFT referring the transaction to the Competition Commission).[32] GWR owned three stations in the East Midlands and Capital owned one. The OFT was concerned that the merger would threaten local advertising in the region. Therefore, the parties offered to divest the overlap by selling Capital's station, Century 106 FM, in the East Midlands. The OFT found this offer suitable as it completely removed the competition concern in the area and was also readily implementable because the assets required to carry on the Century 106 FM business could be easily identified. The OFT attached to this remedy the commitment that the parties continue to remain separate of the divested business going forward and that the OFT approve the final purchaser of the business.
- In November 2006, the pay-TV broadcaster and retailer BSkyB announced that it had acquired a 17.9 per cent share in the television producer and broadcaster ITV.[33] The UK Communications Act 2003 allows the Secretary of State for Business, Enterprise & Regulatory Reform to intervene in certain media transactions when the transaction raises public interest issues. The Secretary of State issued the first ever Public Interest Intervention Notice on concerns about media plurality, and after consultation with both the communications sector regulator, the Office of Communications (Ofcom), and the OFT, the merger was referred to the Competition Commission in May 2007. The Competition Commission concluded (in a recommendation to the Secretary of State in December 2007) that the acquisition constituted a merger that would likely cause a substantial lessening of competition in the market for all television services. This impairment of competition in itself raised public interest concerns.[34]
The Competition Commission concluded that two remedies would effectively address the harm to competition resulting from the transaction—either a full divestment of the whole of BSkyB's shareholding, or a partial divestment, with BSkyB required to divest its holding to below 7.5 per cent combined with undertakings not to seek or accept representation on ITV's board and not to re-acquire shares in ITV. The Competition Commission (and Secretary of State) was satisfied that a divestiture of BSkyB's shareholding below a 7.5 per cent level, in conjunction with commitments not to seek or accept ITV Board representation, not to increase its shareholding in ITV in the future, and not to sell the shares to an associated person would be sufficient to mitigate the competition concerns (and public interest issues) raised by the transaction. The Competition Commission argued that this remedy would be as effective as full divestiture of the BSkyB share because it removed any realistic prospect that BSkyB would be able to exercise material influence over ITV's strategy. This remedy was also believed to be less intrusive and more proportionate than full divestiture.
The Secretary of State followed the Competition Commission's conclusions, and its decision to impose divestiture and behavioural remedies on the transaction was published on January 29, 2008. BSkyB appealed this decision to the Competition Appeal Tribunal. Virgin Media, as an interested third party, also applied for review of the Competition Commission's and the Secretary of State's decisions on media public interest and remedies. The Competition Appeal Tribunal decision on September 29, 2008 upheld the Competition Commission's remedies decision, but noted that the Competition Commission had misdirected itself in law on the interpretation of the relevant media plurality public interest provisions. The upshot is that, despite the Competition Commission's incorrect interpretation of the plurality public interest provisions, the Competition Appeal Tribunal concluded on October 30, 2008 that it was not necessary to revisit the remedies decision, as the original remedy imposed by the Competition Commission to address the competition problem was also satisfactory in allaying any plurality concerns.

Behavioural remedies

The authorities in the Big 6 have been receptive to behavioural solutions in this sector—the French and Spanish authorities being particularly receptive to commitments on conduct. A prevailing feature of mergers in the sector is the concern to ensure access; either access to the relevant market or access to those key elements needed by rivals to establish themselves in the market.

32 *Capital Radio/GWR Group,* decision of December 22, 2004 (UK).

33 Cross-ownership restrictions would have prevented BSkyB from holding more that 20% of ITV.

34 *BSkyB/ITV,* decision of January 29, 2008 (UK). On the separate public interest concern of the merger's effect on media plurality, the Competition Commission concluded that the combination of regulatory mechanisms and a strong culture of editorial independence within television news production would be sufficient to mitigate concerns.

Therefore, the typical focus of the behavioural commitments is to reduce barriers to entry and expansion for competitors thereby creating or maintaining their competitive constraints on the merged entity.

Examples include:

Access to content

Perhaps the most elaborate example of the use of behavioural commitments is in the 2006 merger of two satellite broadcasting and television service providers in France—TPS and Canal Sat.[35] The French competition authority cleared the merger subject to a record 59 commitments, with the majority of these commitments aimed at enabling the acquisition of broadcast rights, programmes and channels by non-satellite operators.

As discussed earlier, in the merger of Audiovisual Sport (AVS) and the biggest player in the Spanish pay-TV market, Sogecable SA, in late 2006, concerns were raised that Sogecable might post-merger have incentives to enhance its hold on the Spanish pay-TV market by precluding its rival pay-TV operators access to football broadcasting rights owned by AVS. The transaction was finally approved subject to the commitment (amongst others) that Sogecable guarantee third party access to football content on fair, transparent and non-discriminatory terms.[36]

Access to infrastructure

Another previously mentioned case is the 2003 Telecom Italia and Megabeam Italia transaction which affected the market for the provision of Wi-Fi sites and services and raised serious competition concern for the Italian competition authority.[37] The concern was that Telecom Italia may have the incentive post merger to give preferential access to its sites to Megabeam, potentially foreclosing other rival Wi-Fi service providers from the sites. The transaction was ultimately approved conditional on a series of measures that aimed to grant full direct and indirect access to the Telecom Italia sites to other Wi-Fi service providers.

Also, as quoted earlier, the 2003 telecoms merger of Abertis Telecom and Retevisión in Spain raised foreclosure concerns over access for third party broadcasters to the only two region-wide terrestrial broadcasting networks in Catalonia.[38] Retevisión owned one of the networks, while a long-term contract gave Abertis Tradia (a subsidiary of Abertis Telecom) control of the Catalonian Government-owned second network. The cost involved in installing a competing broadcasting network in the region was considered too high to allow rivals from presenting effective competition to the merged entity’s own broadcasting offering. The Spanish competition authority investigated two structural remedy alternatives: (i) the termination of Tradia’s long-term contract with the Catalonian Government; or (ii) divestiture of the Retevisión network in Catalonia. The Council of Ministries (the *Consejo de Ministros*), however, disregarded the second remedy designed by the competition authority and instead recommended an alternative set of behavioural commitments designed to grant third party access to the merged entity’s network. The package included commitments: to make network ownership and management legally and operationally separate from the rest of the activities of Albertis Telecom; to grant access to third parties on non-discriminatory and transparent terms; to provide access within one month of request; and to provide updates on access conditions (including space available in sites and tariffs) to the telecoms sector regulator every six months. These commitments would be binding for 10 years. The merging parties accepted this remedy package.

Surrendering rights to allow these to be acquired by a new entrant

In 2002 the French competition authority cleared an acquisition by TDF (a subsidiary of France Telecom) of wireless communication broadcasting sites owned by Bouygtel, subject to commitments to grant third party mobile operators access to the infrastructure.[39] However, the authorities looked also at a contractual arrangement attached to the transaction in which Bouygtel would be granted pre-emption rights to rent back the sites that it had sold to TDF until the end of December 2006. The authority was concerned that this would create a barrier to entry for other mobile communications operators in the market. Bouygtel had to renounce these rights as part of the remedy package.

Guaranteeing terms of supply to other market players

In 2008, the Competition Commission accepted behavioural remedies for a merger-to-monopoly situation, rather than order a divestiture. The case, one of the first UK cases of this kind, involved the merger of Arqiva (a subsidiary of Macquarie Broadcast Ventures Ltd) and National Grid Wireless Group, the only two broadcast/wireless transmission network owners in the United Kingdom. The Competition Commission, rather than forcing divestment of parts of the network to potential competitors, accepted the views put forward by customers who commented that they would prefer discounts and service guarantees over a structural

35 *TPS/Canal Sat*, decision of August 30, 2006 (France).

36 *Sogecable SA/Audiovisual Sport (AVS),* decision of February 26, 2007 (Spain).

37 *Telecom Italia/Megabeam Italia,* decision of August 7, 2003 (Italy).

38 *Albertis Telecom/Retevisión,* decision of October 17, 2003 (Spain).

39 *TDF/Bouygtel*, decision of August 26, 2002 (France).

remedy.[40] The package also includes supporting minor provisions such as assurances that the new company will allow access to its network at fair prices.

As part of the undertakings, an Adjudication Scheme was to be set up whereby Ofcom, as the UK communications regulator, would appoint an independent adjudicator. The adjudicator was to be paid for by Arqiva and would decide disputes in relation to new contracts and the variation of existing contracts where the broadcasters and Arqiva are unable to agree.

Arqiva was also required to appoint a compliance director, who must be a member of the Arqiva Operational Board. The compliance director was to be responsible for monitoring compliance and dealing with the OFT, Ofcom and the adjudicator.

The case illustrates that despite the preference of the UK competition authorities for structural remedies, in appropriate cases they are willing to approve behavioural remedies that are robust and supported by affected third parties. The solution in this case was both novel and complex, facilitated by the fact that the parties had a limited number of customers and it was therefore possible to secure their approval for a behavioural package.

Restricting bundling

The bundling of products often has beneficial effects for the consumer. However, repeatedly in the cases in our review, particularly in those involving the sale of advertising, we see the competition authorities taking a wary view of the practice, reflecting that bundling can in some situations be used by firms to augment barriers to entry and market power.[41]

Editorial independence

In a highly contested case in the Netherlands in 2000, the Dutch competition authority cleared the merger of De Telegraaf Groep, the publisher of the largest national newspaper and some regional newspapers, and DLBV, the publisher of the regional newspaper *Dagblad De Limburger*, subject to the commitment that De Telegraaf guaranteed the commercial and editorial independence of the two competing regional newspapers in the province of Limburg.[42]

It is interesting that the Dutch competition authority subsequently fined De Telegraaf Groep €22,500 for failing to adhere to the agreed condition. In 2004, on the basis of a third party complaint, the authority had investigated compliance with the remedy condition and found that there was a single news organisation and a co-ordination of the editorial and commercial policy of the parties' two regional newspapers, rather than the agreed separation. The parties appealed this fine. The Dutch competition authority investigation in response to this appeal showed that continued separation, given weakening print markets, would have negative effects for De Telegraaf in the longer term as it would prevent De Telegraaf from achieving needed efficiencies. Therefore, the authority decided to remove the independence remedy to preserve the competitiveness of De Telegraaf going forward.

In 2005, the French competition authority was concerned that the merger between the newspaper companies SIPA and Socpresse would homogenise the contents of the newspapers affected and deplete the overall quality of the news for readers.[43] Therefore, the parties committed to, amongst other things, maintain the editorial autonomy of the affected newspapers and, in particular, ensure that each newspaper would have its own editor in chief.

Relinquishing contractual exclusivity or non-competes

Some remedies deal with restraints and ancillary restrictions that are part of standard sales and purchase agreements but, nevertheless, deserve to be mentioned here for sake of completeness. An example is a transaction in the Spanish music sector in which Universal Music acquired the recording company Vale Music.[44] The contract contained a non-competition clause under which the manager of Vale Music committed not to compete with the activities of the acquired business for a specified period. While the transaction raised no significant competition concerns, the authority believed that the non-competition clause was unnecessary to the business terms of the concentration and added an unmerited restriction on competition. The transaction was ultimately approved subject to the removal of the non-competition clause in the contract.

3. Conclusions

The developments in global communications over the past decade have been momentous, bringing fundamental changes in the structure of communication regulation in Europe and worldwide. Our review of national merger decisions in the information and communication sector of the Big 6 countries is suggestive of the richness and diversity of issues with which the competition authorities have grappled.

40 *Macquarie/National Grid Wireless,* decision of March 11, 2008 (UK).

41 Examples include, *Spir Communication/S3G*, decision of May 31, 2006 (France), *France Television/TF1 CFFII*, decision of November 13, 2007 (France), and *Groupe Hersant Media/Lagardere*, decision of December 7, 2007 (France).

42 *De Telegraaf/De Limburger*, decision of May 15, 2000 (Netherlands).

43 *SIPA/Socpresse*, decision of October 28, 2005 (France).

44 *Universal Music/Vale Music,* decision of September 20, 2006 (Spain).

As with our companion study of merger remedies in the more "traditional" wholesale and retail sector, our conclusions are two-pronged in the sense that we identify (i) key trends and implications in the decided cases and (ii) areas for future inquiry.

Key trends

If we were to summarise the key themes of merger remedies in this area, the following broader principles emerge:

Economic drivers

To understand the nature of merger remedies in a particular sector it is imperative to take a step back and examine the merger's economic motivations. In the information and communication sector, two broad themes emerge. The first sees mergers in the sector as reactions to exogenous technological and policy or regulatory changes to the industry's structure. These forces create opportunities for previously distinct operations to combine. A second and more "active" interpretation develops the strategic view of mergers in the sector as a continuous drive by companies to consolidate their operations and improve their efficiency through economies of scale and scope and synergies. Any or all of these factors may combine in a particular case, providing an important backdrop against which to assess the merger and any competition issues.

Sector regulation and access remedies

Despite differences, harmonisation of European information and communication merger review is facilitated by movements away from sector-specific regulation to competition policy. That said, the sector regulator occupies and is likely to retain a role in the design and enforcement of remedies. The authorities have not shied away from behavioural remedies in information and communication cases notwithstanding concerns about compliance monitoring. Remedies have focused on access—access to inputs, access to infrastructure, and access to customers—with the ultimate aim to safeguard freedom of choice for consumers. This departs from the trend in merger remedies as a whole across the Big 6 countries, which exhibited a strong tendency towards structural interventions. Behavioural remedies such as obligations to grant access to content and infrastructure and not to discriminate between competitors are often difficult to control, can be slow to implement and may require complex supervision. Here the involvement of the sector regulator may offer a broader range of remedies and opportunity to monitor remedies.[45]

National perspectives

Nonetheless, important differences in European information and communication markets exist that affect the pace and degree of harmonisation. The structure of the communications sector in many areas continues to reflect the legacy of national markets. The years ahead will tell whether the approach taken by the national competition authorities will allow the emergence of more pan-European communications operators, perhaps comparable in scale to their US counterparts. This requires a focused approach to mergers straddling national boundaries, which takes account of the economic and regulatory peculiarities of all markets affected.[46]

Pluralism

Competition and pluralism are not the same concepts and should not be confused. They represent two separate issues, yet their assessment will typically be intertwined. Effective competition and control of concentration can foster pluralism. Occasionally, however, we might expect that intervention on competition grounds alone may be insufficient to safeguard diversity of opinion and freedom of choice. Yet, recognising the limited time-series of our review (and that for Germany and the United Kingdom, our data is available only for the years from 2003 and 2004, respectively), the cases reviewed suggest that plurality has played only a minor role, and that remedies are typically aimed at resolving competition concerns. For example, plurality is a key theme in the *BSkyB/ITV* case in the United Kingdom, but even in this case the remedy imposed to resolve the competition concerns was deemed sufficient to resolve any plurality concerns. A question therefore arises as to the implications of plurality for the design of remedies and whether competition law intervention of itself is sufficient to guarantee plurality. While there may be a residual role for an additional form of regulation of mergers on plurality grounds, we might expect this to atrophy in light of the wider regulatory, economic, social and even technological context in which information and communication companies operate.

Implications and issues for further inquiry

Standing back from the concrete cases, we identify some pointers looking ahead in terms of the consequences for evaluation of future mergers and remedies design in the sector.

45 As was seen in the *Macquarie/National Grid Wireless* decision of March 11, 2008 (UK), in which the UK communication regulator was involved in appointing an independent adjudicator, paid for by the parties, who would assist in monitoring compliance with the commitments going forward.

46 See, for example, the *Newscorp/Telepiú* merger decision that was notified to the European Commission.

Scope of the divested business

Notwithstanding the readiness of the competition authorities when reviewing mergers in the information and communication sector to consider and actively deploy behavioural remedies, around a quarter of all cases in our Big 6 review comprised pure structural remedies suggesting that they still have a role to play. The relevant authority will need to be clear about the constituents of any divestiture package and what is needed to ensure viability. The authorities' traditional approach is to look at (i) the assets to be divested with a clear preference for a standalone business over a unit carved out; and (ii) the viability of the purchaser as a credible competitor. This approach is not unique to the information and communication sector. However, crucial elements in relation to mergers in this sector must be having expertise in the know-how and technology (where technology is involved), financial resources and a credible business plan. Given the volatility of some information and communication markets such as telecoms, this is heavily dependent on the market environment—perhaps more so than in less dynamic markets.

Emerging markets

Emerging markets, such as Wi-Fi in the *Telecom Italia/Megabeam Italia* merger (2003), present additional challenges. The role of internet access in the development of e-commerce and broadband services, network access and interconnection issues, and the fact that many merging parties have been telecom incumbents, logically motivate a deeper investigation of competition issues around dominance and leverage than in more traditional and mature markets. Merging parties may have to do a lot more economic analysis upfront to convince the authorities that their deal should pass "go".

Instability and volatility

The structure of the telecoms industry in particular has not yet found equilibrium after liberalisation, which poses additional challenges and opportunities for mergers in information and communication. This results in often rapidly fluctuating market shares, frequent exit and entry of firms and extreme financial fragility, making the competitive assessment of mergers highly problematic. The point is underscored by the dot com bubble (and then bust) in early 2002. The upshot is that merger authorities must tread carefully before concluding that an information and communication merger is not good for competition relative to an often even more speculative counterfactual of the status quo.[47]

Type 1 v Type 2 errors

An implication which flows from the nature of emerging markets and the state of flux in the information and communication sector is that competition authorities, when reviewing mergers in the sector, might often labour under considerable information asymmetry vis-a-vis the merging parties. The authorities must be able to anticipate potential changes in market structure and take into account the probability that anti-competitive effects may occur. They must also be able to foresee if the proposed remedies will be sufficient to counteract any adverse effects on competition. This may lead authorities to commit the errors of over-enforcement (a Type 1 error) or under-enforcement (a Type 2 error).[48] In the case of over-enforcement, the welfare loss to the consumers depends on the scope for lower prices, the availability of new innovative products to emerge, and enhanced quality and choice foregone. The harm to the consumer of under-enforcement is being left at the mercy of a merged entity with substantial market power and scope to abuse it.

Level of uncertainty

Generally, given the nature of the information and communication sector, anti-competitive behaviour might be very difficult to assess and prove. First, due to the information difficulties noted earlier, it may be more problematic to assess the long-term benefits of a merger than in other more stable sectors—this relates particularly to Type 1 errors. Secondly, it may be difficult to identify whether the denial of, for example, network access is due to strategic or other even technical reasons—this relates to potential Type 2 errors. This is not to suggest that the authorities should lean on the side of allowing information and communication mergers or applying a rigid approach to the sector as a whole. Rather, it points to the need that they should pay great attention to the demonstrable pros and cons of a merger given the high level of uncertainty in their decision making.

Final comments

This article began with reflections about the challenges of devising appropriate divestiture remedies for mergers in the information and communication sector. The experience suggests that the Big 6 authorities, far from being wedded to a structural "fix", have adopted a more flexible approach, balancing structural remedies with commitments on conduct. We also observe that the transparency and predictability of the process and

47 For example, in *Macquarie/National Grid Wireless* the UK competition authorities took into their examination of the merger the impact of the deal on a future event, the digital switchover, that had not yet taken place.

48 A Type 1 error occurs when a merger that is not anti-competitive is either prohibited or an unmerited over intrusive remedy is imposed. A Type 2 error would occur if an anti-competitive merger was cleared without appropriate remedies.

the effectiveness of ongoing dialogue between the merging parties, their advisors and the authorities, depends on the delicate interplay between competition and non-competition issues. For the information and communication sector, the non-competition issues are chiefly at the level of media plurality.

Looking ahead, rather than suggesting a polarisation (between structural and behavioural remedies), we advocate an evidence-based approach to the development of policy and practice, a methodology based on decided cases and evolving research. Drawing from our research to date we believe that there are possible ways to allow for meaningful research on the success and comparative effectiveness of remedies (albeit something that is beyond the scope of this article).[49] In particular, this should:

- focus on cases that are sufficiently recent to ensure relevance;
- cover a cross-section of different types of remedy;
- give in-depth treatment to the types of remedy that are most frequently used by the authorities;
- include examples of relatively straightforward cases and relatively complex and novel cases;
- involve statistical analysis as well as anecdotal feedback from interested parties, including the merging parties and third parties; and
- finally, include examples of remedies that were thought to have been successful and those that were thought not to have been successful.

The information and communication sector would seem a logical starting point for such a comparative study at the national level.

49 The European Commission's own 2005 Merger Remedies Study is an example of such an exercise at the European Community level. The Competition Commission has published its own study on the effectiveness of UK merger remedies in August 2008 updating its 2002 publication, "Understanding Past Merger Remedies".

Annex I: Merger remedy in the information and communication sector (Big 6)—overview

Case	**SIC sub-division affected by remedies**	**Date**	**Competition issue**[49]	**Remedy**
France				
TDF/Bouygtel	61.2 Wireless telecommunications activities	August 26, 2002	Horizontal Vertical	The transaction affected the markets for terrestrial broadcasting site location and maintenance. Foreclosure concerns arose out of the parties being active on both the upstream market for broadcasting sites and the downstream market for mobile communications. The parties therefore committed to give non-discriminatory access to their sites to other mobile operators. Bouygtel also renounced some pre-emption rights that it had in place for the renting back of the sites that it had sold to TDF.
Frances Antilles/Comareg	58.1 Publishing of books, periodicals and other publishing activities	April 29, 2003	Horizontal	The transaction affected the markets for regional printed press and free advertising press. To remedy competition concerns arising from overlaps, the parties committed to divest one newspaper title in each of 14 affected local markets. As a behavioural remedy the parties committed not to bundle their sales of free press and regional printed press advertising. The parties also renounced an exclusive contract between the parties and a distribution company.
Bayard/Milan	58.1 Publishing of books, periodicals and other publishing activities	February 11, 2004	Horizontal	Group Bayard Press acquired the publishing group Milan. The merger would lead to a lessening of competition in a segment of the youth magazines market. The parties therefore committed to sell one youth magazine title (and all assets attached to the title) in this segment, and also committed to help the authors of the divested magazine work with the new owners of that magazine.

Annex I: (*Continued*)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
Neuf Telecom/Cegetel	61.1 Wired telecommunications activities 61.2 Wireless telecommunications activities	August 12, 2005	Horizontal Vertical	The transaction involved the French telecommunications sector, in which the merging parties' networks were the only strong alternatives to the France Telecom network. Therefore, to allow competition to develop further, the parties committed to give access to their infrastructure for a period of three years to other operators.
SIPA/Socpresse	58.1 Publishing of books, periodicals and other publishing activities	October 28, 2005	Horizontal Conglomerate	The transaction affected the markets for daily regional press, weekly regional press, and the market for classified advertisements in free press. The competition authority was concerned that the merger may result in a weakening of the content quality of the previously competing newspapers. Therefore, the parties committed to maintain the editorial autonomy of the affected newspapers. The parties also committed not to bundle advertising across newspapers or with other media owned by the parties.
Spir Communication/ S3G	58.1 Publishing of books, periodicals and other publishing activities	May 31, 2006	Horizontal	The merger of Spir Communications and Société des Gratuits de Guyenne et Gascogne (S3G) created a joint venture "S3G Com" that would publish certain newspapers in the Southwest of France. The parties committed to maintain separate commercial teams, and also to refuse to bundle advertising, between the S3G Com newspapers and the other Spir and S3G newspapers in the region. The merger raised specific competition concerns in one city, where the parties committed to divest one newspaper.

Annex I: (*Continued*)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
France Television/TF1 CFFII	60.2 Television programming and broadcasting activities	November 13, 2007	Horizontal Conglomerate	The transaction affected the market for TV advertising. The transaction created an international news channel called "France 24". The competition authority was concerned that the merged parties may extend their strong position on the French advertising market by bundling sales of advertising on this new channel with the other channels owned by the parties. The parties therefore committed not to bundle their advertising across channels, and that the advertising sales division of the new channel would operate independently of the parties' other advertising sales divisions.
TPS/Canal Sat	60.2 Television programming and broadcasting activities	August 30, 2007	Horizontal Vertical	The transaction involved two satellite broadcasting and television service providers in France. The merger was approved subject to 59 commitments on behaviour. The majority of these commitments aimed to enable the acquisition of broadcast rights and the distribution of channels by non-satellite operators. This access would prevent foreclosure and would allow the development of the market. There was very close interaction between the sector regulators and the competition authorities in this case.
Spir Communication/ Schibsted	58.1 Publishing of books, periodicals and other publishing activities	September 10, 2007	Horizontal Conglomerate	The transaction affected the markets for the publication of content on the internet. Specifically, this case looked at advertising for automobiles. The competition authorities were concerned that the parties may bundle or tie their online advertising with their printed press advertising. The parties committed not to bundle or tie advertising in the affected markets for a period of five years.

Annex I: (*Continued*)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
LVMH/Les Echos	58.1 Publishing of books, periodicals and other publishing activities	December 19, 2007	Horizontal	The group LVMH acquired the publisher Les Echos, which had leading newspapers and magazines specialising in economic and financial news. The merger created competition concerns in the market for readership of the daily business press, and the market for financial advertising. The parties therefore divested one newspaper and committed not to sell bundled advertising offers in their remaining newspapers and their leading business magazine. However, the parties did commit to allow the divested newspaper to sell bundled advertising with the parties' leading business magazine.
Groupe Hersant Media/Lagardere	58.1 Publishing of books, periodicals and other publishing activities	December 07, 2007	Horizontal Conglomerate	The transaction affected daily and weekly regional press in the South of France. The competition concern was that the merged party may bundle advertising across its newspapers and other media to augment entry barriers and market power. Therefore, the parties committed not to bundle advertising between certain newspapers and websites, as well as to keep the commercial teams for certain newspapers separate.
Italy				
SEAT Pagine Gialle/Cecchi Gori Communications	58.1 Publishing of books, periodicals and other publishing activities 60.2 Television programming and broadcasting activities 61.1 Wired telecommunications activities	February 28, 2002	Horizontal Vertical Conglomerate	The transaction affected various media and advertising markets, as it brought together firms active in both the telecommunications and television sectors. SEAT, a subsidiary of Telecom Italia, is a multi-platform (online and offline) telephone directory active in the publication of telephone directories and the sale of advertising in these directories. Cecchi produced, distributed, and broadcast television programs and advertisements. The merger was approved subject to behavioural commitments on access for third parties to infrastructure and content, and commitments that TV advertisements on Cecchi's channels would not direct customers to SEAT's telephone directories.

Annex I: (*Continued*)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
Groupe Canal+/Stream	60.2 Television programming and broadcasting activities	May 13, 2002	Horizontal Vertical	The transaction brought together two of the major pay-TV providers in Italy. The merger was cleared subject to commitments that Telepiù, the parent of Canal+, would divest certain broadcasting assets and that third parties would be offered access to the parties' infrastructure and content (including the parties waiving exclusive rights on certain premium content). The behavioural commitments would be in effect until the end of 2010. Notwithstanding the competition authority's approval the deal was abandoned, and ultimately restructured and notified to the European Commission.
Telecom Italia/Megabeam Italia	61.1 Wired telecommunications activities 61.2 Wireless telecommunications activities	August 7, 2003	Horizontal Vertical	The transaction affected the markets for Wi-Fi services and hotspots, and the provision of public R-LAN access for broadband internet access. The Italian competition authority was concerned that the transaction may give the telecommunications incumbent, Telecom, a very strong position on the emerging Wi-Fi markets. Therefore, the merger was cleared subject to commitments to maintain structural separation from Telecom of certain Megabeam activities, and for Telecom to waive certain exclusive rights to the provision of Wi-Fi services, the installation of R-LAN infrastructure, and the use of existing R-LAN networks. These measures were aimed at enhancing third party access to the emerging markets.

Annex I: (*Continued*)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
Reti Televisive Italiane/Ramo Di Azienda di Europa TV	60.2 Television programming and broadcasting activities 61.2 Wireless telecommunications activities	April 10, 2006	Horizontal Vertical Conglomerate	The transaction affected the Italian terrestrial television broadcasting market, and the sale of television advertising. Reti Televisive Italiane (RTI), a producer of television channels, aimed to purchase broadcasting infrastructure and assets to develop its DVB-H (digital video broadcasting handheld) technology for the provision of television contents on mobile phones. The merger was cleared subject to commitments that the acquired assets be used only for the purpose of providing television to mobile phones, that third party telecommunications operators be granted non-discriminatory access to the network, and that third party content be allowed to be broadcast on the network. RTI also committed not sell advertising space through the acquired network.
Netherlands				
Wegener Arcade/VNU Dagbladen	58.1 Publishing of books, periodicals and other publishing activities	March 13, 2000	Horizontal	The transaction affected the markets for national and regional newspapers and printing press services. The Dutch competition authority cleared the merger subject to the commitment to divest, amongst others, the regional newspaper *De Limburger*. The parties appealed the decision, but the Trade and Industry Appeals Tribunal ultimately upheld the competition authority's decision.

Annex I: (*Continued*)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
De Telegraaf/De Limburger	58.1 Publishing of books, periodicals and other publishing activities	May 12, 2000	Horizontal	The transaction affected the markets for national and regional newspapers and the sale of newspaper advertising. The Dutch competition authority cleared the merger subject to the commitment that De Telegraaf guaranteed the commercial and editorial independence of the two competing regional newspapers in the province of Limburg.
KPN/Nozema Services	60.1 Radio broadcasting 60.2 Television programming and broadcasting activities	March 06, 2006	Vertical Conglomerate	The transaction affected the markets for the wireless transmission of radio, television and digital signals. The Dutch competition authority cleared the transaction under the condition that KPN divest a number of high broadcasting masts to an independent third party approved by the competition authority.
Mecom/Wegener	58.1 Publishing of books, periodicals and other publishing activities	October 24, 2007	Horizontal	The transaction affected the markets for national, regional, and free newspapers. The Dutch competition authority raised competition concerns in the publishing of free local newspapers, and in the sale of advertising in certain national and regional newspapers. Mecom divested several free local newspapers published by its subsidiary De Trompetter to remedy these concerns.

Annex I: (***Continued***)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
Spain				
Sogecable/Vía Digital	60.2 Television programming and broadcasting activities	November 13, 2002	Horizontal Vertical Conglomerate	The transaction involved two large pay-TV operators and affected the markets for: pay-TV in Spain; the acquisition of premium content for pay-TV; the production and commercialisation of thematic channels; the production and commercialisation of TV content; and, telecommunications (due to the link between Vía Digital and Telefónica). The Spanish competition authority agreed a package of behavioural commitments including granting third parties access to content and pay-TV platforms, price controls on pay-TV, and restrictions on the business agreements and relationships that the merged entity could have with companies in the Telefónica group.
Abertis Telecom/Retevisión	60.2 Television programming and broadcasting activities	October 17, 2003	Horizontal Vertical	The transaction affected the market for TV transmission. The merger brought the only two region-wide terrestrial broadcasting networks in Catalonia under the control of the same company. The merger was ultimately approved, subject to commitments that granted third parties access to this network in Catalonia and that agreed regular reporting on the use and conditions of this access to the telecommunications sector regulator.
Unión Radio/Antena 3	60.1 Radio broadcasting	December 27, 2005	Horizontal	The transaction affected the national and regional radio markets in Spain, and particularly the sale of radio advertising. Both parties had large networks of radio stations. The competition authority approved the merger only on the agreement that certain radio stations be divested in municipalities in which the merger would otherwise likely lead to substantial harm to competition.
Universal Music/Vale Music	59.2 Sound recording and music publishing activities	September 20, 2006	Horizontal	The transaction affected the market for music recording and distribution (including online distribution). Although the Spanish competition authority did not consider that the merger would give rise to serious competition concerns because of rapid innovation in the market and strong buyer power, the authority did require the removal of a non-compete clause that restricted the ability of the manager of Vale to compete with the acquired business.

Annex I: (*Continued*)

Case	SIC sub-division affected by remedies	Date	Competition issue[49]	Remedy
Sogecable SA/Audiovisual Sport SL	60.2 Television programming and broadcasting activities	February 26, 2007	Vertical	The transaction affected the market for the reselling of live football broadcasting rights in Spain. The transaction would give Sogecable, a media and pay-TV company, control of Audiovisual Sport's business of acquisition and management of football rights for matches in Spain. This raised foreclosure concerns. Therefore, the Spanish competition authority cleared the merger subject to a commitment to give third party access to the football rights. A second remedy limited the length of wholesale contracts for broadcasting rights between the merged entity and football clubs.
United Kingdom				
iSoft/Torex	62.0 Computer programming, consultancy and related activities	April 29, 2004	Horizontal	The transaction affected the provision of software, programming and information services to healthcare providers. The OFT cleared the transaction subject to undertakings in lieu of reference to the Competition Commission. The parties divested the entire Torex Laboratory Information Management Systems (LIMS) business, including all legacy contracts, staff and intellectual property rights, to a buyer approved by the OFT.
Capital Radio/GWR Group	60.1 Radio broadcasting	December 22, 2004	Horizontal	The transaction affected the commercial radio market. The OFT was concerned that the merger would lead to a substantial lessening of competition in the East Midlands region. The OFT accepted the divestment of a radio station in Nottingham as undertakings in lieu of reference to the Competition Commission.
Johnston Press/Local Press	58.1 Publishing of books, periodicals and other publishing activities	October 06, 2006	Horizontal	The transaction affected the markets for the publishing of newspapers and periodicals. The OFT cleared the merger subject to divestment of the Northern Irish farming title *Farm Week*.

[49] Horizontal, vertical, conglomerate